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

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2022] EWHC 46 (TCC)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 12/01/2022

Before :

MRS JUSTICE O'FARRELL DBE

- -

Between :

THE QUEEN
on the application of

(1) GOOD LAW PROJECT LIMITED **(2) EVERYDOCTOR**	**Claimants**
- and –	
THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
- and -	
(1) CRISP WEBSITES LIMITED (t/a PESTFIX) **(2) CLANDEBOYE AGENCIES LIMITED** **(3) AYANDA CAPITAL LIMITED**	**Interested Parties**

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- -

Jason Coppel QC, Patrick Halliday and Zac Sammour (instructed by **Rook Irwin Sweeney LLP**) for the **Claimants**
Michael Bowsher QC, Ewan West, Imogen Proud, Khatija Hafesji and Alfred Artley (instructed by **the Government Legal Department**) for the **Defendant**
Alan Bates (instructed by **Osborne Clarke and Lewis Silkin LLP**) for the **First and Third Interested Parties**

Reading day: 17th May 2021
Hearing dates: 18th, 19th, 20th, 24th & 25th May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 12th January 2022 at 10:30am"**

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MRS JUSTICE O'FARRELL DBE

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Mrs Justice O'Farrell:

1. This is the hearing of four separate challenges (two of which have been consolidated) brought by the Claimants, Good Law Project Limited and EveryDoctor Limited, by way of judicial review in respect of decisions by the Defendant, the Secretary of State for Health and Social Care, to make direct awards of contracts for the supply of personal protective equipment and medical devices ("PPE") to the Interested Parties ("PestFix", "Clandeboye" and "Ayanda") pursuant to Regulation 32(2)(c) of the Public Contracts Regulations 2015 ("the PCR").

2. In March 2020, during the COVID-19 pandemic, the Defendant introduced a new approach to the procurement of PPE to ensure that adequate supplies were made available to the NHS and other care providers amid a global shortage. The new approach involved the procurement of over thirty-two billion items of PPE, with a total value of £14 billion, purchased through more than one thousand directly negotiated and awarded contracts using Regulation 32(2)(c) of the PCR.

3. In these proceedings, the Claimants challenge the Defendant's decisions to award the following nine contracts:

   PestFix (interested party in claims HT-2020-000226 & HT-2020-000419)

   i) a contract dated 13 April 2020 for 2 million isolation suits/coveralls at a cost of £28,040,000 excluding VAT, the subject of the First PestFix Claim ("FPC");

   ii) a contract dated 16 April 2020 for 6 million aprons at a total cost of £1,104,000 excluding VAT, the subject of the Second PestFix Claim ("SPC1");

   iii) a contract dated 16 April 2020 for 100,000 surgical gowns at a total cost of £945,000 excluding VAT ("SPC2");

   iv) a contract dated 17 April 2020 for 60 million IIR masks, 25 million FFP3 masks and 25 million FFP2 masks at a total cost of £160,750,000 excluding VAT, varied on 22 June 2020 to comprise an order for 190 million IIR masks and 25 million FFP3 masks at a total cost of £168,500,000 ("SPC3");

   v) a contract dated 27 April 2020 for 2 million Nitrile gloves; 10 million surgical gowns and 18 million aprons at a total cost of £143,269,800 excluding VAT ("SPC4");

   vi) a contract dated 14 April 2020 for 2 million Nitrile gloves at a cost of £197,800 excluding VAT ("SPC5");

   Clandeboye (interested party in claim HT-2020-000291)

   vii) a contract dated 28 April 2020, for 3.4 million polyethylene gowns ("PE gowns") at a cost of £14,280,000 excluding VAT, the First Clandeboye Contract ("FCC");

viii) a contract dated 1 May 2020 for 3.6 million gowns at a total cost of £15,120,000 excluding VAT, varied on 12 May 2020 and again on 18 May 2020 to a total of over 22 million gowns at a total cost of £93,240,000 excluding VAT, the Second Clandeboye Contract ("SCC");

Ayanda (interested party in claim HT-2020-000292)

ix) a contract dated 29 April 2020 for 50 million FFP2 masks and 150 million IIR masks at a total cost of £252,500,000 excluding VAT, varied on 27 August 2020 to 47 million FFP2 masks and 164 million IIR masks but at the same total cost ("the Ayanda Contract").

4. The Claimants seek declarations that the Defendant acted unlawfully in the award of the above contracts on the following grounds for which permission has been granted:

i) Ground 2 - the Defendant was in breach of the EU principles of equal treatment and transparency in that it failed to put in place procedures that identified the selection criteria or evaluation guidance to be applied in deciding whether or not to contract with any supplier. Further, there was no fair competition between suppliers for any contract. The Defendant operated a high priority lane ("the High Priority Lane", also referred to as "the HPL" or "the VIP Lane"), whereby suppliers who had been referred by Ministers, MPs and senior officials were afforded more favourable treatment, significantly increasing their prospects of being awarded a contract or contracts.

ii) Ground 3 - the Defendant failed to provide proper reasons for his decisions so as to permit the court to assess the lawfulness of the decision-making procedure.

iii) Ground 5 - the decisions to award the contracts to PestFix and Ayanda were irrational in that no, or no sufficient, financial or technical verification was carried out in respect of the interested parties or their suppliers, and by operation of the High Priority Lane.

5. The Defendant's case is as follows:

i) The EU principles of equal treatment and transparency are displaced or modified in the context of regulation 32(2)(c) and given the limited scope of these obligations there is no relevant breach of the obligations in the circumstances of this case.

ii) At the pre-action protocol stage, the Defendant's response to requests for documents and information met the requirement of the applicable Pre-Action Protocol, and there has been no alternative failure to give reasons.

iii) The complaints raised by the Claimants:

a) invite the court to displace the expert judgment of the decision-maker on matters which are often of a technical nature or involve the execution of judgment in a time of crisis;

b) focus on operational or post-contractual issues which are only 'issues' with the benefit of hindsight and which can have no bearing on the rationality of the contract award decisions; or

c) proceed on a mistaken factual basis.

6. Further, the Defendant relies on procedural bars to the relief sought by the Claimants, namely:

i) the Claimants lack standing to bring a challenge based on breach of the principles of equal treatment and transparency or insufficient reasons for the awards brought under the PCR;

ii) significant parts of the grounds are not properly amenable to judicial review, all claims are academic and there is no relief which would be of any practical value; therefore, it would be inappropriate for the court to decline to grant relief.

Background Facts

PPE supplies

7. In 2006 the NHS Supply Chain organisation was set up to provide goods to the NHS. In 2018 the Department of Health and Social Care ("the DHSC") established Supply Chain Coordination Limited ("SCCL") to manage the NHS Supply Chain.

8. Prior to the COVID-19 pandemic, SCCL would buy PPE required by NHS Trusts from manufacturers and suppliers of PPE in the UK and overseas, often through long term contractual relationships. NHS Trusts and Foundation Trusts would buy both from NHS Supply Chain and from suppliers directly. Other health and social care organisations were responsible for sourcing their own PPE. Historically, most PPE was manufactured in the People's Republic of China ("the PRC") and was in plentiful supply. In 2019, NHS Trusts and NHS Foundation Trusts ordered around £146m of PPE, of which £61m was ordered through the NHS Supply Chain.

9. In 2020 this situation changed dramatically. From about February 2020 the COVID-19 virus surged through Europe and on 11 March 2020 the Director General of the World Health Organisation announced that COVID-19 had been classified as a pandemic. The use of PPE was no longer confined to limited circumstances, such as theatre operations. Every clinician and healthcare worker working in a hospital or other clinical setting during the pandemic needed to be provided with ample and effective PPE for their own safety and to prevent the spread of the disease. It became apparent that large quantities of PPE would be needed, including single-use aprons, gowns or coveralls, eye visors or safety spectacles, non-fluid-resistant face masks (Type II masks), fluid-resistant face masks (Type IIR masks), respirator masks (filtering face piece "FFP" masks), and gloves.

10. Edward James, Deputy Director, Head of Procurement in the Commercial Directorate of the DHSC, explains in his witness statement:

> "It was in February 2020 that the existing system came under severe challenge. From figures I have seen, the average monthly spend on PPE by SCCL in 2019 was 208 million items at an average cost of £5m. The data given to the NAO suggested that, in February 2020, 281m items were bought at a cost of £15m and, in March 2020, those figures had risen to 417m items at a cost of £50m."

11. The surge in demand from across the globe coincided with a fall in the amount of PPE being exported from PRC, the world's largest source of PPE, caused by the impact of COVID-19 and disruption to transportation links to the main manufacturing bases in the PRC. Existing supply chains were disrupted, prices for PPE rose dramatically and demand increased to unprecedented levels. This caused significant worldwide shortages of PPE. By March 2020, the dynamics of the market for PPE had changed. The capacity of existing supply chains became exhausted. What was normally a buyer's market became a seller's market. These market conditions resulted in extremely high prices, and offers of PPE were often severely time-limited.

12. In the UK, stockpiles of PPE were insufficient to meet demand and became depleted.

13. As explained by Mr James in his witness statement, in these challenging circumstances, buyers were desperate to secure as much of the diminishing supplies as they could find. This resulted in a number of different, but overlapping, changes in the market. Limited supply and unlimited demand led to price inflation. Any offer of supply had a number of bidders. Suppliers were able to increase prices because of global buyers' desperation to secure supplies. Governments of countries where PPE was produced were concerned about their own position and various export bans were introduced. Speed became key in the marketplace. Offers could only be secured by immediate payment of a substantial deposit, and the same offers of supply were often made to multiple potential buyers simultaneously.

14. Emily Lawson, Chief Commercial Officer for NHS England and NHS Improvement, describes the market as being:

> "extremely 'hot', with deals often failing within minutes of being confirmed, due to competitive bidding by other entities."

The PPE Cell

15. By mid-March 2020, it was plain that the existing supply chain was unable to cope with the new demand.

16. On 18 March 2020, the Cabinet Office published "Procurement Policy Note – Responding to COVID-19: Information Note PPN 01/20" ("PPN 01/20"), setting out the circumstances in which regulation 32(2)(c) of the PCR would be engaged to enable direct contracts to be awarded without an open competition:

> "There will be a range of commercial actions that need to be considered by contracting authorities in responding to the impact of COVID-19. In such exceptional circumstances, authorities may need to procure goods, services and works with

extreme urgency. This is permissible under current public procurement regulations using regulation 32(2)(c)…

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…

COVID-19 is serious and its consequences pose a risk to life. Regulation 32(2)(c) of the PCRs is designed to deal with this sort of situation…

… 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, e.g.:

- 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, e.g.:

- 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, e.g.:

- 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, e.g.:

- you have not done anything to cause or contribute to the need for extreme urgency.

> Contracting authorities should keep a written justification that satisfies these tests …
>
> You should limit your requirements to only what is absolutely necessary both in terms of what you are procuring and the length of contract …
>
> It is important that contracting authorities continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be expected in a regular market, any abnormally high pricing should be approved by the appropriate commercial director. Additionally, contracting authorities are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. Where this is not possible, it is recommended a log should be kept and reasoning provided for future auditing…"

17. On 1 April 2020 the European Commission issued guidance on the operation of the EU procurement regime during the pandemic: "Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis". The Guidance included an explanation as to the circumstances in which Article 32 of Directive 2014/24/EU (from which Regulation 32 was derived) might be engaged:

> "1. Introduction
>
> COVID-19 is a health crisis that requires swift and smart solutions and agility in dealing with an immense increase of demand for similar goods and services while certain supply chains are disrupted. Public buyers in the Member States are at the forefront for most of these goods and services. They have to ensure the availability of personal protective equipment such as face masks and protective gloves, medical devices, notably ventilators, other medical supplies, but also hospital and IT infrastructure, to name only a few.
>
> Concretely, the negotiated procedure without publication allows public buyers to acquire supplies and services within the shortest possible timeframe. Under this procedure, as set out in Art. 32 of Directive 2014/24/EU (the 'Directive'), public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level. In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery.
>
> …

> 2.3 In cases of extreme urgency – negotiated procedure without publication. As contracting authorities derogate in this case from the basic principle of the Treaty concerning transparency, the European Court of Justice requires that the use of this procedure remains exceptional. All the conditions have to be met cumulatively and are to be interpreted restrictively (see, for instance cases C275/08, Commission v Germany, and C-352/12, Consiglio Nazionale degli Ingegneri). A 'negotiated procedure without publication' allows contracting authorities to negotiate directly with potential contractors; a direct award to a preselected economic operator remains the exception, applicable if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency."

18. The Defendant decided to establish a parallel supply chain, in order to protect the existing supply chain which could continue to acquire other consumables for the NHS. A new dedicated unit was created over the weekend of 20 and 21 March 2020, "the PPE Cell", formed from NHS, industry and the armed forces. Volunteers joined from various government departments, including the Department of Health and Social Care, NHS England and NHS Improvement, the Cabinet Office, Ministry of Defence, Ministry of Justice, Department for Education and consultants brought in from outside.

19. The Defendant announced the new procurement approach in a policy paper: "COVID-19: Personal Protective Equipment (PPE) Plan", published on 10 April 2020:

> "We've brought together the NHS, industry and the Armed Forces to create a giant PPE distribution network almost from scratch. This is working to deliver critical PPE supplies to those who need it…
>
> We've set up a cross-government PPE sourcing unit to secure new supply lines from across the world and published rigorous standards against which we will buy…
>
> The capabilities of our supply chain have strengthened to meet the urgent need for PPE and increase our ability to monitor PPE needs across the UK in line with the clinical recommendations.
>
> To enable those working in the system to register their PPE requirements more easily, we are working with e-commerce expertise to pilot a new website for ordering PPE. Orders will be managed in line with the published guidance from Public Health England, integrated with NHS Supply Chain's central PPE logistic operations and shipped directly via Royal Mail. The prototype of this new initiative is undergoing the first live tests with an initial group of primary care providers this week. Once the new system is up and running, we will look to expand further to meet the demands of the health and care sectors, including those of social care providers.

> However, we recognise that it will take time to stand up this new approach for the wider health and care system, so in the meantime we will continue to operate a 'push' model, with essential equipment being issued to NHS organisations based on the expected number of COVID-19 patients. We will continue to refine our approach, using the routes set out below and through working with organisations across the UK to understand their PPE needs and develop a more sophisticated demand signal…
>
> Expert procurement professionals from the NHS Supply Chain have been seconded into this dedicated new unit to work with a cross-government team of over 200 staff from the Government Commercial Function. This unit is identifying PPE suppliers from across the globe to meet the increasing demand for a growing list of PPE products. This effort has been equivalent to establishing a new national supply system in the space of two weeks.
>
> Our Foreign and Commonwealth Office (FCO) teams across the world - and in China specifically - have ensured local sources are able to deliver the products required, as well as working with the central teams to secure inbound logistics and freight operations at speed. The Department for Trade has also stood up a global network to coordinate the PPE sourcing augmenting the FCO's work so that faster fulfilment can be delivered.
>
> This is enabling us to pull together a global list of the UK's PPE needs. We are taking an open source approach and involving our partners around the world in a coordinated procurement programme."

20. The Defendant relied on regulation 32(2)(c) of the PCR 2015 in establishing the PPE Cell, using the negotiated procedure without prior publication because the urgency with which PPE had to be procured in the prevailing market conditions prevented compliance with the time limits for open, restricted, competitive or accelerated procedures.

21. The PPE Cell used an 'open source' approach to procurement, that included seeking offers of supply from businesses with little or no prior experience of the PPE market to compensate for the deficit in the existing supply chains, which was called the "Coronavirus Support from Business Scheme".

22. A portal was established on the Gov.uk website at https://www.gov.uk/coronavirus-support-from-business ("the Portal"), through which offers to supply products and services could be made. The Portal provided information to potential suppliers about the types of products which were needed and the technical specification which the products were required to meet. The Portal enabled any business to make an offer to supply goods by completing an online questionnaire.

Assessing demand

23. Jonathan Marron, Director General at the DHSC, sets out in his witness statement that initially the PPE Cell set up a daily call at 8.30am, to agree with Ms Lawson what products were a priority for purchase, including what minimum quantities would justify pursuing an opportunity. This was later supplemented by a second daily allocation meeting at 6pm, to consider demand across the system, available inventory, and the expected incoming supply. The daily review of demand and supply enabled the PPE Cell to decide the volume of PPE to be distributed to the NHS and other users, and to agree a priority "buy list" for the buying teams.

24. Christopher Young, Director of Finance at the DHSC, explains in his witness statement that the demand for PPE was recorded in a series of documents ("the Demand Signal Documents"):

    i) A daily excel spreadsheet, known as the Dashboard, would record, for each category of PPE, known data about inventory, distribution and orders. It contained a tab called "Stock Out" which estimated the number of days' stock held by the PPE Cell of each item of PPE. This data was used in the daily evening meetings and shared daily with Mr Young, Jon Fundrey, Chief Operating Officer at the MHRA, seconded to the DHSC as an Accounting Officer, and the DHSC Finance Team.

    ii) A daily update from the project management office ("the PMO Update") was circulated in advance with the agenda for the daily morning call and contained a summary version of the Dashboard together with status updates and points for discussion.

    iii) A PPE daily pick list decision brief ("the Decision Brief") recorded agreed decisions and actions from earlier meetings, and contained slides for issues to be discussed at the daily evening meetings, including PPE products that were priority items or any particular shortages.

    iv) An email of 'the Pick List' was sent after each evening meeting, recording the actions from that meeting and also setting the buying priorities for the next day.

    v) A weekly report was prepared on PPE inventory and usage rates ("the Summary Dashboard").

25. Mr Marron's evidence is that during April 2020, the most acute requirements were for gowns and IIR masks, although the priority buy list also included gloves and aprons.

Operation of the PPE Cell

26. The PPE Cell comprised:

    i) the 'Buy Team', responsible for finding opportunities to buy PPE, using the 'Opportunities Team' to deal with offers via the Portal, the China team working with the British Embassy in the PRC to identify strategic

opportunities to buy PPE direct from manufacturers in the PRC, and the seconded SCCL team to unlock supply from existing suppliers;

ii) the 'Technical Assurance Team', responsible for ensuring that the supplies offered met the technical specifications and standards;

iii) the 'Closing Team', responsible for negotiating and concluding the contractual terms for PPE supplies;

iv) the 'Make Team', responsible for PPE manufactured in the UK;

v) the 'Purchase to Payment Team', responsible for setting up, maintaining and operating the system for purchasing through to payment in respect of the PPE;

vi) 'Logistics', led by Brigadier Prosser, responsible for distributing the PPE.

27. All potential suppliers were scrutinised against standard requirements. The products were assessed against requirements set out in the technical specifications and the relevant PPE or medical devices regulations as appropriate ('technical assurance'). The suppliers were assessed against due diligence standards in terms of the corporate and financial standing of the business ('financial due diligence'). The suppliers had to establish that the offer of supply was credible, namely, that the products were, or were highly likely to be, available within an acceptable time frame to the specification and technical level required. The pricing of the offer had to be reasonable and acceptable given the market conditions at any given time. The suppliers were required to contract either on the DHSC's standard terms and conditions or such other terms as the DHSC considered to be appropriate in all the circumstances.

Opportunities Teams

28. The Opportunities Teams performed triage on offers and gathered information, including technical documentation and certification of compliance with standards, from suppliers about their offers.

29. The Portal required potential suppliers to register their interest and complete an online survey, providing basic data about the potential supplier, including its legal identity, address, VAT registration number and contact details, together with information about the product offered, including the type of PPE available, technical compliance, pricing and delivery timescales. Information from the completed survey would be transferred into a database, initially a simple Excel spreadsheet, but subsequently, a case management system, Mendix. This acted as a central repository for all information relating to any given offer throughout the process.

30. Triage comprised initial assessment of the offers to identify those that were credible. A number of the 16,000 suppliers who came through the portal over the life of the PPE cell were not credible, either because there was no product, the product failed technical specification, or the offer, although genuine and well-meant, was for insufficient quantities.

31. If the offer appeared credible on its face, it would be allocated to a case worker, who would contact the supplier by telephone (or email if unable to contact by telephone) to

obtain further details, carry out research into the manufacturer, ensuring the supplier had the relevant NHS specification for the product(s) and obtain technical documentation, such as product specification, CE marking, certificates of conformity, and photographs of the product and packaging, required to commission the technical assurance analysis.

32. Every case worker was given a written guide: "The Opportunity Case Worker Guide", setting out in detail the process for case workers to follow in each case, including the following instructions:

> "Overarching goal: Source and deliver additional high priority personal protective equipment (PPE) from suppliers for the NHS front line…
>
> As a case worker, you will be contacting suppliers, understanding the details behind their offer (e.g. what products can they supply, how many of each can be supplied, how long will they take to be delivered) and coordinating the process to review the technical specification of any products offered. If the offer is validated by our technical teams, the case workers will hand over the case to the buying / closing team. "

33. The case worker call script included the following instructions:

> "When you get to the PPE product columns, first check which items they are offering, then make sure that these subsequent columns for each item are complete and correct. Where they can offer an ongoing supply, use the "lead time comments" field to provide details of how many they can provide on what basis (e.g. weekly / monthly). Suppliers may ask what quantities we require. There is currently no set amount that we are sourcing, however the volume is 'very high'. Work on the basis of tens of millions of masks and gloves, hundreds of thousands of other items as starting point."

34. The document contained a link to the Government website which gave details of the types of PPE sought, together with the required standards and specifications to be met. Case workers were provided with a table of indicative pricing but were advised not to remove potential suppliers based on price.

35. The glossary in the document included the following descriptions:

> "FFP3 … FFP3 is a categorisation of face mask. FFP3 is considered the gold standard for the NHS.
>
> FFP2 … FFP2 is a categorisation of face mask. FFP2 is a lower categorisation than FFP3, but is still valid for use.
>
> IIR … Surgical masks. Lower grade than FFP3 or FFP2."

36. If the triage process indicated that the offer should be taken further, it would be passed to the Technical Assurance Team.

Technical assurance

37. The Technical Assurance Team was responsible for determining whether there was sufficient evidence that the product being offered complied with the applicable specifications and standards prescribed in the technical specification documents.

38. David Moore, seconded from the MOD to the DHSC, was responsible for technical assurance within the PPE Cell and explains in his witness statement:

> "Technical assurance is a vital part of the due diligence in any public sector procurement. For the purposes of this matter, the aims of the process are:
>
> i) to seek to ensure that what we are buying with public money meets the required specification; and
>
> ii) to understand what standards and regulations apply to the product in question and to help make sure that what we are buying complies with them."

39. The technical specifications for protective equipment in the UK are overseen by the Health and Safety Executive ("the HSE") in respect of equipment intended to protect the provider of services, and the Medicines and Healthcare products Regulatory Authority ("the MHRA") in respect of medical devices.

40. The applicable technical specifications were published by the Government on 30 March 2020, entitled: "Specification for Personal Protective Clothing (PPE) to include: Gowns, Surgical Face masks, Respirator masks, Eye Protection, Protective Coveralls". The document was updated on 6 April 2020, 5 May 2020 and 28 August 2020. For the purpose of these proceedings, the version published on 6 April 2020 was in force when the contracts under challenge were concluded and, therefore, was the material set of technical specifications.

41. The document identified the standards that each type (and various sub-types) of product were required to meet:

> "All products must have their CE marking clearly evident on the product and/or packaging and must conform to the relevant directive:
>
> **Medical Devices Regulation 2017/745**
>
> Any product that contains phthalates must be indicated on the packaging in accordance with:
>
> **Medical Devices Regulation 2017/745**
>
> **Personal Protective Equipment Directive EU 2016/425."**

42. The technical specifications advertised included the following types of PPE:

i) Lot 1 - Surgical Face Masks (type "IIR"):

> "Surgical face masks must conform to BS EN 14683:2019 or any equivalent standard. Medical face masks. Requirements and test methods …
>
> Masks with ties must …
>
> Have integral ties long enough to go around an adult head whilst wearing a surgical cap…
>
> Masks with ear loops must have elastic ear loops …"

ii) Lot 2 - Respirator Masks (types 'FFP2' and 'FFP3):

> **"Respirator masks must conform to BS EN 149:2001+A1:2009 or any equivalent standard**
>
> Respiratory protective devices. Filtering half masks to protect against particles. Requirements, testing, marking …
>
> Respirator masks are filtering respiratory protective devices to protect against particles to cover the nose, mouth and chin and are required both with and without inhalation/exhalation valves. The mask consists entirely or substantially of filter material. It must be designed to provide adequate sealing on the face of the wearer against the ambient atmosphere, when the skin is dry and moist and when the head is moved. Respirator masks must be classified according to their filtering efficiency and their maximum total inward leakage…
>
> All respiratory masks must comply with the following:
>
> … Must have integral straps/ties long enough to go around an adult head whilst wearing a surgical cap;
>
> Straps/ties must be adjustable for fit by the user;
>
> The upper strap/tie should sit at the crown of the head;
>
> The lower strap/tie should be positioned to allow it to be positioned behind the neck to hold the sides of the mask against the face of the user to prevent any gaping …"

iii) Lot 4 – Gowns

> "This lot is for gowns and includes:
>
> - Sterile gowns.

- Non-sterile gowns – sometimes referred to as Isolation gowns.

- Thumb-looped aprons…

BS EN 13795:2019 or equivalent standard

Surgical drapes, gowns and clean air suits, used as medical devices for patients, clinical staff and equipment. General requirement for manufacturers, processors and products, test methods, performance requirements and performance levels.

BS EN 11810:2015 Must be fire resistant / tested for laser ignition and penetration …

Sterile single use surgical gowns used to cover the wearer whilst in an operating theatre or environment which requires a sterile covering in such a way as to prevent exposure to potentially contaminated fluids, including those which may contain pathogens as well as helping to prevent the wearer from contaminating the clean surgical site…

Non-Sterile Gowns or Isolation gowns are used for procedures that do not require a sterile product. They are required where the users need a degree of comfort and protection with low risk of fluid where simple plastic aprons do not offer enough coverage or protection. Non-Sterile Gowns are mainly used in Barrier nursing in preventing the spread of infection from one person to another in hospital and for minor procedures within the hospital or community setting…

Thumb looped aprons are used for tasks where fully impervious non-sterile protection is needed."

iv) Lot 7 - Protective Coveralls:

"All coveralls protective suits must conform to BS EN 14126:2003 or any equivalent standard

Protective clothing. Performance requirements and test methods for protective clothing against infective agents.

In accordance with the requirements of **BS EN 14126:2003 or any equivalent standard** protective clothing must be subjected to 5 test methods specified in the standard.

Personal Protective Equipment Directive EU 2016/425 - Category III …

Coveralls/protective suits must be designed to cover the whole body except for the hands, feet and face area, providing a barrier to air borne and fluid borne contaminants and pathogens

> preventing infective agents from reaching the (possibly injured) skin."

43. Technical Assurance was initially carried out by Clinical and Product Assurance ("CAPA"), part of SCCL, but it was insufficiently resourced to deal with the volume of offers. Therefore, from the start of April 2020, a team from Defence Equipment and Support ("DE&S"), part of the Ministry of Defence with extensive experience of procurement for the UK Armed Forces, was brought in. The team from DE&S were independent of the Opportunities Teams, Due Diligence Team and Closing Team within the PPE Cell.

44. Technical Assurance is a risk-based decision. Mr Moore explains in his witness statement that the task of the Technical Team was to ascertain whether the evidence provided was reasonably capable of demonstrating the product complied with the required standards and whether it met the relevant regulations for the type of product:

> "In relation to those questions: If yes, the Closing Team could finalise its commercial negotiations and put the submission forward to the DHSC for final scrutiny and approval. If no, the opportunity would not be taken forward unless the supplier could satisfy us that it could, indeed, pass TA. I explain below the process we had for carefully managing opportunities for suppliers to supply missing evidence (irrespective of how they entered the process). In some cases, the process did not lead to a clear "yes" or "no" answer. If members of the team had different views, from about mid-April 2020 we were able to decide the answer was "maybe". A "maybe" case could be one where a manufacturer's product claimed to comply with an "equivalent standard" and this required further exploration, or where we required the involvement of the Medicines and Healthcare Products Regulatory Agency ("MHRA") or the Health and Safety Executive ("HSE"). We would refer these cases to the Decision Making Committee ("DMC") – this was different to the Deals Committee referred to in Andy Wood's statement. This was a committee headed up by Miranda Carter which had officials and experts from the DHSC, HSE, the MHRA and the Office for Product Safety and Standards ("OPSS"). Later, Technical Assurance became a member of this committee, in order to appreciate existing risks and communicate new ones."

Financial due diligence

45. Michael Beard, a civil servant working in the Ministry of Defence, was seconded to the DHSC during the period March to June 2020 and worked in the Closing Team of the PPE Cell. He explains in his witness statement that the purpose of financial due diligence was to give the DHSC a level of confidence in taking a risk based decision that, if it entered into a contract with a supplier for the supply of PPE, the supplier was a reputable company, the goods were likely to be delivered on time, at the price agreed and to the specification and quality required. This also required consideration of the manufacturer.

46. Initially, financial due diligence was intended to be carried out at the earliest stages of engagement with a supplier but, to accelerate the procurement of PPE, it was carried out in parallel with the processes of the Opportunities Team and Closings Team, or in some cases was carried out once opportunities were ready to be recommended by the Closings Team to DHSC**.**

47. Principal responsibility for financial due diligence lay with the Cabinet Office and was carried out by a team seconded from the Cabinet Office, supported by a team from MOD's Cost Assurance and Analysis Service ("CAAS"). They used a traffic light system to categorise the offers as red, amber or green, indicating the level of risk associated with the proposed transaction. For overseas businesses, the Cabinet Office helped secure due diligence through the Foreign and Commonwealth Office ("FCO") and the Department for International Trade ("DIT").

48. However, the Cabinet Office did not have sufficient resources to produce due diligence reports for the high volume of offers under consideration. In cases where a report was unavailable, the caseworker in the Closing Team would have to identify and mitigate risk, by carrying out a search of Companies House, Dun and Bradstreet and any other publicly available information, and taking into account any information obtained by the Opportunities Team. If appropriate, they would use FCO or information from other cases to support this assessment. The extent of the due diligence and the outcome of the research was communicated to the Accounting Officer.

49. Mr Beard explains in his witness statement the weight placed by the Accounting Officer on such due diligence:

> "This caseworker-led DD was adequate to identify risks which allowed the AO to make a reasoned and evidence-based decision on the risk of awarding or not awarding a contract to any particular supplier. DD, of itself however, would not be the sole criterion for an award. The AO would have to take into account other factors such as:
>
> - the acuteness of the demand for the PPE in question at the time of the contract and the availability of supply;
>
> - the price of the product and its comparison to the market norm at that specific time;
>
> - the outcome of the TA process;
>
> - the volume of the supply available through this contract and the date it would be available to the NHS frontline."

Closing Team

50. If an offer passed technical assurance, it was passed on to the Closing Team, which was responsible for negotiating contractual prices and terms. Andrew Wood, a civil servant working in the Complex Transactions Team in the Cabinet Office, who was

seconded to the DHSC during the period March to July 2020 to lead the teams procuring PPE, describes the process involved in his witness statement as follows:

i) contacting the supplier to complete set-up of administrative and accounting details;

ii) discussing the offer in detail, including negotiating price and any deposit (advance payment);

iii) managing the 'onboarding' of the supplier through the completion of a New Supplier Form;

iv) where the supplier was in a foreign country, liaising with the Foreign and Commonwealth Office ("FCO") and the embassy in the country where the manufacturer was based for due diligence purposes;

v) securing contractual agreement (in the vast majority of cases on NHS standard Terms and Conditions or, if not, generally on FCO Terms and Conditions), if necessary seeking the advice of an external law firm where a would-be supplier did want to contract on different terms;

vi) taking a final decision about whether to recommend that a transaction should proceed, which involved a system of peer review.

51. The Closing Team would prepare a submission pack for the Accounting Officer, containing evidence of due diligence, technical assurance and a summary of the commercial terms, including a market price assessment. This included a form entitled: "Request for approval of spend against HMT Delegated Funding."

52. The Closing Team could only make recommendations about contract awards; it was DHSC alone, via the Accounting Officers, which had authority to approve contracts, as explained by David Williams, then Director General, Finance Group Operations and Second Permanent Secretary at the DHSC, who was one of the Accounting Officers:

> "Sir Chris Wormald is the Permanent Secretary at the DHSC. He is the principal Accounting Office ("AO") for the DHSC. I am also an AO. Chris Wormald and I decided that, for all PPE related procurement during the pandemic, I would be the AO. I also agreed that authority for all contracts of a value of £100m or less would be delegated to the Directors of Finance. Chris Young was the sole Director of Finance prior to the pandemic. We brought in Jon Fundrey, the Chief Operating Officer at the MHRA, as a co-Director of Finance to assist at this senior level during Covid and they both had this delegated authority."

53. By 3 May 2020 there was an additional 'Deals Committee' within the PPE Cell which scrutinised, for all transactions over £5 million, the Closing Team's submission pack before it went for Accounting Officer approval.

54. In making their decision, the Accounting Officers would take into account a range of factors, as explained by Mr Williams:

> "The role of the AO was not simply to rubber stamp the recommendation from the buying team. Each of us considered each case on its merits and we were always acutely conscious of whether what was before us was needed (and how urgently); whether the price being offered was competitive in the fast-moving and volatile market, using comparator data to assess how this price compared to recent similar orders; what factors (including due diligence) we could see that would give us confidence in the supplier and in the manufacturer (which was usually based in China). We also had to be satisfied on the technical suitability of the product for its intended use and be as sure as we were able to be that they would be delivered in accordance with the supplier's promises.
>
> We were operating in a market which provided far fewer certainties and far more risk than we were used to. Jon Fundrey, Chris Young and I understood that. We knew that whatever steps we took, the contracts we were approving carried a degree of risk which would not be acceptable in a business as usual scenario. We had to judge whether, based on what we knew, the risk was one which was acceptable for us to take as custodians of public money. On the one hand, we knew that the contracts we were dealing with were often with new entrants to the market, for products made by manufacturers whom we had not always inspected, for goods we had not had the chance to test prior to purchase. On the other hand, without action, we had the real prospect of NHS staff and other key workers running out of the PPE they needed to be safe, and the consequential harm, including potential loss of life that would entail. We knew that in order to avoid harm, we had to accept a level of risk which would mean that some contracts may not be fulfilled or we may be supplied with defective product. We sought to mitigate that risk as far as we could, not least by using the NHS Standard Form contract as the norm which would provide us with contractual remedies in the event of breach by the supplier, but running an ordinary procurement exercise in order to mitigate that risk was simply not an option for us at the time."

Advance Payments

55. In March 2020, the Cabinet Office published a Procurement Policy Note (PPN 02/20) - "Supplier relief due to COVID-19", setting out information and guidance for public bodies, including central government departments, on payment of their suppliers to ensure service continuity during and after the pandemic. The actions mandated included putting in place the most appropriate payment measures to support supplier cash flow, including forward ordering, payment in advance, interim payment and payment on order.

56. Paragraph 8 of PPN 02/20 states:

> "Central Government organisations should note that Managing Public Money prohibits payment in advance of need in absence of Treasury consent as this is always novel contentious and repercussive. However, in the circumstances Treasury consent is granted for payments in advance of need where the Accounting Officer is satisfied that a value for money case is made by virtue of securing continuity of supply of critical services in the medium and long term. This consent is capped at 25% of the value of the contract and applies until the end of June 2020… Consent for payment in advance of need in excess of this amount should be sought from HMT in the usual way. This consent does not alleviate accounting officers their usual duties to ensure that spending is regular, proper and value for money or for other contracting authorities to conduct appropriate and proportionate due diligence to ensure such payments are necessary for continuity of supply of critical services."

57. On 4 April 2020, the Senior Policy Adviser for Health Spending at HM Treasury confirmed an increase in the delegated funding envelope for PPE, subject to the following conditions:

> "Ensure any foreign companies are considered reputable by FCO and the local British Embassy, and assurances provided to DHSC in writing;
>
> Ensure all equipment has the appropriate medical certification and commercial colleagues have sought and taken all reasonable action to review time-stamped pictures of the equipment;
>
> Confirm that all stock will be medically inspected as fit for purpose before distribution to NHS Trusts and use;
>
> Ensure commercial teams have reviewed purchase contracts and confirmed they see no terms and conditions that represent unacceptable risk to Government;
>
> Make all reasonable attempt to ensure prices are <25% above the average unit price paid to date;
>
> Ensure DHSC AO has signed off each payment given potential issues with propriety, regularity, vfm and feasibility;
>
> Share details with HMT of all individual procurements; including supplier, product type, volume of goods purchased, unit cost, certification details and written assurances from Embassy/FCO;

> Provide HMT with a weekly tracker on purchases made and potential upcoming purchases, and how progress tracks against demand in the system; and
>
> Keep any deposit payments and prepayments to a minimum."

The High Priority Lane

58. In late March 2020 the High Priority Lane (also referred to as the "HPL" or "VIP Lane") was set up. The intention was to manage the large number of referrals that were being made outside the Portal by senior officials. It was reserved for referrals from MPs, ministers and senior officials, including those in the NHS ("the Senior Referrers").

59. Max Cairnduff, a senior civil servant working in the Complex Transactions Team in the Cabinet Office, who was seconded to DHSC during the period April to June 2020, explains in his witness statement the operation of the High Priority Lane:

> "The High Priority Lane ("HPL") was established in March 2020 before I joined and was one of around 8 teams ("Opportunities Teams") dealing in parallel with opportunities coming to the PPE Cell from suppliers who wanted to supply PPE during the coronavirus epidemic. The HPL was set up specifically to deal with referrals from Ministers, MPs and/or senior officials ("Senior Referrers"). It was used between the end of March 2020 and the end of June 2020 and I joined, to lead it, at the beginning of April 2020.
>
> The HPL worked by offering a dedicated email address (which I was responsible for establishing) to which Senior Referrers could direct opportunities from people who had contacted them wishing to supply PPE. My team would then get in touch with those potential suppliers and find out further information from them about their business, their products and offers (this was also done by the other parallel Opportunities Teams in relation to the opportunities they were considering). If the offer looked promising after this information gathering, it would be passed to the Technical Assurance team."

60. Mr Cairnduff stated that the principal purpose of the High Priority Lane was to deal with "noise" being generated in the system:

> "Following the Defendant's 'call to arms' a large number of would-be suppliers contacted their MPs, Ministers or senior officials with their offers. Those Senior Referrers passed the offer to the PPE Cell (at first without a dedicated place to send them, until I asked that the dedicated email address be set up). Those who had made the referrals were highly likely to seek feedback or progress updates frequently and robustly. This was not unreasonable: the Senior Referrers were keen to assist with the effort and wanted to ensure offers sent to them from their

> constituents and other suppliers would not be lost but were instead being followed-up.
>
> The HPL was therefore an Opportunities Team which dealt with the referrals from those sources, which were going to demand a higher level of contact and stakeholder management at the same time as the caseworkers were gathering the requisite information in order to take the decision of whether the opportunity was worthwhile and should be passed to Technical Assurance for the next stage of scrutiny."

61. The existence of the High Priority Lane was identified in a report of the National Audit Office published on 18 November 2020 ("the NAO Report").

62. A team within the High Priority Lane ("the High Priority Lane Team") acted as an opportunities team. Its main role was to assess the viability of offers. It did not have the authority to award contracts and played no part in the 'decision-making' process of the Technical Assurance Team. Potentially promising offers remained subject to technical assurance and due diligence. If they passed those assessments, they would be submitted to the Accounting Officers, who had the authority to decide whether or not to award the contracts. When making those decisions, the Accounting Officers were unaware as to whether a particular submission was from the High Priority Lane or the Portal.

Rapid Response Team

63. In late April 2020 the Rapid Response Team was formed, comprising individuals from the Opportunities Team, Closing Team, Technical Assurance, due diligence and contract management. Mr Wood's evidence is that this was designed to speed up the process of taking or rejecting a high priority opportunity (from the Portal or High Priority Lane) through to a contract award by having one single team which worked in a close and focussed way on a given case. The criteria for allocating an offer to the Rapid Response Team were offers of PPE items that were in demand and high volumes of such PPE items. A 'high priority opportunity' was identified during a morning call where cases most likely to be progressed successfully were identified by reference to buying priorities.

The Contracts

PestFix

64. Daniel England, the Company Director of PestFix, sets out in his witness statement that PestFix is a wholesale and mail order supplier of tools, chemicals, PPE and other goods, operating in the business support services sector. It trades under the 'PestFix' brand name because many of its customers are involved in providing pest control services, or purchase supplies for pest control or deep cleaning operations.

65. Prior to the Covid-19 pandemic, PestFix was already an established supplier to public sector organisations, including NHS Trusts, although it did not previously supply medical grade PPE. However, Mr England states that it is a goods trading company, with expertise in sourcing goods, and has established relationships with manufacturers

and logistics providers, enabling it to make arrangements quickly to source, transport and supply goods to meet demand. PestFix's experience of sourcing high quality PPE, together with personal connections in the PRC and strong business relationships with Chinese-speaking owners of factories across China manufacturing medical PPE, placed it in a strong position to offer assistance.

66. Mr England decided to offer the services of PestFix because he considered that it was well-placed to provide assistance in securing supplies of PPE:

> "I watched the news about the unfolding Covid emergency and wanted to do something to help. I thought about how PestFix's experience of sourcing high quality PPE, and my personal connections in China could be of potential value in helping the UK Government.
>
> My wife, who is a senior veterinary surgeon, is of Chinese descent and has many close family members in China with business links there. In the early months of 2020, I worked closely with my wife's family to build strong business relationships with Chinese-speaking owners of factories across China manufacturing medical PPE.
>
> Due to our strong family connections "on the ground" in China at a time when international travel was prohibited, we were suddenly uniquely placed to help the UK deal with a potentially devastating shortage of vital PPE. As part of the open source procurement process launched by the Department of Health and Social Care ("DHSC"), we stepped up to the challenge of identifying potential sources of such PPE in China."

67. On 26 March 2020, Mr Joe England sent an email to Steve Oldfield, the Chief Commercial Officer at DHSC, stating:

> "I am a good friend of Ray's [Mr Oldfield's father-in-law] and we met at his 80th birthday bash. I spoke to Ray a short while ago and he was kind enough to give me your email (which will not be abused). I am one of the owners of a family business that specialises in PPE equipment supply.
>
> In particular:
>
> Masks of different specs dependent on requirements and usage…
>
> Gloves all sizes
>
> We have been approached by a number of NHS trusts to supply them but before we do that I thought it wise to check whether this is better handled through a more central body in your organisation? … In normal circumstances we supply a large number of Pest Control & Facilities Management companies."

68. Mr Oldfield replied on the same date:

> "How very nice to hear from you, and I remember well our chat when you came to Ray's 80th at ours. I am delighted that Ray passed on my details to you, and even more pleased to hear the reason why!
>
> Yes, indeed, we are very much in need of all manner of PPE and other consumables in the NHS, and as you can imagine, we have a veritable army of people doing sourcing and procurement, and even processing donations! My colleagues and I would be delighted to learn more about what you have available and in what quantities. By copy of this email, I am asking … my team to contact you to get more technical details from you (we're most in need of FFP3 and type IIR masks, surgical gowns and hand sanitiser) …"

69. Mr Oldfield passed on Mr Joe England's email to Andy Flockhart, a Deloitte consultant who was seconded to the PPE Cell. Mr Flockhart responded to both of them, stating:

> "we will be in touch with you directly to request a little more information about the products but thank you very much for reaching out - it's genuinely appreciated. There are teams working on this in a dedicated shift pattern but do please feel free to use me as a contact point if you have questions in the meantime."

70. On 27 March 2020 Mr Flockhart sent an email to the PPE Cell, stating:

> "One for the VIP list please".

71. Mr Oldfield sent an email to Mr Flockhart, thanking him, and stating:

> "He's an old school friend of my father in law, but on this occasion it does look like he might have something. It does spark a thought - his business is pest control/extermination. Have we done a call to arms to all these such sectors and any others who might use PPE who have stocks in the UK we could acquire or at worst requisition?"

72. On 27 March 2020 an indicative list of items of product specifications was sent to PestFix and it was requested to provide details of the company and potential offers of PPE. Mr England sent a further email to Mr Flockhart and Mr Oldfield by return, providing further details of his business, his connections in the PRC and potential supplies.

73. On 28 March 2020, Mr Oldfield emailed Ms Lawson, stating:

> "Just putting this on your radar: it came from a contact who's an old school friend of my father-in-law's, which I threw across

> to Andy Flockhart, but looks pretty useful I think – and there's lots of it in stock now it seems".

74. PestFix registered on the Portal on 30 March 2020 and completed a questionnaire. It did not hold itself out as a manufacturer but rather as an agent with the ability to source PPE stocks from producers in the PRC.

75. Darren Blackburn, a civil servant working in the Complex Transactions Team in the Cabinet Office, states in his witness statement that Terry Burrows, the Managing Director of PestFix, also contacted a senior NHS individual with details of PPE that could be supplied and this was also passed on as a Senior Referral.

76. As a result of the above referrals, PestFix was placed onto the High Priority Lane.

77. On 4 April 2020, Nick Dawson, Head of Commercial Income at NHS England and NHS Improvement ("NHSE&I"), acting in a support capacity for the DHSC, became involved in the PestFix offer. He explains in his witness statement that he formed a favourable view of PestFix as a PPE supplier:

> "Pestfix was potentially an attractive opportunity because of a number of factors including:
>
> They were already familiar with PPE as they were a pest control firm that sourced PPE for their industry. I thought it was likely they would have strong links with companies manufacturing PPE with a likely understanding of PPE;
>
> They were able to offer a range of products in high volumes at pace and often the products that had the greatest criticality at the time;
>
> They had articulated previous supply to Royal Mail and other NHS organisations;
>
> They were able to supply products with very short lead times;
>
> They had credible ties to manufacturers in China and had family and team members on the ground that could source PPE or inspect factories and it was apparent they had strong links with influential people in China which may assist with securing manufacturing;
>
> They offered an end-to-end logistics solution to transport products to the UK. This included identifying options to fly PPE to the UK free of charge by putting gloves in overhead lockers on planes, provided options for use of their freight planes and was one of the only companies I was aware of that had a real understanding of pallet sizes and capacity size on planes."

78. On 5 April 2020 Mr Cairnduff directed PestFix to re-submit its PPE offers using the priority appraisals mailbox for the High Priority Lane.

PestFix - coveralls (FPC)

79. PestFix made multiple offers of various items of PPE, including isolation suits/coveralls.

80. The technical assurance process was carried out by CAPA. The technical specification stipulated that the required standard to which coveralls must be tested was BS EN 14126:2003 or any equivalent standard.

81. No specific technical specification was provided to PestFix for the coveralls; it identified what it could supply and the technical standards that would be met by such supply as part of its commercial offer to DHSC.

82. By email dated 5 April 2020, a member of the High Priority Lane Team requested PestFix to provide further information in respect of the offer, including a request for confirmation that the coveralls offered met the required standard:

> "We need the following info confirmed regarding the coveralls:
>
> MDR regs 2017/45
>
> PPE regs Eu 2016/425 CAT III protective clothing. Level of protection i.e. which one of these is it 3B, 4B, 5B, 6B. Must have certification that it has been tested in line with EN 14126 and must have the international biohazard label clearly marked on the packaging."

83. In response, Mr England sent a test report from XM Test Technology Company Limited on the testing of the isolation gowns to EN14126:2003 in March 2020. The test report confirmed that the submitted samples complied with Medical Devices Directive 93/42/EEC&2007/47/EC. Mr England set out his understanding of the test report in an email of 5 April 2020:

> "… Isolation Suits – Hooded (not surgical Gowns)
>
> Having read the test data these suits:
>
> 1. "Conform to Medical Devices Directive 93/42/EEC&2007/47/EC
>
> 2. Have been tested to the following standards: EN 14126:2003; EN ISO 13688:2013
>
> 3. Have a Class 3 rating against penetration by infective agents, tested against the synthetic blood test ISO/FDIS 16603
>
> 4. Have a Class 2 rating Resistance to penetration by infective agents due to mechanical contact with substances containing contaminated liquids.

> 5. Have a Class 2 rating Resistance to penetration by contaminated liquid aerosols when tested in accordance with ISO/DIS 22611
>
> 6. Have a class 2 rating Resistance to penetration by contaminated solid particles when tested in accordance with ISO/DIS 22612
>
> 7. Have suitable Marking: a) the number of this European Standard; b) the type of protective clothing, as specified in Table 5, with the suffix "-B", e.g. type 3-B; c) the pictogram "protection against biological hazard.
>
> We can therefore supply the type of suit you require, your team just need to specify what level of protection they need on the order.
>
> I have re-attached the test data but named the file Isolation Suit instead of Isolation Gown to avoid any confusion up the line."

84. On 5 April 2020 Mr Moore recorded in an email that the technical assurance for the isolation gowns offered by PestFix was acceptable.

85. On 6 April 2020 Stephanie McCarthy, National Clinical Engagement and Implementation Manager at CAPA, approved the protective clothing offered by PestFix as coveralls.

86. Mr Moore explains in his witness statement that although there was some uncertainty as to the specification of the supplies, in that there were pictures of coveralls in the PestFix technical file but they were described as isolation gowns, they met the requirements of the CAPA coverall guide:

> "This opportunity came very early on in our work with the PPE Cell. We had to balance the fact that we had not reached our desired level of comfort with the subject matter with the need to keep the procurement of suitable PPE moving forward. In a very early case such as this we would rely on our professional experience – we would look at the standard to which the goods were said to be compliant and see whether it was appropriate to the goods in question. In the case of these Isolation Gowns/coveralls, the manufacturer was claiming compliance with EN14126 which is for protective clothing and medical devices and that was an appropriate standard for the goods in question, and that claim was supported by an appropriate test report."

87. Following technical assurance, the offer was sent to the Closing Team. Tracy Washer was the Closing Team caseworker for the PestFix offer. She collated information regarding the commercial aspects of the offer, including logistical and freight information, the level of deposit required and a comparison with the Closing Team daily average cost per item. She then prepared a submission for the DHSC

procurement and finance teams, who used it as the basis of their request for approval of the contract by the Accounting Officer.

88. Following discussions with Ms Washer, on 8 April 2020 Mr England submitted a completed new supplier form, a signed draft contract and the PestFix product offers with pricing information, including offers to supply coveralls.

89. Due diligence in respect of FPC was limited to basic checks carried out by Ms Washer, as set out in her witness statement:

> "I was the caseworker and there was no Cabinet Office due diligence report. As was normal in those circumstances at the time, therefore, I carried out some checks. I accessed both the Companies House and Dun and Bradstreet websites, as well as undertaking an internet search. On Companies House, I was able to confirm the Pestfix Company number, that they were a UK registered company, their Officers and that documents were filed (which they were). I also checked against "Crisp Websites Limited" since that was the name of the company which traded as "Pestfix". From the Dun and Bradstreet website, I checked the D-U-N-S number (which is a unique nine-digit identifier which is relied on by banks) was correct and that they were registered there too, as well as the records held on the site relating to the company. This information gave me confidence that Pestfix was a real entity which was based in the UK and which was trading in the UK. I did not keep a written or electronic record of my searches and the emails received by me from the Cabinet Office with the details of the Pestfix offer did not include a Due Diligence report. However, it did include the statement "Supplier Due Diligence Approved." I would add that these offers were at pace and the ever-changing market meant that we had to work quickly to secure supply. I understand that further checks were also undertaken by DHSC Finance in relation to companies House, Dun & Bradstreet, VAT registration and authenticity of their bank account."

90. On 10 April 2020, PestFix received an initial purchase order from the DHSC for the supply of isolation suits, gloves and facemasks.

91. On 11 April 2020 Ms Washer submitted the PestFix offer for approval to the Accounting Officer, Jon Fundrey, acting as co-director of Finance with Mr Young.

92. Mr Fundrey satisfied himself that there was sufficient demand for the coveralls to justify their purchase. In making this decision, he explains that he had regard to a Data Dashboard which indicated demand, as well as a PMO Update which indicated that gowns were in high demand. He had been informed by others within the PPE Cell that coveralls were useful in mitigating a shortage in gowns. The coveralls had been approved by the technical assurance team. The price was competitive and offered value for money. Pestfix had traded in PPE before and had previously supplied PPE to Royal Mail which indicated that they were capable of fulfilling orders at scale.

93. Mr Fundrey was aware that limited due diligence had been carried out, as he explains in his witness statement:

> "One important factor which was missing from the submission sent to me was any comment on due diligence. This order was being proposed during the early days of the PPE Cell and it is fair to say that the systems and processes were not as fully developed at this stage as they were later in the life of the PPE Cell. The Cabinet Office had provided some resource to carry out due diligence reports but, in these early days, it was not at all unusual for a submission to be made to me without such a report. I can see, reviewing the material submitted to me that this is one such case. There was no Cabinet Office due diligence report. This coveralls order was unusual in that it was split off from a wider Pestfix offer which came in during early April. The submission to me did not contain a Request for Approval of Spend because one had been submitted for the whole of the original offer on 10 April 2020. This form confirmed that "Standard Procurement Cell due diligence" had been undertaken. That this was early on in the life of the cell is shown by the comment, also on the form that "we have an open question as to what this entails". To my mind, at that time, the work being done in the Buy Team on due diligence was not sophisticated because they did not have any specialist tools. I understood this, at the time, to mean there would have been basic checks done on the internet – Companies House and similar. I judged that, in the circumstances and the factors above, this was imperfect due diligence but it was adequate to justify proceeding."

94. On 12 April 2020 Mr Fundrey approved the FPC for coveralls but rejected the additional offers of gloves and masks on the basis that he did not consider that they would provide value for money.

95. The FPC was dated 13 April 2020 and was for two million isolation suits/coveralls at a cost of £28,040,000 ex VAT.

96. The Defendant published a report dated 13 April 2020 pursuant to regulation 84 of the PCR, setting out the reasons for selection of PestFix:

> "PPE is a key component for the fight against COVID-19 and sources of various equipment have been heavily depleted internationally. In mid-March 2020 it was recognised that buying sufficient PPE stocks was going to be a challenge and a pillar system was introduced into DHSC to dedicate a sourcing team to fulfil national demand for PPE.
>
> Given the immediacy of the threat of COVID-19 and the intense international competition for resources, suppliers were chosen on the basis of available stock at the time of purchase. Effectively, if a supplier had stock or access to stock of the

> right quality and past due diligence cheques, the department sought to contract with them."

97. The regulation 84 report also set out the Defendant's justification for its use of the negotiated procedure without prior publication:

> "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 Concern 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, isolation suits, pose a risk to life of those on the frontline and the likelihood of significantly increased death toll.
>
> 3. In March the NHS experienced severe shortages of PPE, modelling based on 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. Additionally, there were many buyers competing for the same supplies. It is imperative that security of supply is maintained to save lives. Demand for equipment was high, with little or no incentive for supplies to participate in competitive procurement procedures. In these circumstances, a procurement following the usual time scales 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 was bound to fail as the usual time scales for negotiations during this period was a matter of hours. Failure to acquire the necessary stock of PPE equipment presented a significant risk to life.
>
> 4. The Department for Health and Social Care ("DHSC") is satisfied the tests permitting the use of the negotiated procedure without prior publication (Regulation 32(2)(c)) were met:
>
> A. **As far as is strictly necessary:** PPE in mass volumes was identified as strictly necessary to meet anticipated demand in 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, 01.04.2020).
>
> D. **It was impossible to comply with the usual time scales in the PCR**: Due to the emergency 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 in the unique market circumstances in which they were obtained.
>
> 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."

98. The Contract Award Notice ("CAN") was sent for publication on 7 July 2020 and published on 10 July 2020.

99. The gowns that were delivered were initially rejected by HSE on the grounds that they were incorrectly labelled as isolation gowns, rather than coveralls, they were not correctly labelled as type 6B coveralls, and they had been tested against medical device standards rather than PPE standards.

100. Mr England explains that in April 2020 the situation was very challenging. The manufacturers had complete control of pricing and production availability, and quality and assurance checks were very difficult to undertake:

> "At the time these orders were placed, it was not possible for PestFix staff from the UK to visit China to verify factory conditions. Nor were we able to obtain physical samples and send them for additional testing. Not only were testing houses overbooked and delayed, but the time it would have taken to obtain tests would have allowed another 'bidder' to take the products and we would have lost our place in the 'queue'. A further complication was that international couriers were unable to transport PPE samples out of China for assessment, as the samples were being stopped by Customs in China. Given the intense competition and range of other parties willing to buy the products quickly, we were not in a position to dictate terms to the factories. As widely described across DHSC's

> evidence, the market conditions were unique and incredibly fast-moving.
>
> Due to international travel bans and quarantine requirements for our agents if they entered the factories, such checks necessarily involved paper-based verification rather than physical site visits or inspections. Even sending Chinese personnel cross-country in China to inspect factories presented huge challenges, with national travel restrictions in force across much of China …"

101. On 6 August 2020, HSE produced a report on the coveralls, which stated:

> "This PPE was sourced by Pestfix on behalf of NHS Procurement.
>
> These coveralls were originally tested against the wrong standard for UK supply and CE marked in China as a medical device, rather than as PPE.
>
> This product is currently 'locked' at Daventry and our team there have now sourced the relevant documentation for this product.
>
> The product (and original accompanying documentation) refers to itself as an isolation gown, but it is clearly a disposable coverall.
>
> The product has been evaluated and Tech Team can confirm that it is a Type 6B coverall that meets the relevant NHS PPE Minimum Specifications for Type 6B coveralls (spray-tight coveralls that provide protection against biological agents).
>
> The product is not CE marked as PPE and the regulatory easement for healthcare is required."

102. The decision reached was that the coveralls would be released into the NHS supply chain subject to correction of the labelling.

103. Mr Jordan, International Sourcing Lead, PPE within the DHSC, confirms in his witness statement that he is not aware of any dispute relating to the coveralls supplied, and believes that they have been distributed, following the easement by the Regulator allowing them to be used in the NHS.

PestFix - aprons (SPC1)

104. On 13 April 2020, PestFix made an offer by email to the COVID PPE Priority Appraisals Inbox to supply up to 6 million aprons: 300,000 aprons from immediately available stock and 100,000 aprons per day thereafter.

105. No specific technical specification was provided to PestFix for the aprons, although there was an NHS specification for aprons, stipulating dimensions, thickness and

strength. PestFix identified what it could supply in its specification document, namely, aprons described as "71x117cm 25g" tested to "all four sections of EN1186" (EN1186-1:2002, EN1186-2:2002, EN1186-3:2002 and EN1186-14:2002).

106. Mr Moore explains that his understanding was that aprons, unlike gowns, were not regarded as PPE or medical devices and therefore were not required to conform to any particular standard:

> "The Technical Specifications, under Lot 4 (Gowns), refers to "thumb-looped aprons" as being covered by this Lot, which included the catalogue in which there was information about aprons. However, since it was neither PPE nor a Medical Device, an apron needed to comply with no particular standard. The catalogue did provide certain parameters - there was stated gravimetric thickness, tear resistance and dimensions. In this case the aprons were larger than the dimensions described and there was no information on thickness or tear resistance. The requirement for these products was very low. When working on Covid wards, doctors and nurses would wear a gown which they would change infrequently during their shift. In order to promote the longevity of the gown, and to minimise infection, it was common practice for an apron to be worn over the gown. The apron was changed frequently and was, therefore, not required to be long lasting or particularly robust."

107. Mr Cairnduff asked for the offer to be considered by technical assurance as soon as possible. Although the offer was for aprons, rather than gowns, Mr Cairnduff noted that gowns were extremely high priority items and he understood that aprons had the same priority.

108. On 13 April 2020 the aprons were approved by the Technical Assurance Team. Although there was some uncertainty as to the thickness of the aprons, Mr Moore was satisfied that the Technical Assurance Team had considered this aspect and concluded that the aprons on offer were sufficiently durable and robust to be used for their intended purpose.

109. On 15 April 2020, a submission was made to Mr Young as Accounting Officer for approval of the purchase of six million aprons. The submission relied upon the earlier, limited due diligence carried out by Ms Washer in relation to the FPC and stated: "DD confirmed on COVID19 Support Portal".

110. Mr Young and Mr Fundrey were concerned that the unit price for the aprons was too high and they agreed to reject the submission on that basis. However, the Closing Team responded by copying Mr Young in on an email suggesting that Ms Lawson's view was that the requirement was so substantial and urgent that this would override concerns on price. He states in his witness statement that the inventory levels at Total Forecast Demand Rate within the daily PPE Dashboard and the Daily Pick List indicated that aprons were listed as "Buy Priority":

> "By 16 April 2020, the Dashboards were showing the number of days of stock being held against the current "burn" (i.e.

> usage) rate. It stated that the stock of aprons was extremely low. Whilst I was certainly aware that the demand data I was seeing was based on modelling and was known to have some fragility, it was accurate enough for me to know that there was a severe current need for these items, even if I could not be sure of precise numbers from the modelling."

111. On that basis, Mr Young approved the contract, including the advance payment required.

112. On 16 April 2020 contract SPC1 was concluded for six million aprons at a total cost of £1,104,000 excluding VAT.

113. The CAN for SPC1 was sent for publication on 12 October 2020 and published on 16 October 2020.

114. PestFix supplied 6 million blue polyethylene aprons under SPC1. Samples of the aprons were tested by a third party, Intertek UK but they did not pass all required tests when tested against the NHS Supply Chain Specification:

    i) Spot thickness (ISO4593:1993) – Failed;

    ii) Gravimetric Thickness (BS2782-6: Method 631A:1993, ISO4591:1992) – Failed;

    iii) Impact strength (BS EN ISO 7765-1:2004) – Passed;

    iv) Tear strength (ISO6383-2:2004) – Passed;

    v) Dimensions – Failed; and

    vi) Opacity – Passed.

115. Mr Jordan confirms that PestFix supplied what they contracted to supply under SPC1, so there is no commercial dispute in relation to these goods. However, the aprons have been deemed unsuitable for use in an NHS clinical setting. The DHSC is continuing to look for alternative uses for the aprons within the public sector.

PestFix – surgical gowns (SPC2)

116. On 13 April 2020 Mr England sent an information pack to Mr Moore concerning surgical gowns, isolation gowns and protective coveralls he could secure from the PRC. The information was considered by the MOD and assessed to be acceptable against the technical specification for sterile gowns, although the labelling did not bear the appropriate sterilisation marking and there was no declaration of conformity.

117. On 15 April 2020, Mr England sent an offer to Mr Dawson to supply surgical gowns in two tranches, each of 50,000.

118. At that time, there was a critical demand for gowns in the NHS and, therefore, this offer was considered immediately by Mr Dawson. Mr Dawson explains in his witness statement:

> "At the time there was a desperate need for gowns in the NHS. The data we had on demand was showing stocks of only a few days and the actions we took meant that the NHS had sufficient supplies of PPE available to them. While the Buying Team was working tirelessly to bring in PPE (including gowns), I was being told that manufacturing slots were being lost because orders were not being placed quickly enough which is not a criticism of the process that was evolving, but a reflection of the environment and pace we were having to work at."

119. Due to the urgency surrounding the demand for surgical gowns, the offer was sent directly to Mr Young as Accounting Officer. A Chief Operating Officer of an NHS Trust who was supporting Ms Lawson with the procurement of PPE, carried out some checks against the specification but Mr Young noted that limited technical assurance had been carried out in respect of the offer (and he was unaware that technical assurance had previously approved the gowns).

120. The submission relied upon the earlier, limited due diligence carried out by Ms Washer in relation to FPC.

121. Mr Young approved the order, despite the limited technical assurance and due diligence, because of the critical need for surgical gowns, as he sets out in his witness statement:

> "The data from the daily dashboard and picklists showed an imprecise but, nevertheless, very acute and ongoing need for gowns. This consideration spoke to the propriety of the order all other factors being equal, the demand meant that it was appropriate to spend public money on these gowns;
>
> These gowns were immediately available, which was a key determinant of value for money given the requirement for the PPE;
>
> The contract value was, in the context of government spending on PPE at the time, relatively modest and being well within my delegated authority, I was persuaded the offer represented value for money;
>
> We had bought from PestFix already. I understood that DD had been done and we knew something of the business … it was not unusual at this time not to have a Cabinet Office due diligence report. This absence was a factor I took into account but still considered the offer was acceptable on grounds of feasibility and propriety;
>
> The risk to public money was mitigated by there being no money required upfront. This bolstered the propriety and value for money considerations;

> I was concerned about the risk emanating from a lack of technical assurance, but I considered, even on what I was being shown, this to be a risk worth taking given the urgent need for surgical gowns and their scarcity of supply - the modelling of the stockholding was showing stock as being very low… I considered this to be an appropriate risk to take because (i) all of the surgical gowns would be tested upon arrival in the UK and would not be distributed to the NHS unless they met the specification; and (ii) we would have contractual remedies in the event that the surgical gowns did not meet the specification upon arrival."

122. On 15 April 2020 PestFix received an email from NHS England and Improvement, stating that:

> "In order to expedite the order to ensure shipment within the next three days I understand it would be quicker for you to place the order directly with the manufacturer whilst we raise the PO to cover the cost for pestfix which in in this instance we are happy to do. Nick has kindly got the balling rolling already with relevant colleagues in DHSC around raising the PO for pestfix and also with our teams dealing with China deals to secure the correct logistics process ensues."

123. PestFix paid in advance for the surgical gowns, using its own funds.

124. Purchase orders in respect of the surgical gowns were issued on 16 April 2020 and 22 April 2020.

125. On 16 April 2020 contract SPC2 was concluded for 100,000 surgical gowns at a total cost of £945,000 ex VAT.

126. Exchanges between Mr Dawson and Mr England on 18 April 2020 indicate that there was great nervousness about the orders placed at the factory in the PRC; orders were being cancelled, third parties were required to re-negotiate their contracts at the factory and there was a suggestion that an agent of PestFix was attempting to bribe officials at the factory to secure supplies. However, there is no evidence that PestFix was involved in such activity (Mr England referred to this as: "of his own doing not ours") or that it was condoned.

127. On 21 April 2020 Mr England sent an email to Ms Washer, stating that the surgical gowns were CE Rated to EN 13795 and would have English labelling and CE marking stating Compliance with EN 13795. However, he also stated that, in common with all standard Chinese gowns, they were not compliant with BS EN11810:2015 and would have to be tested for fire resistance and marked as 'non-laser safe'.

128. The CAN for SPC2 was sent for publication on 12 October 2020 and published on 16 October 2020.

129. The gowns were delivered in accordance with SPC2. The Defendant has confirmed that it is likely that the gowns were distributed for use in the NHS, but at the time they

were received from PestFix, the tracking system was not sufficiently mature to allow the Defendant, now, to establish the current location of the product.

PestFix – masks (SPC3)

130. On 5 April 2020 PestFix sent technical documentation regarding IIR, FFP2 and FFP3 masks to CAPA.

131. On 17 April 2020 Mr Burrows of Pestfix sent an offer of IIR, FFP2 and FFP3 masks to Mr Dawson.

132. Ms McCarthy of CAPA approved the IIR masks.

133. The technical specification for the FFP2 masks required that they: "must have integral straps/ties long enough to go around an adult head whilst wearing a surgical cap." Photographs of the FFP2 masks supplied by PestFix showed that they had ear loops, rather than head loops. Despite that non-compliance, Mr Moore's technical assurance team was satisfied that the FFP2 masks were acceptable on the basis that they met standard BS EN149:2001.

134. Initially, Mr Moore did not consider that the FFP3 masks were acceptable because some of the documentation was in Chinese and images of the certificates were obscured or incomplete. However, on 17 April 2020 the technical assurance team approved the FFP3 masks based on a certificate for type IIR masks from ECM, an Italian certification body, following an email from the DHSC, stating:

> "We are looking to place an urgent order (by lunchtime today) for FFP 3 face masks from a company called PestFix. Having spoken to Tracy I understand the necessary product assurance checks have not been completed for this particular stock item and I would be extremely grateful if you can progress these for me as a matter of urgency. Terry Burrows (the Managing Director of PestFix) has just provided me with what I believe to be the necessary product assurance documentation. Really grateful if you can take a look at this and let me know whether the product assurance checks are satisfactory so I can progress with the order and make payment by c12 noon today."

135. The submission made to the Accounting Officer, Mr Young, relied upon the earlier, limited due diligence carried out by Ms Washer in relation to the FPC.

136. Mr Young approved the masks for the reasons set out in his witness statement. The IIR masks were particularly difficult to source and there were very low supplies available. Mr. Young was satisfied that due diligence had been carried out and that technical assurance was complete. He was also satisfied that the offer represented value for money. In respect of the FFP3 masks, there was a clear and necessary requirement for the masks and, although the price was above average, Mr. Young had received advice that no better price could be achieved at that point in the market. Mr. Young was reticent about the order for the FFP2 masks because there was no authoritative demand and supply data. However, he considered the order to be justified on the basis that it was prudent to obtain stocks whilst they were available

and they could be used as a backup for the stock of FFP3 masks or used elsewhere in the system.

137. On 17 April 2020 SPC3 was concluded for 60 million IIR masks, 25 million FFP2 masks and 25 million FFP3 masks.

138. The FFP2 masks supplied had ear loops (as indicated in the photographs supplied by PestFix), instead of head loops, and were unsuitable for use in the NHS. Mr Dawson renegotiated the contract so that the remainder of the value of the FFP2 mask order was put towards the production of IIR masks. None of the FFP2 masks delivered was distributed to the NHS.

139. On 29 May 2020 the contract was varied to comprise (i) an order for 190.2 million IIR masks; and (ii) a separate order for 25 million FFP3 masks at a total cost of £160,750,000.

140. Although there were two separate orders, a single CAN for SPC3 was sent for publication on 12 October 2020 and published on 16 October 2020.

141. The IIR masks were delivered in accordance with SPC3. The FFP3 masks were delivered but failed testing and there is an ongoing commercial dispute with PestFix in respect of these items.

PestFix – gowns, aprons and gloves (SPC4)

142. As set out above, in April 2020, PestFix made offers to supply PPE and submitted information regarding potential supplies of gowns (5 April 2020), gloves (12 April 2020) and aprons (13 April 2020).

143. Mr Moore gave technical approval in respect of the gloves based on documentary evidence provided by PestFix, including an EU Declaration of Conformity and test reports evidencing compliance with the relevant standards (EN455 and EN374). It was understood that technical approval had already been given for the aprons and gowns under SPC1 and SPC2 respectively.

144. The submission made to the Accounting Officer relied upon the earlier limited due diligence carried out by Ms Washer in relation to FPC.

145. The Accounting Officers for this contract were Mr Young and Mr Williams (because this was a contract exceeding £100m).

146. On 27 April 2020 the offer was submitted to Mr Young for approval. He was immediately concerned by the overall cost commitment and upfront payment required and was not prepared to authorise it without being persuaded that it was necessary and that the order would deliver value for money. By email dated 27 April 2020 Mr Fundrey confirmed that there were critically low stocks of aprons and twelve days' stock of gloves but the stock levels for gowns was unclear. In reply, Mr Young stated:

> "I am really struggling to approve this order. Yes, the supplier is known to us, and there seems to be a consensus that Aprons remain in scarce supply, but: What is the single version of the truth on both Gowns and Gloves? (the PPE Dashboard says this

> order is a priority today but what is the delivery volumes by week? How does that compare to expected demand? I don't think either Jon or I can approve any material orders for PPE until we have greater clarity from the Buy Team on one version of the truth on [what] is/isn't scarce and thus priority. Jon - grateful for your view as I don't want to hold this up if I am just missing something."

147. Mr Fundrey confirmed that there was a clear demand for gloves but that the position on gowns was unclear. Following further requests for information by Mr Young, Ms Lawson sent an email, stating:

> "Re the future point, as you know these markets are incredibly insecure so while theoretically we have a surplus, based on the last few weeks, I have my concerns. We do need to buy gowns until we have security on the stock coming in.
>
> Nevertheless, this is a large order with a very expensive price point. I've asked Chris Hall to do a sanity check for me as he's close to the relevant markets.
>
> We definitely want the gloves and the aprons though."

148. Chris Hall, at the Cabinet Office, agreed that the gowns should not be included in the order until demand for the same had been established.

149. Following those exchanges, Mr Young approved the contract for gloves and aprons but not gowns.

150. Mr Williams was prepared to approve the contract for gloves and aprons on the basis that both products were in demand, the prices offered by PestFix were below the average paid in respect of other supplies, PestFix had been used on other contracts and the documentation indicated that technical assurance was satisfied.

151. On 28 April 2020 Mr Dawson sent an email, setting out the case for pursuing the order for gowns:

> "**STERILISED SURGICAL GOWNS – UNDERSTANDING THE REQUIREMENT**
>
> Thought it would be helpful to share some data on the current position on gowns, especially relating to surgical gowns to give a level of comfort that we **should** be pursuing these gowns: while it is true that, according to the model that feeds the SofS update, forward orders of gowns in general look like we have sufficient supply for 90 days, the following context *must* be considered:
>
> **Unreliability of orders.** The model showing a strong position assumes 100% hit rate for gown orders (i.e. all turn up as planned and all pass Quality Assurance). Current experience

> tells us that this is emphatically *not* the case. The COVID PPE Supply Tracking Cell … are currently compiling 'hit rate' figures from prediction to deliveries that pass QA, so I don't have an exact figure to give on this, but based on experience we'd put it no higher than 50-60%.
>
> **Types of gowns.** The model treats all gowns as being equal, which is a reasonable assumption for COVID purposes, but a return to elective surgeries (as just announced by SofS) will drive a demand for sterilised surgical gowns. Sterilised surgical gowns can be used in place of lower grade coveralls but the reverse is not the case. This order is for sterilised surgical gowns.
>
> **Security of supply.** While expensive this … gown order, as long as it delivers, will secure our surgical gown position through at least the first wave of this crisis. Demand for PPE is increasing globally and there is no guarantee that we will be offered lower prices going forward…
>
> While [we] do not have authority to authorise this, our recommendation is that we should probably pursue this order for the above reasons.
>
> **Emily** are you supportive of this? "

152. On 28 April 2020, Mr Young received further information in respect of the demand for PPE. The Dashboard and Dashboard Summary showed the modelled estimate of stocks to be very low for gowns and aprons, and low for gloves. The Pick List showed gowns, aprons and gloves as 'buy priorities'. On the basis of this further information, Mr Young recommended to Mr Williams that he approve the contract for the surgical gowns. Although he shared Mr Young's reservation, namely, that the price was very high, Mr Williams approved the order based on the advice of Ms Lawson that there was high demand for the product.

153. On 28 April 2020 the contract (SPC4) was concluded for two million Nitrile gloves; ten million surgical gowns and eighteen million aprons at a total cost of £143,269,800 ex VAT.

154. The CAN for SPC4 was sent for publication on 12 October 2020 and published on 16 October 2020.

155. Mr Jordan's evidence is that the aprons had the same failures as the aprons supplied under SPC1. There is no commercial dispute with PestFix about these items and consideration is being given to where they can be deployed in the public sector, outside of the NHS.

156. Mr Jordan explains that there were issues regarding the surgical gowns. The gowns came from three different manufacturers. In the case of one manufacturer, the gowns failed the water permeability tests. In the case of the other two manufacturers, it was

found that the gowns were not sterile, despite being labelled as such. There is an ongoing commercial dispute with PestFix about the gowns.

PestFix – Gloves (SPC5)

157. The offer of gloves was made as part of the initial offer made by PestFix on 5 April 2020.

158. The technical assurance for the gloves was carried out by Ms McCarthy of CAPA on 6 April 2020.

159. The submission made to the Accounting Officer relied upon the earlier limited due diligence carried out by Ms Washer in relation to FPC.

160. This offer was initially rejected due to its excessively high freight costs. However it was resubmitted after PestFix were able to secure free freight by transporting the gloves in the overhead lockers of a British Airways flight. This transport option ultimately proved infeasible. PestFix then arranged for the gloves to be transported in the aircraft hold at its expense.

161. The Accounting Officer was Mr Fundrey, who approved the contract on 14 April 2020 because he considered that there was reasonable demand for the product, the quantity ordered was proportionate to the level of demand and it was competitively priced.

162. The contract (SPC5) was dated 14 April 2020 and was for two million Nitrile gloves at a cost of £197,800 ex VAT.

163. The CAN for SPC5 was sent for publication on 12 October 2020 and published on 16 October 2020.

164. On delivery, the gloves passed testing and they were distributed to the NHS.

Clandeboye

165. Clandeboye is a food production company based in Northern Ireland. As a routine part of its business, PPE, such as foot coverings, head coverings and overalls, is used to meet the stringent cleaning and hygiene standards that apply. Its sister company, Anchor Fixings Limited, is a supplier of PPE.

166. Prior to the contracts under challenge, Clandeboye successfully supplied 200,000 items of PPE to NHS Wales.

Clandeboye – gowns (FCC)

167. On 20 April 2020 Clandeboye offered to supply 3.4 million gowns to NHS Wales.

168. Clandeboye was not on the High Priority Lane but its offer was prioritised because of the high volume offered against very high demand for gowns.

169. On 21 April 2020 Clandeboye's offer was passed to the Technical Assurance Team, with a file containing a link to the FDA approval for the gowns, ISO 9001:2015

certificate for the manufacturer, Medtecs (Cambodia) Corp Limited, a Quality Management Certificate to ISO 13485:2016, a product information sheet and a test report from Intertek dated 18 October 2019, stating that the items were commercially acceptable regarding their resistance to penetration by blood and blood-borne pathogens.

170. The gowns satisfied AAMI Level 4, a US standard, but there was no product certificate of conformance to demonstrate that they would meet the requirements of BS EN 13795 or equivalent standards. On 23 April 2020 Clandeboye provided the certificate of conformance and on 26 April 2020 the MHRA confirmed that the AAMI Level 4 was acceptable as an equivalent standard to BS EN 13795. Following that confirmation, the Technical Assurance team approved the gowns.

171. On 27 April 2020, due diligence checks were carried out by the CAAS on Clandeboye, which confirmed that the firm was a small family confectionery business. As the firm filed abbreviated accounts, financial visibility was limited but they had an 'adequate health score'. A 'Company Watch' Report gave an amber risk rating. It was also known that Clandeboye had processed one consignment of isolation gowns to NHS Wales which had been collected and was due for delivery on 28 April 2020. The FCO was unable to carry out full due diligence checks in the time available.

172. The Accounting Officer for FCC was Mr Young, who initially raised concerns as to whether Clandeboye had the size and experience to compete against more established companies but subsequently approved this contract:

> "The Daily Dashboard data still showed that gowns were desperately needed, and this order would make a material contribution to this demand. Delivery would be within 60 days which was tolerable. From a feasibility and propriety perspective, therefore, I was satisfied that this order would help satisfy NHS demand in a reasonable timescale;
>
> I was aware there were few alternative sources of supply of gowns at this point in time. That, too, satisfied me that it was proper and feasible to proceed with this order. We were looking for credible offers wherever we could find them;
>
> The price was less than the average price being paid at the time and almost half the price of the highest price we had paid for PE gowns previously. I note that the request for approval contains a typographic error in that it refers to face shields. I can confirm that this is simply a typographical error, as the prices referred to are in fact those of PE gowns. In the circumstances, this offer clearly provided value for money on the basis of the evidence presented to me;
>
> The documentation I had been provided with was all in order and there was enough due diligence for me to be comfortable that the risk we were taking with this supply was acceptable as both Clandeboye and the manufacturer had been rated as

> acceptable risks. Again, this meant that my consideration of feasibility and propriety was positive;
>
> I had also seen that the product had been passed by technical assurance and that was an important factor from a value for money and feasibility perspective;
>
> I was given added confidence by the fact that the due diligence report noted that the manufacturer had already shipped goggles and, of course, by the order supplied to NHS Wales.
>
> I, therefore, had sufficient confidence that we were using public money in a responsible and reasonable way to buy a product which I had good evidence was fit for purpose and in respect of which there was evidence that both the manufacturer and supplier were capable of, and likely to, meet their obligations."

173. On 28 April 2020 the FCC was concluded for 3.4 million polyethylene gowns at a cost of £14,280,000 ex VAT including an advance payment.

174. The Defendant published a report dated 27 April 2020 pursuant to regulation 84 of the PCR, setting out the reasons for selection of Clandeboye and its justification for use of the negotiated procedure without prior publication.

175. The CAN for the FCC was sent for publication on 19 June 2020 and was published on 24 June 2020.

176. The gowns were delivered in accordance with the FCC.

Clandeboye – gowns (SCC)

177. On 29 April 2020, Clandeboye offered to supply additional gowns with the same technical specification. As a result, no further technical assurance was necessary.

178. On 1 May 2020 the SCC was concluded, for a total of 3.6 million gowns, at a cost of £15,120,000 and no deposit.

179. Following notification from Clandeboye that it could secure additional supplies, and further consideration by the Accounting Officers, the SCC was amended to increase the quantities, initially, on 12 May 2020, and subsequently, on 19 May 2020, for a total of 22.2 million gowns at £93,240,000 ex VAT, with no upfront payment.

180. The Defendant published a report dated 5 June 2020 pursuant to regulation 84 of the PCR, setting out the reasons for selection of Clandeboye and its justification for use of the negotiated procedure without prior publication.

181. The CAN for the SCC was sent for publication on 19 June 2020 and was published on 24 June 2020.

182. The gowns were delivered in accordance with the terms of the SCC. On 28 July 2020 Clandeboye shipped its final instalment of gowns due under the SCC, ahead of the contractual deadline.

Ayanda

183. Ayanda is a UK registered company, engaged in the business of private equity, trading, asset management and trade financing. Tim Horlick, a director of Ayanda, states in his witness statement that he believed Ayanda to be in a strong position to respond to the Government's call for assistance in procuring PPE because the company's management team and advisers had extensive experience in international trade and finance and global connections, including connections with the PRC.

The Ayanda Contract

184. In late March 2020 Mr Horlick was contacted by a business partner, who identified an opportunity to access the full capacity of the Zhende Medical Co. Limited ("Zhende") manufacturing plant and secure fifty million FFP2 masks. Mr Horlick passed on this information to Andrew Mills, the director of Prospermill Ltd and an adviser to the Ayanda board, because Mr Mills had previous involvement in the development of an online procurement platform for the NHS, including the procurement of PPE.

185. On 9 April 2020, Mr Mills sent an email to three of his contacts at the NHS, stating:

> "… through a business associate I can get access to 50m N95/FFP2 masks over the next three months starting immediately, and I'm sure they can be supplied at a price that matches the prevailing rate in the catalogues you manage.
>
> I was wondering if you could connect me with the relevant people to see if this is something that would be of interest to the NHS trusts you work with and to help work the supply arrangements as clearly this factory and my associate have not supplied the NHS directly before."

186. On 10 April 2020 the potential offer from Prospermill was referred to Darren Blackburn, a civil servant working within the Complex Transactions Team at the Cabinet Office. Mr Mills was asked to complete a Portal application, which he did, and the offer was considered by Wendy Burdon, a member of the High Priority Lane Team.

187. Mr Mills confirmed that he could offer N95/FFP2 masks through a business associate. Further, he stated:

> "They also claim to be able to get preferential access to supplies of ventilators, rapid testing kits (both the lateral flow test made by Wandfo and the PCR real-time test made by Hybriobio), other mask (KN95, 3-Ply, FFP3), gloves, caps, gowns, protective suits and many other medical grade products directly from the manufacturers, but I haven't yet verified this."

188. The initial offer was set out in a summary sheet dated 13 April 2020, which stated that the manufacturer would be Zhende, the offer was for the full capacity at the factory of sixty production lines of FFP2 masks for twelve weeks from 15 April 2020. The price would be confirmed on order due to daily fluctuations in raw material prices. A pre-

payment was required for the first four weeks of production, with the balance for the first month's production due in week 3. There would be a revolving and renewable letter of credit for the remaining balance to be drawn down weekly and the possibility of extension by mutual consent. The summary also provided an image of the Declaration of Conformity for medical masks (Type I, II and IIR), a test report for the N95 masks, and a series of photographs.

189. On 14 April 2020 Mr Mills chased Mr Blackburn about the offer and also contacted Martin Kent, Director of Global Trade and Investment, at the DIT, stating:

> "Following on from my last email I thought I'd share the correspondence I'm in with the Cabinet Office.
>
> I'd like to make sure that I have got through to the right place as this is an opportunity for **HMG to get exclusive access to the entire manufacturing capacity of the Zhende Medical Co Limited for an initial period of 12 weeks, during which they can produce 50m FFP2 masks**.
>
> I'm getting good engagement from Darren, but as the press has already highlighted a number of procurement opportunities that HMG has failed to capitalise on I think this is the sort of deal that **really needs Ministerial attention**.
>
> The **French and US governments are both circling**, and we will lose this opportunity if we can't give a positive response very soon, as demand is soaring and prices are rising."

190. Mr Kent circulated the offer to the Joint Action Coordination Team for Covid Procurement ("the JAC"), stating:

> "Andrew is a former Advisor to the Board of Trade when it sat under the former SOS."

191. The JAC forwarded it to the China Procurement Team at the FCO, stating:

> "I think this might need escalating but not sure who [to]? There is an ask for ministerial engagement to secure the below offer for HMG to get exclusive access to the entire manufacturing capacity of the Zhende Medical Co Limited for an initial period of 12 weeks, during which they can produce 50m FFP2 masks. I've cc'd in Darren who has been in contact with the company so far and may be able to provide further information."

192. On 15 April 2020 the DIT asked for Prospermill's offer to be treated as a VIP case:

> "Could we treat this as a **VIP case** please. Andrew (the source) was a Board of Trade Advisor (similar to a Non Exec Director) for DIT. This will be credible and I'd suggest should be fast tracked through the system.
>
> Would it make sense for:

> - Darren you and your team to continue liaising with Andrew directly today
>
> - CPT to provide a view on his claim to have 12 weeks manufacturing capacity, and the documentation / due diligence requirements that would be required to move this forward. Ideally today as well."

193. The offer was allocated to the High Priority Lane on 15 April 2020 and Ms Burdon submitted the technical documents for the FFP2 masks to the Technical Assurance Team on the same day, asking for a "really urgent review".

194. At that time, the PPE PMO Update directed that the focus of the PPE Cell should be on closing orders for 12 million masks or more and that orders would dry up in mid-May.

195. On 17 April 2020, the Technical Assurance Team evaluated and rejected the products offered by Mr Mills on the basis that, although the declaration of conformity quoted the correct EN standards, it related only to Type I, Type II and Type IIR masks and did not, therefore, apply to the proposed supply of KN95 FFP2 masks. Further, there was no CE mark for the FFP2 masks or a certificate from the notifying body.

196. On 18 April 2020 Mr Mills was notified of the outcome. He responded the same day, stating:

> "Many apologies for the confusion regarding certification standards.
>
> In summary, the situation is this:
>
> - Zhende have applied for and received FDA approval.
>
> - They have applied for, and expect to receive, EU/CE approval by the end of this month at the latest.
>
> - The French government, via their Chinese partner … have made an offer that is contingent on CE certification, that is higher than the price being offered to us, as they are of the view that securing this production capacity is strategically critical for their national C-19 response.
>
> I have attached three documents:
>
> 1. The evidence of Zhende's EU/CE certification submission, and which also includes confirmation of FDA approval.
>
> 2. The letter sent to Zhende … outlining the conditions that Zhende have stated they are prepared to accept (along with a translation).
>
> Zhende are willing to accept an LOI from HMG that is contingent on them securing EU/CE certification from an

> appropriate notifying body, and will offer unqualified rights of termination and refund if, for any reason, this doesn't occur.
>
> **In short, H&G can effectively take a free option over, and secured the exclusive rights to, the full production capacity of this advanced factory facility at zero risk**.
>
> We are happy to facilitate any further due diligence that may be required…"

197. The matter was referred to Mr Cairnduff, Mr Moore and Mr James for advice. Mr Blackburn's email of 18 April 2020 indicated that he was undecided on the value of the offer:

> "They've been granted N95 status by the FDA and are currently applying for CE qualification.
>
> The French are going to take them up on this offer it seems.. (but we always hear this).
>
> I wonder if we could provide some LOI to secure while they get certification? Thoughts? Or are we happy to [lose] this?"

198. Mr James responded that if the masks were needed, he would be prepared to produce a letter of intent, provided it included "the standard get out clauses" if the supplier or product were unsatisfactory. On that basis, the following letter of intent was sent to Prospermill:

> "I am writing to confirm that the Department of Health and Social Care (DHSC) is interested, subject to the satisfactory conclusion of negotiations between us, in placing a contract with Prospermill Limited for exclusive rights to the manufacturing capacity of Zhende Medical for a period of 12 weeks in order to produce a minimum of 50 million FFP2/N95 surgical face masks.
>
> The placing of such a contract is further subject to you obtaining and providing proof of satisfactory CE Certification and Declaration of Conformity for these masks to BS EN 149:2001+A1:2009 or any equivalent standard acceptable to us.
>
> If you are able to provide the required proof within a period of two weeks from the date of this letter, we shall enter into further negotiations with you with a view to agreeing legally binding terms."

199. Mr Mills commissioned a report on the FFP2 masks from the BSI to test them against the relevant standard EN149:2001+A1:2009. The report demonstrated that the masks met the relevant standard and that a Declaration of Conformity would be issued. On 24 April 2020 a copy of the report was sent to the PPE Cell.

200. On 27 April 2020, the Technical Assurance Team passed the FFP2 masks, despite the absence of satisfactory CE certification or a Declaration of Conformity but subject to proof of both as set out in the letter of intent. Mr Moore explains in his witness statement:

> "This was an unusual situation, but in my view permitted under the OPSS Guidance and EU2020/403, and we were given great comfort by the very strong BSI report which had tested the masks to the relevant standard and had found them to be compliant. The BSI is a highly reputable test centre and it is responsible for publishing British Standards. This was very compelling evidence that this was a technically safe product. Our approval was caveated in that it required the delivery of a declaration of conformity and the products to be CE Marked. I think this is a good example of the risk-based approach to TA. We were told this was a desperately needed product. We had a gold standard test report and there was, therefore, nothing to stop the declaration of conformity being produced and nothing to stop the product being CE marked. We had confidence that these two steps could and would be done and if they were, these masks had clearly passed the technical assurance tests.
>
> The Technical Assurance Team also approved the FFP2 masks in reliance upon the Commission Recommendation and corresponding OPSS guidance, which permitted Member States to rely on evidence of engagement by a supplier with a notified body and the commencement of the process of Type Examination (even if not concluded) as long as the product meets minimum safety standards."

201. This was in accordance with the European Commission Recommendation (EU) 2020/403 on conformity assessment and market surveillance procedures within the context of the COVID-19 threat, which was adopted by the UK Department of Business, Energy and Industrial Strategy and the Office for Product Safety Services (OPSS) on 25 March 2020. Paragraph 8 of the Recommendation permitted Member States to assess and purchase Medical Devices and PPE not bearing a CE mark provided these products were only made available for healthcare workers for the duration of the Covid-19 crisis.

202. On 20 April 2020, Ms Burdon was informed that there was a demand for large volumes of type IIR masks and asked Mr Mills whether he could secure any supplies. On 21 April 2020, Mr Mills confirmed that he could supply IIR masks (in addition to the FFP2 masks). The offer was fast tracked to the Technical Assurance Team but on 23 April 2020 the type IIR masks were not accepted because the certificates provided did not demonstrate conformance to the appropriate standards. On 24 April 2020 Mr Mills sent a new Declaration of Conformity and, following a further CE technical documentation review report, on 27 April 2020 the masks were approved as acceptable.

203. Mr Mills registered the initial offer through the Portal from Prospermill, as the contracting party, but by email dated 27 April 2020, he informed Ms Burdon that

Ayanda would be used, as they already had an international payments infrastructure set up.

204. Due diligence on the manufacturer was carried out by the FCO, resulting in an amber risk rating. In the report dated 16 April 2020, it was noted that Zhende was a medical device manufacturer, listed on the Shanghai Stock Exchange. It held two licences to sell and produce medical devices. Its website indicated that it had extensive facilities and a track record of fulfilling large orders. It was listed on 'the whitelist' which meant that it had the ability to export from the PRC. The British Embassy noted that: "There are strong indicators in the public domain that the company is capable of fulfilling large orders" but also that the manufacturer had been penalised six times since 2014 as its products had failed local authority quality inspections.

205. On 27 April 2020, due diligence was undertaken on Prospermill by the Cabinet Office which concluded in an amber rating:

> "Please find attached the DD complete for Prospermill. No financials available for this supplier so we have rated as amber with a recommendation for this information to be sourced and rating to be updated or necessary assurances to be undertaken to ensure delivery."

206. On 28 April 2020 the Cabinet Office carried out due diligence on Ayanda which concluded in a red rating:

> "… please find attached the completed DD. Please note the red rating does not exactly mean reject outright but that significant assurances are required to ensure delivery."

207. The attached report stated:

> "No financial information available for this supplier due to total exemption accounts filing and so full assessment cannot be made. Rated red as significant assurances required to be able to progress with this supplier and ensure they have ability to deliver but rating to be re-assessed when missing info is obtained."

208. On 29 April 2020 Mr Fundrey, as Accounting Officer, approved the order for the reasons set out in his witness statement, including:

> "Emily Lawson … had advised that these masks remained an urgent requirement, even though they were not on the priority list. I had been advised that the FFP2 masks were of particular interest as a standby, in case we could not secure sufficient numbers of FFP3 masks. I understood that, if they were not used in the NHS, there would be a need for them in other settings, such as in social care …

> I had seen the approval from the Technical Assurance team for both FFP2 masks and type IIR masks making this order feasible in that regard…
>
> The pricing of the FFP 2 masks was very good, being well below average. The type IR mask price was only marginally above the average price. On price, therefore, these offered value for money.
>
> A very compelling factor in this offer was that, by proceeding, we were securing exclusivity to the production capacity of a factory in China. The due diligence on the factory carried out by the FCO and British Embassy in Beijing was amber but securing the capacity gave us a security and confidence in the feasibility of the order which we would not otherwise have had…
>
> I also believed … that we would have contractual remedies in the event that the goods supplied were defective and, also, that the goods would be tested before being used in the NHS.
>
> I was clear in my mind that Ayanda was not a business which had any direct experience in the manufacture, supply or distribution of PPE. That, as a factor by itself, did not unduly concern me. The parallel supply chain which had been established was there to find alternative supplies of PPE. The Treasury had set some guidelines for us on how we should apply the delegated spending powers for Covid-19 which had been granted to the DHSC. I understand Chris Young will explain that in his witness statement. Nevertheless, it was a balance. The factory where the supplies were being made was one which was dedicated to the manufacture of these products. I had seen the technical assurance verdict and I was aware that both the supplier and manufacturer had had due diligence done on them. The results of the due diligence was amber so we had to weigh that in the balance. In the circumstances, therefore, my view was this was an order which, on balance, should be concluded. To my mind, the most important factor was the ability to source technically approved Type IIR masks on a regular supply over a prolonged period at a good price. I was aware that there were risks associated with the lack of experience of the supplier and the fact that the manufacturer had not received a green due diligence rating but, in my judgment, the risks of not proceeding outweighed the risks of proceeding."

209. Given the value of the proposed contract, which exceeded £100 million, the proposal was sent to Mr Williams for final approval. Mr Williams checked the demand for the masks with Mr Marron, who sent an email dated 30 April 2020, stating:

> "I can confirm we need to complete this order.

> Type IIR masks are our priority requirement in both short and medium term. Delivery through May and June will be critical.
>
> FFP2 less critical, we are holding them against shortages of the preferred FFP3 masks."

210. Mr Williams gave his final approval for the reasons set out in his witness statement:

> "The submission which came to me contained confirmation that full due diligence had been carried out. I was not provided with the due diligence report itself, but that was the norm. The AO's role was to confirm that the necessary steps had been carried out, not to review the work done in completing those steps. I was satisfied on pricing – the Type IIR masks were marginally more expensive than the average price which was acceptable in the market conditions and was a price well worth paying to help resolve supply issues. The fact of the matter was, however, that we needed to secure all the Type IIR masks we could and, in that context, my view was that feasibility, propriety and value for money were all achieved The FFP2 masks were actually fractionally cheaper per mask than the average price, thereby presenting savings against buying from a different supplier at the market average price."

211. The Ayanda Contract, dated 29 April 2020 but signed on 30 April 2020, was for 50 million FFP2 masks and 150 million IIR masks with a value of £252,500,000 excluding VAT. This contract was varied on 27 August 2020 to adjust the quantities but at the same total cost.

212. Following completion of the contract, NatWest Bank raised a general concern about payments being made to new entrants to the PPE market, including Ayanda, and stopped an advance payment being transferred. On 1 May 2020 Mr Fundrey sent the following email to Mr Williams, Mr Marron, Mr Young and others:

> "I would like to alert you to a potentially serious disruption to our ability to make payments through our house bank, NatWest. This could seriously impact our ability to make payments for PPE, vaccines, testing et cetera in the near term…
>
> The situation has arisen because the banks (both our house bank and receiving counter parties) have grown increasingly concerned recently by the nature of some of our recent payments to suppliers, particularly of PPE. Many of them are new entrants to the market, with little track record or are intermediaries. There have been an increasing number of payments to such companies held up by their banks as potentially suspicious transactions.
>
> Today, NatWest suspended our ability to make payments for much of the afternoon. They have now advised us that payments over £5m (which will represent the majority of PPE

> payments) will be reviewed by their fraud team, which is likely to result in extended delays, and we will be unable to make forward dated payments, which has been a feature of a number of our contracts.
>
> It is worth saying that the Government Banking Service, with whom we hold weekly meetings as a matter of routine, have been helpful but are unable to overturn what the bank sees as its obligation under the legislation.
>
> Key to resolving this is clarifying the due diligence that takes place as the various buying teams contract with the suppliers. It needs to be clear and consistent, which Chris and I, when approving orders under David's delegated authority, have often found not to be the case…"

213. DHSC Finance sent a similar email to Mr Fundrey on this issue:

> "Over recent days DHSC Finance has become increasingly concerned regarding the adequacy of the supplier due diligence process embedded within the personal protective equipment (PPE) buying stream. We meet regularly (at least weekly) with our colleagues from Government Banking Services (GBS), RBS and NatWest and they are similarly concerned. Over recent days, and in particular over the last 24 hours, a number of approved payments have been stopped by the bank who believe there is evidence we may be being targeted by fraudsters and that the supplier due diligence processes being operated by the buying teams (or outsourced providers servicing those teams) are not sufficiently robust.
>
> … Clearly not all of the bank's concerns will regard fraudulent transactions. We know for example that ma[n]y companies have recently repurposed their activity into the PPE market and this is not necessarily in isolation a red flag, but I concur with the bank's assessment we are at high risk and the buying teams supplier due diligence processes, including the documentation of associated decision making, require strengthening…"

214. The Ayanda contract, and the associated due diligence, were retrospectively considered and approved by the Deals Committee. The review identified that Ayanda had a number of amber and red flags, although Zhende was given a green flag. The concerns included the limited assets held, indebtedness to the Horlick family, the fact that the holding company was an offshore company and the fact that Mr Horlick had a number of dissolved companies against his name. The overall assessment by the DHSC was amber flag – proceed with caution, primarily due to the company debt with controlling influences based overseas.

215. The CAN for the Ayanda Contract was sent for publication on 30 June 2020 and was published on 2 July 2020.

216. The Defendant published a report dated 21 July 2020 pursuant to regulation 84 of the PCR, setting out the reasons for selection of Ayanda and its justification for use of the negotiated procedure without prior publication.

217. The IIR masks and FFP2 masks were delivered as required by the Ayanda Contract. The FFP2 masks delivered have not been distributed into the NHS as they have ear-loops rather than head-loops. No commercial dispute has arisen with Ayanda.

Proceedings

218. On 15 June 2020 the Claimants issued a claim for judicial review in respect of the decision to award the FPC contract to PestFix. A second claim was issued on 12 November 2020, challenging the award of the other contracts to PestFix. On 18 January 2021 those claims were consolidated.

219. On 22 July 2020 the Claimants issued a claim for judicial review in respect of the decisions to award contracts to Clandeboye.

220. On 31 July 2020 the Claimants issued a claim for judicial review in respect of the decision to award the contract to Ayanda.

221. Each claim was issued in the Administrative Court and subsequently transferred to the Technology and Construction Court.

222. In each case, the relief sought is a declaration that the contract award decision was unlawful.

223. Initially, there were five separate grounds on which the Claimants sought permission to challenge the Defendant's award of the contracts. By orders dated 17 November 2020 and (following an oral renewal application) 3 December 2020, permission to apply for judicial review was granted in respect of grounds 2, 3 and an amended form of ground 5 but refused on grounds 1 and 4. On 18 February 2021 permission to appeal against those decisions was refused by the Court of Appeal.

224. The amended grounds of claim for which permission has been granted are as follows:

    i) Ground 2 – the direct award of the contract violated Treaty principles of equal treatment and transparency. The Claimants' case is that even if the Regulation 32(2)(c) procedure was lawful, there remained an obligation to comply with the principles of transparency, equality of treatment and proportionality set out in Regulation 18. The Defendant has failed to provide evidence that it conducted any or any fair and transparent form of negotiated process which applied equally as between prospective suppliers.

    ii) Ground 3 – no proper reasons permitting the court to assess the lawfulness of the procedure. The Claimants' case is that the Defendant has failed to provide reasons that are sufficient to enable them to understand the basis for the decision and if necessary challenge it or to enable the court to assess the lawfulness of the procedure.

    iii) Ground 5 – the contracts awarded were irrational. The Claimants' case is that the award of the contracts to PestFix and Ayanda were irrational, based on no

or insufficient financial or technical verification in relation to PestFix, Ayanda or their suppliers and by operation of the High Priority Lane. Initially, this allegation was made in respect of all the Interested Parties but at the hearing, the Claimants confirmed that this ground was no longer pursued in respect of the contracts awarded to Clandeboye.

225. On 23 February 2021 this court made a costs capping order in terms that:

i) any award or awards of costs against the Claimants in the proceedings, whether in favour of the Defendant and/or the Interested Parties, shall not exceed £250,000 in total; and

ii) any award or awards of costs in favour of the Claimants in the proceedings, whether against the Defendant and/or the Interested Parties, shall not exceed £250,000 in total.

Ancillary applications made during the hearing

226. At the start of the hearing, there were a number of preliminary applications:

i) the Claimants' application made orally on 18 May 2021 for redactions to be removed in respect of material in the confidentiality ring;

ii) the Claimants' application dated 13 May 2021 for permission to cross-examine Mr Cairnduff and Mr Blackburn;

iii) the Claimants' application dated 6 May 2021 for permission to rely on additional witness statements in reply;

iv) the Claimants' application for further disclosure;

v) the Defendant's application dated 17 May 2021 for permission to rely on the sixth witness statement of Mr Marron.

Confidentiality

227. On 18 May 2021 the Claimants sought a ruling, pursuant to paragraph 1(c)(vi) of the confidentiality ring order, that all information in their skeleton argument be released from the confidentiality ring, including:

i) the number of units of each type of PPE supplied under each contract (and, accordingly, the price per unit, and the breakdown of prices in the 'mixed' contracts as between different types of PPE);

ii) the amount of pre-payment under each contract;

iii) the amount of public money which has been spent on PPE which is not fit for purpose (calculated using the information at i) above); and

iv) the names of relevant individuals identified in their skeleton argument at paragraphs 50, 59, 82, 83, 95, 198.

228. On 13 May 2021, the Claimants sent emails to the other parties, seeking their consent to release of information in the Claimants' skeleton argument from the confidentiality ring; and notifying them that, in the absence of such consent, they would raise this issue at the start of the hearing. In the absence of a response from the other parties, the application was made on 18 May 2021 at the start of the hearing.

229. Unfortunately, the Claimants did not notify the Press Association or any other media organisation, or indeed the court, in advance of the hearing that the application would be made (although written submissions were sent to the court overnight on 17/18 May 2021). Following a ruling on the application, having heard submissions from the parties, the Press Association requested an opportunity to be heard on this issue. Permission was granted and the court re-considered the application on 20 May 2021. The court is grateful to Sam Tobin of the Press Association for his written and oral submissions on this issue. The parties were invited to consider the arguments made by the Press Association and make any further submissions before the court's further ruling. It was agreed that full reasons for the determination of the application would be given in this judgment.

230. Mr Coppel QC, leading counsel for the Claimants, submitted that the release of the information sought is required in accordance with the open justice principle. Any departure from the principle of open justice:

    i) has to be "justified by some even more important principle": *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618 at [4];

    ii) "is permitted only if it is necessary in the interests of justice and the administration of justice": *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 1158 (Ch) at [32];

    iii) must recognise that the "the burden of establishing that it is necessary to depart from the principle of open justice rests firmly on the party seeking it" (*McKillen* at [33]);

    iv) "must be supported by clear and cogent evidence which will be subjected to careful scrutiny by the court" (*McKillen* at [34]).

231. Mr Coppel submitted that none of the information in the Claimants' skeleton argument meets these requirements for departure from the open justice principle:

    i) The 'pricing' information is now over a year old, and it is unique to a set of circumstances which, the Defendant emphasises, no longer apply and are unlikely to be repeated. It cannot have any ongoing commercial sensitivity which is sufficient to override the open justice principle.

    ii) The Defendant has not discharged the burden of proving that it is necessary to conceal pricing information, and the names of relevant officials. He has not adduced any evidence - let alone "clear and cogent evidence" - to justify doing so.

iii) In fact, the Defendant has adopted a confusing and contradictory approach to his designation of information as 'confidential'. Both the initial and Amended versions of his Detailed Grounds (which were 'open' documents) contained information about pricing and unit volumes without designating such information as confidential. This contradicts the approach he has taken to redaction of the documentary evidence, and in the latest version of his Detailed Grounds.

iv) The Interested Parties have not adduced any evidence with regard to confidentiality or sought to argue in any other way that their pricing information ought to be kept secret.

232. The Claimants' position was that they had not seen any information in the 'confidential' bundles which appeared to justify redaction in the 'open' bundles. However, they recognised that the court was not in a position (without having read all of the documents) to rule that all documents in the 'confidential' bundles should be released. They invited the court to decide, as and when it was referred to information in the 'confidential' bundles during the course of the hearing, whether that information can be released.

233. The Defendant resisted the application on the grounds relied on when this matter was before the court on 22 April 2021. Mr Bowsher QC, leading counsel for the Defendant, submitted that:

i) The appropriate starting point is that these proceedings involve applications for judicial review which engage the Defendant's duty of candour. The Defendant takes that duty very seriously. It is for him to determine what needs to be disclosed in order to comply with it, including whether or not it is necessary to disclose the names of individuals identified in any documents.

ii) The names of individuals on documents that have been disclosed have been redacted where their identity is irrelevant to the issues to be determined. In the context of these proceedings there is no need for the identities of individuals to be disclosed in order for the relevant documents, their contents or the rationale for the challenged decisions to be understood.

iii) As explained in Mr Marron's fourth witness statement, junior officials have a reasonable and longstanding expectation that their privacy will be respected and their names and roles not disclosed. Further, some of the individuals involved in procuring supplies of PPE during the COVID-19 pandemic were seconded from the Ministry of Defence or other departments and hold, or have previously held, positions which put them at risk of harm if their identity were disclosed. The disclosure of unredacted documents into the confidentiality ring addresses any concern that the names of any individuals are necessary for the purpose of understanding the documents.

iv) The pricing details are commercially sensitive, particularly in circumstances where the Defendant may need to enter into negotiations with other suppliers in further waves of the pandemic.

234. PestFix and Ayanda were neutral on this application.

235. The Press Association supported the Claimants' application in respect of the financial information in categories i), ii) and iii). In addition to the above points made by Mr Coppel, Mr Tobin submitted that the overwhelming public interest in members of the public knowing how public money has been spent (on the procurement of PPE during a pandemic, an important issue of public policy) must outweigh any and all countervailing factors in favour of confidentiality. The public must be entitled to know the amount of public money which has been spent on PPE which is not fit for purpose. A significant amount of information is already in the public domain and it is highly likely that the information in question will be published by Parliament, the National Audit Office or another executive agency. The Defendant's objection is essentially one of timing and the Court is, therefore, required to consider s12(4) of the Human Rights Act and the extent to which the material has, or is about to, become available to the public, as well as the (significant) public interest in publishing the material.

236. CPR 39.2(1) provides:

> "The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3)."

237. Paragraph (3) provides that a hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice. Those matters include at (c) that the hearing involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality. Derogations from the principle of open justice must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which parties are entitled to have protected by such means.

238. The above CPR provision reflects the principle of open justice which is a fundamental aspect of English and Welsh law as explained by Lord Diplock in *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at p450:

> "As a general rule the English system of administering justice does require that it be done in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

239. In *Harman v Home Office* [1983] 1 AC 280, Lord Scarman (in a dissenting judgment) stated at p.316:

> "… there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification.…
>
> Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case..."

240. In *Al Rawi & Others v The Security Service & Others* [2011] UKSC 34, the importance of the open justice principle was emphasised by Lord Dyson at [11]:

> "The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p.476) criticised the decision of the lower court to hold a hearing in camera as "constituting a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security." Lord Haldane LC (p.438) said that any judge faced with a demand to depart from the general rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity"."

241. In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 Toulson LJ stated at [1]:

> "Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 477:
>
> > 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' "

242. The media plays a crucial role in furthering the principle of open justice by reporting proceedings, as explained in *R v Shayler* [2002] UKHL 11 by Lord Bingham at [21]:

> "Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. … The role of the

> press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge."

243. The right of the media to report on proceedings engages Article 10 of the European Convention, which states:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …

The right to freedom of expression is not absolute; it is subject to restrictions to protect other legitimate interests and may include restrictions on the disclosure of information received in confidence.

244. Section 12 of the Human Rights Act 1998 provides that when making any decision that affects the right of the media to report proceedings, particular regard must be had to the Convention right to freedom of expression, including the extent to which the material in question has, or is about to, become available to the public, or it is, or would be, in the public interest for the material to be published.

245. The principle of open justice is not absolute: *AG v Leveller Magazine* (above) per Lord Diplock at p.450:

> "… where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice."

246. Any derogation from the principle of open justice must be justified: *R (Guardian News and Media)* (above) per Toulson LJ at [85]:

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons … I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

247. The court's discretion when applying the principle of open justice to the circumstances of a specific case was considered by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 by Lady Hale, delivering the judgment of the Court at [41]:

> "The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."

248. Thus, the general principles can be summarised as follows:

i) The principle of open justice demands that the public are entitled to attend court proceedings to see what is going on - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly: *AG v Leveller* per Lord Diplock at p.450; *Al Rawi* per Lord Dyson at [11]; *Guardian Newspapers and Media Ltd* per Toulson LJ at [1].

ii) The evidence and argument before the court should be made public so that the public can understand the issues for determination, the evidence and legal arguments on those issues, the procedural rules applied and the basis on which the court reaches its decision: *AG v Leveller* per Lord Diplock at p.450.

iii) The media should be permitted to report court proceedings to the public, in furtherance of the principle of open justice and to facilitate exercise of their right to freedom of expression: *AG v Leveller* per Lord Diplock at p.450; *R v Shayler* per Lord Bingham at [21]

iv) The fact that a hearing in open court may be uncomfortable or humiliating to a party or witness is not normally a proper basis for departing from the open justice principle.

v) Any departure from the principle of open justice must be justified and will be permitted only where it is necessary in the interests of justice and the administration of justice: *Guardian Newspapers and Media Ltd* per Toulson LJ at [4]; *McKillen* per Richards J [32]-[34].

249. In this case, the hearing is in public. Although by consent a remote hearing, members of the public and media have been granted full access to all parts of the hearing, including this application. The issue is whether there should be public access to the information that has been redacted in documents that are before the court.

250. However, a separate question falls to be considered before one gets to the issue of public access to the redacted information on the open justice principle; that is, whether the redactions the subject of the application are in respect of evidence that has, or should be, admitted in the proceedings.

251. The court has wide powers to control the evidence that is admitted in proceedings, subject to the overriding objective, right to a fair trial and principles of natural justice, as set out in CPR 32.1:

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

252. The redacted information in issue has been obtained by the Claimants from documents disclosed by the Defendant pursuant to its duty of candour and/or as ordered by this court.

253. The duty of candour, to make full and fair disclosure, was explained in *R* (*Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 by Singh LJ:

> "[13] … This is the duty of candour and co-operation with the court, particularly after permission to bring a claim for judicial review has been granted. This duty goes back at least to the decision of the Court of Appeal in *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 which was cited with approval by Lord Walker of Gestingthorpe in *Belize Alliance Conservation of Non-governmental Organisations [BACONGO] v Department of the Environment* [2004] UKPC 6, [2004] Env LR 38 at para.85.
>
> …
>
> [16] To continue with the citation from *Huddleston*, Sir John Donaldson MR continued:
>
> > " ... the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on

> a common aim, namely the maintenance of the highest standards of public administration."

The MR continued:

> " ... It is for the respondent to resist [the] application if he considers it to be unjustified but this is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

…

> [20] The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack". It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal put it at the hearing before us, to identify "the good, the bad and the ugly". This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.
>
> [21] It was common ground before us that there is a duty on public authorities not to be selective in their disclosure (see *Lancashire County Council v Taylor* [2005] 1 WLR 2668, para.60 and also *R (On Application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, para.47)."

254. CPR 31.12 provides that the court may make an order for specific disclosure or specific inspection of documents but it is not usual for disclosure to be ordered in judicial review proceedings, as explained by Singh LJ in *Hoareau*:

> "[9] Disclosure is not automatic in judicial review proceedings. In this respect, judicial review differs from ordinary civil litigation (see PD 54A, Civil Procedure Rules, para.12 which confirms that disclosure is not required in judicial review proceedings unless the court orders otherwise). One reason for this is that the nature of the issues in judicial review proceedings differs from most civil litigation. It is usually both unnecessary and inappropriate for the court to resolve factual disputes. The issues are usually ones of law.
>
> …

> [11] … even in the human rights context it is usually unnecessary for the court to resolve disputes of fact as distinct from forming an evaluation of those facts. In those cases where the court does have to consider whether to order specific disclosure - as the House of Lords made clear in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] I AC 650, para.3 –
>
> > "3 ... The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly." (Lord Bingham of Cornhill).
>
> [12] In the same case the House of Lords made it clear that there is no warrant even in such a context for "fishing expeditions" (see para.31 (Lord Carswell) and para.56 (Lord Brown of Eaton-under-Heywood)).”

255. Where disclosure is ordered, CPR 31.6 provides that standard disclosure requires a party to disclose only:

> “(a) the documents on which he relies; and
>
> (b) the documents which –
>
> > (i) adversely affect his own case;
> >
> > (ii) adversely affect another party’s case; or
> >
> > (iii) support another party’s case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction.”

256. Disclosure of information and documents, whether pursuant to the duty of candour or CPR 31, carries with it an inevitable invasion of privacy and confidentiality: *Riddick v Thames Board Mills Limited* [1977] QB 881 per Lord Denning at p.896:

> “Compulsion [to disclose] is an invasion of a private right to keep one’s documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires.”

257. In *Harman v Home Office* [1983] 1 AC 280 Lord Diplock identified a potential tension between the principle of open justice and admissibility of evidence at p.303:

> “My Lords, although the reason for the rule is to discipline the judiciary - to keep the judges themselves up to the mark - the form that it takes, that justice is to be administered in open court where anyone present may listen to and report what was said, has inevitable side effects that may not be conducive to the attainment of justice in the particular case, but which have to be accepted because of the general importance of

> maintaining the general rule. One of those side effects is that any document or portion of a document that is read out orally in open court can be taken down in shorthand by anyone competent to do so and can be published as part of a report of the proceedings in the court, even though after it has been read aloud it turns out that it ought not to have been, because it is later ruled to be inadmissible in evidence."

258. In *Shah v HSBC (Private) Bank Ltd* [2011] EWCA Civ 1154, a case concerning proceedings under the Proceeds of Crime Act 2002, the Court of Appeal held that disclosure of redacted names of bank employees in documents was not required in order to discharge the obligation to give standard disclosure under CPR 31.6. Having referred to the pre-CPR approach to a case in which part of a document had been redacted, as explained by Hoffmann LJ in *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172, namely:

> "Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so.",

Lewison LJ stated at [29]:

> "In my judgment the same approach to the sealing or concealing of parts of documents applies in the changed landscape of the CPR."

259. In this case, as is common in procurement challenges, issues of disclosure and confidentiality have given rise to competing interests:

i) The Defendant owes a duty of candour to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide: *Hoareau* at [20]. The nature of the challenge requires the Defendant to give disclosure in respect of his decision-making process, including internal communications and confidential commercial information supplied by the Interested Parties.

ii) The Claimants need access to the information, often documentary information, necessary to enable them to consider, formulate and advance their case, in furtherance of the public interest in ensuring that justice is done. This is a particularly acute issue in procurement challenges because there is an inequality of arms between the parties: *Huddleston* per Sir John Donaldson MR.

iii) Disclosure of information and documents carries with it an inevitable invasion of privacy and confidentiality: *Riddick* per Lord Denning at p.896.

iv) The Defendant has an interest in maintaining confidentiality in respect of information that is sensitive on commercial, expectation of privacy and/or security grounds. Where the information does not fall within the duty of candour, or within the ambit of disclosure obligations under CPR 31, such

confidentiality can be maintained by redacting parts of the documents: *Shah* per Lewison LJ at [29].

260. The parties agreed an appropriate and proportionate approach, balancing these competing interests, by consent orders, approved by the court, establishing a confidentiality ring into which documents containing any confidential information could be placed. Different levels of access to the confidentiality ring were agreed for named lawyers conducting the case for the Claimants, the Defendant and the Interested Parties. Access was also given to client representatives of the Claimants, including: Mr Maugham QC of Good Law Project; its legal director; an investigative journalist acting on its behalf; the Head of Law and Policy; Dr Patterson; and a further director of EveryDoctor.

261. The court considered the scope of redactions made and disclosure to be given in earlier procedural hearings held on 22 April 2021 (see the judgment transcript at [2021] EWHC 1223 (TCC)) and 29 April 2021 (see the judgment transcript at [2021] EWHC 1237 (TCC)). The outcome was that the Defendant disclosed unredacted documents into the confidentiality ring. The court was optimistic, wrongly so, that it would enable the parties to ventilate any challenges to the redactions so that they could be resolved in advance of this hearing. However, it ensured that the parties were in a position to read the documents in unredacted form, to fully understand their sense and context.

262. The use of a confidentiality ring for the purpose of disclosure is not conclusive for the purpose of any application to admit documentary evidence at the hearing. The court must be astute to the potential for a party to misuse a confidentiality ring; a party seeking to rely on maintenance of redactions must be prepared to justify the same. However, it does not follow that the Claimants are entitled necessarily to use the redacted information as evidence or argument in the hearing. Where the court is required to construe a document, it is unlikely that redactions of part of the document could be justified on the sole ground of confidentiality. Likewise, where the redacted parts of documents provide relevant background or context to an issue, it might be difficult for a party to justify the redactions. However, where the substance and meaning of a document is clear on its face from the visible parts, and the redacted parts are irrelevant to any argument before the court, that may justify maintenance of the redactions. In each case, the material question is whether the redacted information is properly admissible, as necessary for the fair and just resolution of the issues before the court.

263. The issues raised by the grounds of challenge are:

i) whether the Defendant was in breach of the EU principles of equal treatment and transparency; in particular, by operation of the High Priority Lane;

ii) whether the Defendant failed to provide proper reasons for his decisions so as to permit the court to assess the lawfulness of the decision-making procedure; and

iii) whether the decisions to award the contracts to PestFix and/or Ayanda were irrational in that no, or no sufficient, financial or technical verification was

carried out in respect of those Interested Parties or their suppliers, and by use of the High Priority Lane.

264. The Claimants have not sought to justify reliance on the redacted material as a necessary part of their case on these issues. Although referred to in their skeleton as part of the background narrative, the precise levels of pricing, pre-payments and amounts spent are not relevant to the issues to be determined by the court. None of the grounds for which permission has been granted involves consideration of whether any of the contracts under challenge represent value for money or whether public money was wasted. Likewise, no attempt has been made to explain the relevance of the names of the individuals currently redacted. The court is concerned with what those individuals did or said, and their respective roles in operation of the high priority lane or financial and technical due diligence. But those matters can be gleaned from the unredacted parts of the documents. If the information is not relevant to the issues that the court must determine, there are no grounds on which it should be admitted as part of the evidence in the hearing.

265. The court acknowledges the public interest surrounding the procurement of PPE during the pandemic. Indeed, the court set out the grounds on which it accepted that these are public interest proceedings for the purpose of making cost capping orders at an earlier hearing in this matter on 23 February 2021 (see the judgment transcript at [2021] EWHC 997 (TCC)). Further, it accepts the submission by the Press Association that there is public interest in knowing whether any, and if so how much, public money spent on PPE was wasted. However, that is not a matter that this court is investigating. It does not form part of the grounds of challenge for which permission has been granted. In these proceedings, the court is concerned with whether the procurement processes, and the contracts in question, were lawful. Public interest in wider questions surrounding the procurement is not sufficient to justify the admission of evidence regarding those wider questions into the proceedings, or access to documents.

266. In conclusion, the redacted information in the Claimants' skeleton is not properly admissible material. The court excludes those parts of the skeleton from the evidence admitted in the hearing. It follows that the principle of open justice is not engaged in relation to the redacted material.

267. Even if it were engaged, the court is satisfied that it is necessary in the interests of justice and the administration of justice to derogate from the principle of open justice in respect of the redacted material.

268. The Defendant has established that it is necessary in the interests of justice that confidential and sensitive material disclosed should be protected by redaction. The Interested Parties have not objected to the application to make public details of payments and pricing in respect of their contracts but the context is that their respective contracts have been performed or have expired. In contrast, the Defendant has an ongoing interest in maintaining confidentiality in the commercially sensitive prices because it may need to negotiate further contracts with other parties, to secure additional PPE or other supplies, in similar circumstances. This pandemic is not yet over and its course remains unpredictable. As to the redacted names, public identification of individuals, who were involved in the procurement process but did

not play key roles in the decision-making, would expose them to unwarranted invasion of their privacy.

269. Mr Tobin submits that it is likely that the financial information will become public through other sources. That is certainly a factor to which the court has regard but it is not determinative of the issue. Proposals made elsewhere to publicise confidential information would be subject to arguments by any affected parties at the material time so that a proportionate approach could be taken to the issue; it is not for this court to second-guess the decision that would be reached in potentially different circumstances.

270. For all those reasons, the court rejects the Claimants' application for the redacted parts of its skeleton to be made public.

271. Further, the court rejects the Claimants' wider submission that the court should consider making an order regarding all documents in the confidential bundles. Although the Claimants state that they have not seen any information in the confidential bundles which appears to justify redaction in the open bundles, they have not identified any specific documents in the confidential bundles that have been subject to unnecessary or inappropriate redaction. In those circumstances it has not been necessary for the court to adopt the approach taken in *Bechtel v HS2* [2021] EWHC 458 (TCC), where documents were examined for confidentiality as the hearing progressed.

Cross-examination of witnesses

272. On 13 May 2021 the Claimants issued an application, seeking an order pursuant to CPR 8.6(2)(3), CPR 32.1 and the court's inherent jurisdiction for permission to cross-examine Mr Cairnduff and Mr Blackburn. The application was opposed by the Defendant.

273. The Claimants' case is that in breach of the equal treatment principle, certain suppliers had an unfair advantage as a result of referral to the PPE cell through use of the High Priority Lane. In order to determine that claim, it is submitted that the court will be required to make factual findings as to the circumstances in which suppliers were referred to the high priority lane and the extent of any advantage conferred thereby. The Claimants submitted that there is a factual dispute on these issues in respect of which Mr Cairnduff and Mr Blackburn give evidence, which they wished to challenge through cross-examination. Mr Cairnduff's evidence is that suppliers were placed in the high priority lane because they were credible, rather than because they had been referred by 'VIPs', suppliers derived no benefit from presence in the High Priority Lane; they were not progressed faster than those who used the Portal, and the High Priority Lane team did not accelerate those suppliers through technical assurance. Mr Blackburn's evidence is that he did not differentiate between suppliers on the basis of whether they had, or had not, been referred through the High Priority Lane.

274. The Defendant's position was that, although the court has power to order cross-examination in judicial review proceedings, it is an exceptional order to make in judicial review proceedings and it was not necessary in this case. There was no gap in

the evidence, or conflicting evidence, in relation to a factual issue that the court must and could only resolve fairly by oral evidence.

275. The court has power to require or permit oral evidence at the substantive hearing of a judicial review, so that a witness may be cross-examined, but it is an exceptional order to make in such proceedings: *Bubb v London Borough of Wandsworth* [2012] PTSR 1011 per Lord Neuberger MR at [24]; *R (Jedwell) v Denbighshire County Council* [2015] EWCA Civ 1232 per Lewison LJ at [50]-[54].

276. Such cross-examination will be permitted if it is necessary to determine the claim fairly and justly: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2115 per Stanley Burnton LJ at [14]:

> "I acknowledge that cross examination is exceptional in judicial review proceedings. This is largely because the primary facts are often not in dispute, or at least those asserted by the defendant public authority are undisputed. In addition, the defendant public authority may normally (but not invariably) be relied upon to disclose its relevant documents, thus fulfilling its duty of candour in relation to its documents. However, the court retains a discretion to order or to permit cross examination, and it should do so if cross examination is necessary if the claim is to be determined, and is seen to be determined, fairly and justly."

277. A witness's evidence in judicial review proceedings will not automatically be accepted by the court, simply because there is no cross examination of that witness. In *R (Good Law Project Limited) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) Chamberlain J stated at [122]:

> "A court hearing a claim for judicial review normally accepts the written evidence of the defendant unless exceptionally there is an application to cross examine the deponent or it is obviously in conflict with other written evidence before the court."

This reflects the usual position in judicial review proceedings that the court is not required to resolve disputes of fact. However, it is always open to a party to challenge the written evidence of another party, by analysis of the facts and law, by reference to the documents and/or other witness statements in its written and oral submissions.

278. In this case it is not necessary for the Claimants to have an opportunity to cross examine the witnesses. One of the issues raised by Ground 2 is whether, on the facts as stated by the witnesses and set out in the contemporaneous documents, operation of the High Priority Lane infringed the principles of equal treatment and transparency. The Claimants seek to rely on gaps in the evidence, inconsistencies in the evidence of Mr Cairnduff and Mr Blackburn, and contradictory evidence in the documents, in support of their argument that the High Priority Lane conferred an unfair advantage on PestFix and Ayanda. They can do that through submissions, identifying the alleged gaps and inconsistencies in the evidence and inviting the court to draw conclusions

from the same. It is not necessary, or proportionate, to permit cross-examination of the witnesses on those points.

Additional witness statements

279. On 6 May 2021, the Claimants issued an application seeking to rely on the following witness statements in reply:

i) Fifth witness statement of Jolyon Maugham QC dated 5 May 2021;

ii) Fourth witness statement of Dr Julia Patterson dated 6 May 2021;

iii) Witness statement of Michael Perkins dated 6 May 2021;

iv) Witness statement of Rizwana Hussain dated 4 May 2021; and

v) Witness statement of Stuart Hunter Reid dated 5 May 2021.

280. On 11 May 2021, the Claimants filed a further witness statement from Ms Hussain, on which it also wishes to rely.

281. The Claimant submits that, save for Ms Hussain's second statement, it filed the additional evidence by the deadline for service of reply evidence.

282. The Defendant, supported by PestFix and Ayanda, opposes the application on the ground that it was an illegitimate attempt to extend the scope of the Claimants' case and to make points which are not pleaded. The evidence is highly controversial and introduced at a very late stage, giving the Defendant insufficient time to investigate and obtain the documents required properly to respond to the new issues raised.

283. CPR 54.16 provides that CPR 8.6(1) does not apply to judicial review. Further, it provides that no written evidence may be relied on unless it has been served in accordance with any rule under CPR 54.16, a direction of the court or the court gives permission for it to be used.

284. One of the difficulties in this case is the protracted and ongoing dispute as to the scope and adequacy of disclosure required, leading to late applications made by the Claimants and late disclosure of documents by the Defendant.

285. However, such ongoing matters must not be allowed to detract from the procedural rules that limit the scope of the judicial review to the grounds for which permission has been given and require the claim to include a detailed statement of the grounds together with the facts relied upon.

286. The court recognises that there is a need for rigour in public law matters as emphasised in *R (Talpada) v SSHD* [2018] EWCA Civ 841 per Singh LJ:

> "[67] … in my view, it cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. I recognise that public law litigation cannot necessarily be regarded in the same way as ordinary civil litigation between private parties. This is because

> it is not only the private interests of the parties which are involved. There is clearly an important public interest which must not be overlooked or undermined. In particular procedure must not become the master of substance where, for example, an abuse of power needs to be corrected by the court. However, both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.
>
> [68] … The Courts frequently observe […] that the grounds of challenge have a habit of 'evolving' during the course of proceedings, for example when a final skeleton argument comes to be drafted…
>
> [69] These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party in the case, but potentially to the wider public interest, which is an important facet of public law litigation."

287. Mr Maugham's fifth witness statement dated 5 May 2021 addresses three issues, namely: (i) due diligence conducted in relation to PestFix; (ii) operation of the High Priority Lane; and (iii) the Claimants' standing to bring the claim. The due diligence section is a commentary on the evidence of Tracy Washer, using contemporaneous documents that Mr Maugham contends would have been available to Ms Washer at the material time for the purpose of carrying out financial due diligence. The High Priority Lane section is a short commentary on the alleged failure by the Defendant to comply with its duty of candour and alleged inadequacies in its pleaded case. The standing section is a miscellaneous collection of quotations from MPs and media publications regarding public interest in the governance issues surrounding PPE procurement, none of which is relevant to, or of any probative weight regarding the issues before the court. In truth, the witness statement is a vehicle for submissions and commentary on the witness evidence and documents. The Defendant has responded to the allegations made through correspondence and in its submissions for this hearing. The court is prepared to admit the statement as a summary of points the Claimants wish to make in these proceedings, taking into consideration the relevant new contemporaneous documents produced, but will ignore the irrelevant material.

288. Dr Patterson's fourth witness statement dated 6 May 2021 raises concerns as to the secrecy surrounding the existence and operation of the High Priority Lane. She states that the British Medical Association ('BMA') and the Royal College of Nursing ('RCN') did not have access to the High Priority Lane, even though they were contacted by, and therefore would have been able to put forward, credible leads based on the knowledge of their members. The references to submissions made by the BMA and RCN, and general allegations regarding the ability of the medical profession to refer suppliers to the PPE Cell, are unhelpful because the Defendant does not have

any opportunity to investigate the source or reliability of the same. However, Dr Patterson also makes a direct assertion that the medical profession did not have access to the High Priority Lane, which can be addressed in responsive evidence. The operation of the High Priority Lane is a material ground of challenge in these proceedings. Knowledge of, and access to, the High Priority Lane is of relevance to the pleaded issue of equal treatment. Although the evidence has been produced shortly before the hearing, the key point made is clear and concise. On that basis the court is prepared to admit the statement, again ignoring the irrelevant material, but will also give permission to Mr Marron to rely on his seventh witness statement in response.

289. The other witness statements fall into a different category. The statements of Mr Perkins, Ms Hussain and Mr Reid concern attempts by unsuccessful suppliers to obtain contracts for the supply of PPE. The court refuses permission for the introduction of such evidence for the following reasons.

290. Firstly, the issues raised by the statements fall outside the scope of the pleaded facts and grounds of challenge for which permission has been granted. There is no pleaded ground that the Defendant unlawfully excluded from consideration, or rejected, offers to supply PPE from the companies identified by the new witnesses. There is no application by the Claimants to amend the pleadings to introduce such an allegation; in any event, it would be too late to expand the scope of the hearing.

291. Secondly, the introduction of such new evidence at this stage would cause significant prejudice to the Defendant. There is no opportunity for any investigation into the detailed facts and matters relied on in the statements, regarding the potential contact and offers to assist in procuring PPE by three separate companies, recently identified, and there would be insufficient time to produce any statements and documents in response.

292. Thirdly, the appropriate course of action by disappointed suppliers would have been to issue proceedings by a part 7 claim under the PCR 2015. If started in good time, they could have been case managed alongside these proceedings, or, potentially, used as the lead claims for the challenge.

293. In conclusion, it is simply too late for this new evidence to be introduced into the proceedings. For the above reasons, permission to admit it is refused.

Further disclosure / Mr Marron's sixth statement

294. The Claimants raised issues of outstanding disclosure, concerning: (i) the Portal survey and responses by the Interested Parties; and (ii) communications with ministers or the Defendant about the institution and operation of the high priority lane.

295. As to (i), the Defendant agreed to search for additional documents, which were disclosed subsequently during the course of the hearing.

296. As to (ii), an explanation as to the level of interaction with ministers regarding the procurement of PPE and the high priority lane was provided in Mr Marron's sixth witness statement dated 17 May 2021 for which the court gave permission.

Mr Wood's second statement

297. On 19 May 2021 the Defendant issued an application, seeking permission to rely on the second witness statement of Andrew Wood dated 19 May 2021. The matter was raised with the court on 20 May 2021. Mr Bowsher submitted that the short statement was in response to matters raised in the Claimants' skeleton that were not pleaded but amounted to a development of their case.

298. Mr Coppel objected to the introduction of this statement at a late stage in the proceedings, submitting that it contradicted earlier evidence contained in Mr Jordan's witness statement. Further, the evidence sought to be given in respect of the suppliers was new.

299. Mr Wood's statement contains: (i) a response to allegations in the Claimants' skeleton submissions that the Technical Specifications did not advertise any requirement for gloves or for basic aprons; (ii) a response to the Claimants' case that an advantage conferred on suppliers in the High Priority Lane was the opportunity for them to offer additional items of PPE; (iii) a response to the suggestion by the Claimants that FFP3 masks failed testing because they had ear loops; and (iv) examples of suppliers who were not on the high priority list but were prioritised and awarded contracts.

300. The court noted that the witness statement was produced at a late stage in the proceedings but it was largely in response to matters raised for the first time in the Claimants' skeleton. The court permitted reliance on those parts of the statement that contain relevant, responsive evidence as to the matters the court must determine and to give the court a full picture of the material circumstances. However, the court refused permission for the new evidence as to treatment of suppliers who were not on the high priority list for the same reasons that it refused permission to the Claimants to introduce new witness statements on this issue; such evidence was sought to be introduced too late and would broaden the scope of the hearing beyond the pleaded case.

Further evidence of Mr Moore and Mr Williams

301. On 24 May 2021 the Defendant issued an application, seeking permission to rely on two further witness statements, the second statement of David Moore and the third statement of David Williams. The application was heard by the court on 25 May 2021. Mr Coppel objected to the production of new evidence at a late stage in the proceedings on the basis that it would not give the Claimants any opportunity to investigate or respond to the evidence.

302. Mr Moore's statement addressed the slide deck that relates to FFP2 face masks and related PPE, his understanding and knowledge as to the applicable specifications. Mr Williams' statement addressed due diligence on the manufacturer Zhende and Mr Williams' decision to approve the Ayanda contract.

303. The court considered that it was too late to introduce any new evidence that was not already in the witness statements or documents in the bundles. The court agreed to consider the points raised as part of the submissions in the case on a '*de bene esse*' basis. The court excluded the evidence regarding the position of Zhende on the basis

that it was new evidence and it was not before the Accounting Officers at the material time.

304. However, the court permitted the witness statement of David Williams dated 20 May 2021, correcting a drafting error in his earlier statement.

Ground 2 – Equal treatment and transparency

The issues

305. The Claimants' pleaded case is that each contract was unlawful in that it was unfair and breached the principles of transparency and equal treatment:

i) Although the Defendant was permitted to make a direct award under regulation 32(2)(c) of the PCR 15, he remained bound to comply with the principles of transparency and equality of treatment set out in regulation 18 of the PCR 15 and based on the Treaty on the Functioning of the European Union as they apply to the award of Public Contracts. The fact that regulation 32(2)(c) permits the award of a contract without a full tender process does not mean that it permits an award to a supplier of the authority's choosing, without any steps being taken to distinguish between suitable suppliers.

ii) In this regard, the Defendant has failed to provide any evidence that it conducted any or any fair and transparent form of negotiated process which applied equally as between prospective suppliers. This would appear to be a case where the Defendant has inverted the normal procurement process. Instead of putting a specific contract out to tender, creating a level competitive playing field for all potential suppliers who will know precisely what is on offer and the basis upon which it will be awarded, the Defendant appears to have invited any and all tenderers to make an offer as to what they can supply.

iii) In circumstances where no business was aware of what it was bidding for, it was incumbent on the Defendant to put in place procedures that not only identified the selection criteria to be used in order to assess offers being received from business, but also guidance as to how those criteria would be applied such that those evaluating offers could properly decide to proceed with some over others, and properly evaluate the relative merits of those offers. Suppliers could then have been asked to quote against particular specifications within a very short timeframe.

iv) The Defendant, in breach of his duties of fairness, transparency and equality of treatment, used a "VIP lane" or "high priority lane" in order to prioritise some suppliers' offers over other suppliers' offers, and did not disclose his reliance on the VIP lane to suppliers before awarding contracts, nor establish and publish criteria for the referrals to the VIP lane.

306. The Defendant's grounds of resistance are as follows:

i) Where, as in this case, regulation 32(2)(c) is lawfully engaged, the principles of equal treatment and transparency impose no further obligations applicable to the conduct of the procurement process beyond those expressly provided for

in regulation 32, or those provisions imposing obligations after the award of a contract. The application of these principles is excluded by the terms of regulation 32(2)(c) in that the need for any prior notice is explicitly excluded. If no such notice is required, there can be no logical requirement that there be more than one offeror or offer under consideration at any one time and therefore no basis upon which it can be said that any obligation governs the treatment of that offeror or offer by comparison to the treatment accorded to any other actual or hypothetical offeror or offer. Regulation 32 is a derogation from normal EU Treaty principles and is to be strictly applied, in the sense that the test of whether it is engaged must be considered restrictively. However, once regulation 32 is engaged, the principles of equal treatment and transparency have no further role to play during the process leading up to the award of the contract. Indeed, it is precisely for that reason that the derogation requires strict application.

ii) Alternatively, if and in so far as the use of the procedure in regulation 32(2)(c) PCR imposes a continuing obligation of equal treatment, that can extend no further than considering the relevant offer on its own merits. That may involve consideration against an internal benchmark but does not involve comparison, whether direct or indirect, with other potential offers.

iii) Where the derogation in regulation 32(2)(c) PCR is relied upon for multiple contract awards relating to the same group of products and over a period of time, compliance with the principle of equal treatment is not to be and cannot be discharged by a comparative assessment of tenders at the same point in time through the application of conventional award criteria, resulting in some form of ranking. Rather it requires the application of an objectively verifiable standard to offers received, e.g. by comparison against a set specification and against benchmark prices.

iv) The approach adopted by the Defendant accorded with those principles.

a) There was a transparent "call to arms" which resulted in offers from 16,000 potential suppliers. Despite there being no requirement to publish a contract notice, the Defendant nonetheless made the market, including both current and potential suppliers, aware of the opportunity to come forward with offers of supply of PPE. This open source approach more than complied with any obligation of transparency.

b) The essential process adopted for consideration of offers involved comparison against an objectively verifiable benchmark, i.e. a technical specification that was published and made known to potential suppliers. It was further evident that a supplier in such a competitive open source procurement was required to come forward with its best price.

c) The basis for selection of offers took account of those benchmarks, but also prioritised items for which need was greatest and where the volume and integrity of the supply could be best assured. That was a rational basis upon which to proceed. In so far as it resulted in some offers being accepted and others rejected, including for equivalent

products, that was objectively justifiable given the overriding need to protect public health and the purpose for which the supplies were required.

d) The use of a "high priority lane" was also per se compatible with those principles. That initiative, which was originally conceived for client handling and management purposes but later developed into a channel for prioritisation of goods in particular demand, was a rational means of securing the Defendant's legitimate objective of protecting public health.

307. The issues that arise for determination by this court in respect of Ground 2 can be summarised as follows:

i) whether the Defendant was obliged to comply with the EU principles of equal treatment and transparency, in circumstances where he was permitted to make direct contract awards without prior publication pursuant to regulation 32(2)(c) of the PCR 15;

ii) whether use of the 'open source' procurement, whereby any potential suppliers were invited to make offers of what they could supply rather than bidding for specific contracts, complied with any applicable obligations of equal treatment and transparency;

iii) whether the Defendant failed to put in place the selection criteria to be used and/or failed to issue guidance to the evaluators as to the application of such criteria so that the offers could be properly evaluated;

iv) whether operation of the High Priority Lane was in breach of any obligations of equal treatment and transparency.

Relevant legal principles

308. The contracts the subject of this challenge were awarded during the implementation period for the purpose of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020). Therefore, EU-derived domestic legislation, as it had effect in domestic law immediately before exit day, continued to have effect in respect of these contracts as set out in sections 1A and 1B of the Act.

309. Directive 2014/24/EU establishes rules on the procedures for procurement by contracting authorities in respect of public contracts, to ensure that practical effect is given to the principles of the Treaty on the Functioning of the European Union ("TFEU"), notably freedom of movement of goods, freedom of establishment and freedom to provide services, utilising the derivative principles of equal treatment and transparency.

310. The principle of equal treatment was set out by the ECJ in *Cases C-21/03, C-34/03 Fabricom v Belgium* [2005] ECR I-01559:

> "[26]… the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition.
>
> [27] Furthermore, it is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

311. The terms of the 2014 Directive are implemented through the PCR. Regulation 18 of the PCR imposes on public contracting authorities obligations of equal treatment and transparency:

> "(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.
>
> (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

312. The application of the equal treatment obligation in the context of the 2006 procurement regulations was summarised by Coulson J (as he then was) in *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [9]:

> "The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus "comparable situations must not be treated differently" and "different situations must not be treated in the same way unless such treatment is objectively justified": see Fabricon v Belgium [2005] ECR1-01559 at paragraph 27. Thus the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach."

313. The principle of equal treatment gives rise to an obligation of transparency, as summarised by the ECJ in Case C-19/19/00 *SIAC Construction Limited v County Council of the County of Mayo* [2001] ECR 1-07725:

> "[41] … the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified …

> [42] More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.
>
> [43] This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure …
>
> [44] Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers ..."

314. The purpose of the obligation of transparency was explained in *Telaustria v Telekom Austria AG* (C-324/98) [2000] ECR I-10745 at [62]:

> "That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."

315. Regulation 26 of the PCR sets out the general rule that there must be a competition for public contracts:

> "(1) When awarding public contracts, contracting authorities shall apply procedures that conform to this Part.
>
> (2) Such contracts may be awarded only if a call for competition has been published in accordance with this Part and the Public Contract Directive, except where regulation 32 permits contracting authorities to apply a negotiated procedure without prior publication.
>
> …
>
> (8) Subject to paragraph (9), the call for competition shall be made by means of a contract notice in accordance with regulation 49.
>
> (9) Where the contract is awarded by restricted procedure or competitive procedure with negotiation, sub-central contracting authorities may make the call for competition by means of a prior information notice in accordance with regulation 48(5) to (7).
>
> (10) Where the call for competition is made by means of such a prior information notice, economic operators which have expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm

> their interest in writing by means of an invitation to confirm interest in accordance with regulation 54."

316. The procedures contained in Part 2 of the PCR include:

    i) the open procedure (regulation 27), under which any interested economic operator may submit a tender in response to a call for competition, advertised by publication of a contract notice;

    ii) the restricted procedure (regulation 28), under which any economic operator may submit a request to participate in a procurement in response to a call for competition by providing information for qualitative selection and, if invited by the contracting authority, may submit a tender; and

    iii) the competitive procedure with negotiation (regulation 29), under which any economic operator may submit a request to participate in a procurement in response to a call for competition by providing information for qualitative selection and, if invited by the contracting authority, may submit an initial tender which forms the basis for negotiations.

317. A common feature of the above procedures is that at the outset of the exercise the contracting authority is required to publish a contract notice, informing potential bidders of the nature and scope of the procurement, type of award procedure to be used, conditions for participation in the exercise (including selection criteria, exclusion criteria or minimum requirements), and the criteria to be used for the award of the contract or contracts.

318. There is established guidance as to the application of the principles of equal treatment and transparency to such public procurement competitions.

319. Contracting authorities are afforded a wide margin of discretion in designing and setting award criteria, as explained by Choudhury J in *Abbvie Ltd v The NHS Commissioning Board* [2019] EWHC 61 (TCC):

> "[54] … In Case C-448/01 *EVN AG v Wienstrom GMBH Austria* [2003] ECR I-14527, at paragraph 39, the ECJ stated:
>
> > "… provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender."
>
> …
>
> [56] The same is reflected in domestic authority. As explained in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch); [2008] Eu. L.R. 191 at paragraph 93, the choice of methodology is:

> "…a matter of evaluation by the procuring authority. The court can interfere with the decision of the procuring authority, if the decision is manifestly wrong. The fact that one scoring system favours one bidder as compared with an alternative system does not, ipso facto, make it manifestly wrong. There must be something else wrong with the system before the court could reach the conclusion that it is manifestly wrong."

> [57] It is clear, therefore, that a contracting authority does not necessarily breach the equal treatment principle simply by selecting a scoring system which could favour one bidder as compared with an alternative scoring system. As set out in *Lion Apparel* above, award criteria are a matter of choice for the contracting authority. That choice will reflect its views about what it considers valuable. If, as a result, a bidder is more or less likely to win, and another more or less likely to lose, that does not in itself entail any breach of the equal treatment principle."

320. Thus, the margin of discretion available to an authority permits differential treatment of bidders provided that it is not arbitrary nor excessive: *Abbvie Ltd* at [59]-[67]; *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport* [2020] EWHC 1568 per Stuart-Smith J (as he then was) at [26].

321. However, once a contracting authority identifies the terms on which bidders are required to tender, it is obliged to follow those rules: *Commission v Denmark* (ECLI:EU:C-1993:257):

> "[37] ... observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.
>
> …
>
> [40] That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so."

322. A contracting authority is not permitted to change any of the essential conditions, or the criteria against which the bids will be assessed, during the course of the procurement exercise without a formal amendment notified to all potential tenderers: *Case C-496/99P Commission v CAS Succhi di Frutta* [2004] ECR I-3801:

> "[116] … the contracting authority … may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made

> it possible for tenderers to submit a substantially different tender.
>
> [117] Consequently, in a situation such as that arising here, the contracting authority could not, once the contract had been awarded … amend a significant condition of the invitation to tender such as the condition relating to the arrangements governing payment for the products to be supplied."

323. These rules were summarised in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) by Fraser J at [255]:

> "The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid ..."

324. The principles of equal treatment and transparency also require an authority to disclose any matter which it intends to consider when evaluating bids. In Case C-331/04 *ATI EAC Srl e Viaggi di Maio Snc v ACTV Venezia SpA* [2005] ECR I-10109 the ECJ stated:

> "[21] … the award criteria defined by a contracting authority must be linked to the subject-matter of the contract, may not confer an unrestricted freedom of choice on the authority, must be expressly mentioned in the contract documents or the tender notice, and must comply with the fundamental principles of equal treatment, non-discrimination and transparency …
>
> [22] … the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives … tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed …
>
> [23] … all such criteria must be expressly mentioned in the contract documents or the tender notice … so that operators are in a position to be aware of their existence and scope …
>
> [24]… in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders … "

325. Guidance as to what is required to comply with the obligation of transparency is provided in Case C-72/10 *Costa and Cifone* ECLI:EU:C:2012 80 at [73]:

> "In that context, the purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure (see, to that effect, Case C-496/99 P Commission v CAS Succhi di Frutta [2004] ECR I-3801, paragraph 111, and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraphs 45 and 46)."

326. Having regard to the above authorities, the requirements that are applicable in the context of competitive procurement exercises can be summarised as follows:

i) A contracting authority must adopt ground rules, setting out the procedure for the procurement, the conditions that must be met by any tenderers and the criteria by which any award will be made: *ATI EAC* [21]-[24]*; Costa and Cifone* at [73].

ii) The rules must be advertised and sufficiently clear so that any interested operator may take the decision to tender for the contract, the tenderers understand the significance and weighting to be applied, and can interpret the rules in the same way: *Telaustria* at [62]*; SIAC v Mayo* at [41]-[44]*; Costa and Cifone* at [73].

iii) Contracting authorities are afforded a wide margin of discretion in designing and setting award criteria: *Lion Apparel* at [93]*; Abbvie* at [53]-[57]*; Stagecoach* at [26].

iv) A contracting authority is not permitted to change any of the essential conditions or award criteria during the procurement process without making a formal amendment that is publicised to all potential tenderers: *Commission v Denmark* at [37] and [40]; *SIAC v Mayo* at [43]*; Commission v CAS Succhi di Frutta* at [116]-[117]*; Energysolutions* at [255].

v) When assessing tenders, a contracting authority must apply the award criteria uniformly to similar bids unless there is an objective justification for a difference in approach: *SIAC v Mayo* at [44]*; Fabricom* at [26]-[27]*; Woods* at [9].

Regulation 32

327. Regulation 32 of the PCR 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) 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:- …
>
> (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons … (ii) competition is absent for technical reasons … but only … where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
>
> (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…
>
> (4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority."

328. When considering the application for permission on the papers, Jefford J refused permission to the Claimants in these proceedings to challenge the Defendant's entitlement to make direct awards without prior publication pursuant to regulation 32(2)(c).

329. That refusal of permission was upheld by this court at the oral renewal hearing: *(R) Good Law Project v SSHSC* [2020] EWHC 3609:

> "[52] It is common ground that by mid-March 2020 the WHO had classified COVID-19 as a global pandemic, there was an urgent need for very large quantities of PPE, supply chains had been disrupted, there was a global shortage of PPE and prices had escalated such that it was a suppliers' market. Perhaps most importantly, by that stage there was great uncertainty as to the scale and duration of the pandemic and therefore the need for further PPE supplies in the future.

> [53] In those circumstances, it is not properly arguable that Regulation 32(2)(c) was not engaged. The event, the global pandemic, was unforeseeable. There was extreme urgency; the NHS and other key workers were desperate for immediate supplies of PPE. The time limits for a conventional public procurement could not be complied with and would not have generated the supplies that were required; the supplies were needed immediately and it was a suppliers' market. The alternative procedure was strictly necessary; failure to secure the supplies that were needed would put at risk the health of the NHS workers and other key workers in frontline positions. Finally, the pandemic and the global shortage of PPE were not attributable to the Defendant. For those reasons, I refuse permission to challenge the contracts by way of judicial review on ground one."

330. Permission to appeal against those decisions was refused by the Court of Appeal.

331. Therefore, the starting point is that the Defendant was entitled to rely on regulation 32(2)(c) to award each of the contracts under challenge by a negotiated procedure without prior publication.

Applicability of principles of equal treatment and transparency

332. The first issue is whether the Defendant was obliged to comply with the EU principles of equal treatment and transparency in circumstances where he was permitted to make direct contract awards without prior publication pursuant to regulation 32(2)(c) of the PCR.

333. Where regulation 32(2)(c) of the PCR is lawfully engaged, as in this case, regulation 32(1) provides that the contracting authority is relieved of any obligation to publish a call for competition by way of a contract notice. Therefore, it is not required to run a competitive tender process. The wording of regulation 32 does not require the contracting authority to justify, on an incremental basis, each degree of departure from the process steps in the procurement that would otherwise apply; it permits negotiation without a contract notice. The consequence of such relaxation is that the contracting authority is not required to publish the nature and scope of the procurement, the selection or exclusion criteria, minimum requirements or the criteria on which any contract will be awarded. Further, it is unnecessary for the contracting authority to follow any of the prescribed procedures in the PCR (open, restricted or competitive procedure with negotiation), or the stipulated time limits, the inability to comply with the same being a prerequisite to the application of regulation 32.

334. However, regulation 32 does not set out the alternative procedures that are, or are not, permitted, no doubt because extreme urgency may require a number of different approaches, depending on the circumstances arising on the facts of each case. It is therefore necessary to consider whether there are any constraints on the permissible approach by a contracting authority when acting under regulation 32; in particular, whether there is an irreducible minimum standard of objective fairness that applies to such procurements, even in the absence of open competition.

335. The general principles in awarding contracts are set out in regulations 56 to 69 of the PCR. Regulation 56 provides that contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the tenders meet the selection criteria and are not subject to the mandatory exclusion of economic operators who have been convicted of offences of bribery or corruption set out in regulation 57. Regulation 58 provides that selection criteria may relate to suitability to pursue a professional activity, economic and financial standing, and technical and professional ability. Regulation 67 provides that contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority. The permitted criteria include price or cost; quality, including technical merit; organisation, skill and experience of staff; and delivery process and period for completion.

336. Regulation 32 does not expressly disapply the general principles imposed on the award of contracts set out in regulations 56 to 69. The question that arises is whether there is any implicit exclusion or modification of those provisions arising from operation of the negotiated procedure without notice.

337. It is reasonably clear that some of these provisions would not be applicable because they would be inconsistent with the freedom to conduct the procurement without a competition, such as the requirement for a contract notice (regulations 26 and 49), or contract award based on the most economically advantageous tender (regulation 67). However, a number of the other provisions in principle could be compatible with the operation of regulation 32. There is no obvious rationale for not applying the mandatory exclusion set out in regulation 57, although it is noted that even this provision may be disregarded on an exceptional basis, including overriding public health needs (regulation 57(6)), emphasising the flexibility afforded to contracting authorities where necessary. The urgency of any procurement would not necessarily justify abandonment of the principles of selection criteria that are related and proportionate to the subject matter of the contract, such as suitability of the bidder, financial standing, and technical ability (regulation 58). In the absence of express exclusion of any specific regulation, or implied exclusion based on inconsistency with regulation 32, such general principles would continue to be applicable to a procurement pursuant to regulation 32.

338. Likewise, the operation of regulation 50, imposing an obligation to publish contract award notices, would be unaffected by the urgency justifying reliance on regulation 32(2)(c). Indeed, in *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin), Chamberlain J clarified that regulation 50 was applicable in such circumstances at [140].

339. Further, regulation 84(1)(f), requiring a written report in respect of every public contract awarded under the PCR, expressly provides that for negotiated procedures without prior publication, such report should contain the circumstances referred to in regulation 32 which justify the use of such procedure.

340. Regulation 18 provides that contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. Regulation 32 does not expressly disapply the obligations set out in regulation 18. As above, the question that arises is whether there is any implicit

exclusion, or modification, of this provision arising from operation of the negotiated procedure without notice.

341. It is reasonably clear that where there is only one economic operator who can provide the works, supplies or services, the principle of equal treatment can have no application. Where there is no alternative source, there will be no comparative exercise carried out and no question of any discrimination arises. However, where the contracting authority considers bids from more than one economic operator, whether at the same or at different times, there is no obvious rationale for disregarding the principle of equal treatment in terms of the criteria used to decide which bidders should be awarded a contract. Dispensing with a competition does not justify arbitrary or unfair selection criteria where more than one economic operator could satisfy the demand.

342. The Defendant's primary position is that once regulation 32(2)(c) is engaged, the contracting authority has a freedom of action that is constrained in only very limited and specific respects and the principles of equal treatment and transparency have no further role to play during the process leading up to the award of the contract. Reliance is placed on Article 52 of the TFEU, which entitles Member States to derogate from the Treaty freedoms, including the derivative principles of equal treatment and transparency, where essential for public policy, public security or public health:

> "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

343. This freedom of derogation may extend to the provision of health services and medical provisions: *Case C-372/04 Watts* [2006] ECR I-4325 at [103]-[105]; *Case C-531/06 Commission v Italy* [2009] ECR I-4103 at [51]-[52]. Further, it is for Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. This carries with it a considerable margin of discretion and, where there is uncertainty as to the existence or extent of risks to human health, a Member State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent: *Commission v Italy* at [36] and [54].

344. However, a strict approach is taken to any derogation from the otherwise applicable principles in the context of procurement; a contracting authority must justify, not only the use of any derogation, but also the extent of such derogation: *C-275/08, Commission v Germany*; *Case C-372/04 Watts* [2006] ECR I-4325 at [106]; *IPTM v Navileme and Natuizende* Case C-509/12 [2014] ECLI: EU: C: 2014: 54.

345. Therefore, Article 52 of the TFEU provides support for the operation of regulation 32 in the circumstances of the COVID-19 public health crisis but does not provide guidance as to the circumstances in which, or the extent to which, the obligations found elsewhere in the PCR, including regulation 18, may be disregarded. The above case law indicates that objective justification is required, not just for any derogation under Article 52, but also for the extent of such derogation. The circumstances in

which extreme urgency might arise, and the procurement process that might be justified in those circumstances, on an objective basis, are likely to depend on the facts of each case.

346. The Defendant submits that, as he was not constrained to implement any competitive tender process, it was lawful for the Defendant to elect to approach an economic operator of his choice and negotiate directly with such economic operator for the purposes of awarding any individual public contract. In those circumstances, it is submitted, the principle of equal treatment did not apply. In my judgment that submission goes too far. It would be open to the Defendant to justify the selection of one economic operator but only: (i) where he could bring himself within the conditions set out in regulation 32(2)(b), for example where only one economic operator could source the required PPE; or (ii) where he could justify the extent of such derogation from the principles in regulation 18 under regulation 32(2)(c), for example where only one economic operator could source the PPE within the required timescale. That interpretation is consistent with the guidance issued by the European Commission on 1 April 2020.

347. The evidence does not suggest that there was only one supplier of PPE who could have satisfied the requirements of the Defendant within the very tight timescale; on the contrary, it was envisaged that there would not be a single supplier who could meet the demand for PPE amidst the global shortage. Therefore, there is no factual basis for this argument in this case.

348. In any event, that is not the way in which the Defendant approached the procurement of PPE and the contracts under challenge. The approach adopted was an open, rolling procurement exercise. Each potential supplier was endeavouring to gain a contract for the supply of PPE in circumstances where numerous other potential suppliers were also striving for the same, or another contract in respect of the same, or different items of PPE. The pool of potential contracts was not fixed, in scope, nature or timing; demand for PPE was constantly changing, as was the availability of PPE. Therefore, the procurement exercise did not allow, or demand, a comparative assessment of offers. It was, nonetheless, a procurement exercise in which some offers would be accepted and some would be rejected. An internal benchmark was used to assess each offer on its own merits against known demand for the supplies under consideration. In those circumstances, the principle of equal treatment and non-discrimination was applicable to the process chosen by the Defendant.

349. Inevitably, any relaxation of the procedural rules is likely to erode the transparency of the procurement process. But, where a contracting authority identifies rules of selection, the absence of a competitive bidding process with comparative assessment does not obviate the need for transparency as to any changes in the known rules that might disadvantage a particular bidder: *R (Law Society) v Legal Services Commission* [2008] QB 737 per Lord Phillips CJ, giving the judgment of the Court of Appeal at [79]-[81]. Further, a number of the general provisions relating to transparency, including regulations 50 and 84 of the PCR, continue to apply.

350. In conclusion on this issue, regulation 18 imposes express obligations of equal treatment and transparency on the Defendant. Regulation 32(2)(c) does not expressly disapply regulation 18 and there is no necessary implied exclusion of regulation 18 where regulation 32 is engaged. Article 52 of the TFEU permits derogation from

those obligations on grounds of public health but, for the reasons set out above, there is no objective justification for disapplying them in this case. Regulation 32 entitled the Defendant to select a procedure without any competition. Necessarily, a number of the procedural rules in the PCR were disapplied in consequence but the general principles in the PCR continued to apply to any selection process, albeit with appropriate modification. Therefore, the Defendant was obliged to comply with the principles of equal treatment and transparency set out in regulation 18 *in relation to the process chosen* by the Defendant for making direct contract awards without prior publication pursuant to regulation 32(2)(c) of the PCR.

Open source procurement

351. The second question that arises is whether use of the 'open source' procurement, whereby any potential suppliers were invited to make offers of what they could supply rather than bidding for specific contracts, complied with the applicable obligations of equal treatment and transparency.

352. The Claimants' position is that the open source approach breached equal treatment and transparency principles; a modified form of the competitive procedure should have been adopted for the contracts under challenge. It is submitted that the Defendant could have published rudimentary information about how he would choose between offers and conduct a basic competition between comparable offers; alternatively, he could have published a set of transparent selection and award criteria, which would have avoided the unequal and opaque prioritisation of some offers over others.

353. As submitted by the Defendant, the Claimants' argument on this issue ignores regulation 32(2)(c) and is unrealistic given the circumstances within which the contracts under challenge were awarded.

354. Firstly, the Defendant's decision as to what PPE was required, how much should be acquired and when it should be procured, was a discretionary decision of a kind which the courts have traditionally been particularly reluctant to disturb: *Rotherham MBC v Business Skills and Innovation* [2015] UKSC 6 per Lord Sumption at [26]-[28]. The Defendant's witness statements explain the constantly changing demand for different types and volumes of PPE during the fast-evolving and uncertain course of the pandemic. Therefore, there was no fixed series of PPE contracts that would be susceptible to a competitive procedure.

355. Secondly, where, as in this case, the Defendant was entitled to rely on regulation 32(2)(c), he was relieved of the obligation to call for competition. Therefore, as set out above, he did not have to conduct any competition between comparable offers.

356. Thirdly, the open source procurement adopted by the Defendant was justified on an objective basis, having regard to the evidence that there was a global shortage of PPE, the established sources of PPE were depleted, large volumes of PPE were required urgently for critical healthcare purposes, and the market had become inverted. The purpose of the open source procurement was to find new sources of PPE from new suppliers by an open invitation to make offers that were not circumscribed by fixed tender conditions.

357. Fourthly, the nature of the open source procurement exercise did not fall to be treated as a competition. It was not a single competition for the award of a fixed number of contracts. Rather, it was a rolling procurement exercise leading to many separate contracts awarded at a number of different points in time. There was no closed pool of potential suppliers and no fixed number of PPE lots in respect of which a competition could be held. Each offer was considered on its merits as soon as could possibly be achieved so that the desperate need for PPE could be satisfied.

358. In those circumstances, the court rejects the Claimants' case that the Defendant's open source approach was in breach of the principles of equal treatment or transparency.

Selection and evaluation criteria

359. The third question that arises is whether the Defendant failed to put in place the selection criteria to be used and/or failed to issue guidance to the evaluators as to the application of such criteria so that the offers could be properly evaluated.

360. The Defendant had a wide margin of discretion in designing and setting any award criteria: *Lion Apparel; Abbvie; Stagecoach* (above).

361. The Defendant established guidance as to the types of PPE that would be required and the technical specifications that were applicable, as explained by Ms Lawson in her witness statement. These were not fixed parameters, as guidance changed with increased understanding of the safety requirements against transmission of COVID-19:

> "During March and April 2020, the guidance as to what PPE should be used in specific clinical situations was updated due to learning about the virus and its transmission. This guidance was then a primary input into the demand model that was built. That guidance was pulled together by Public Health England (PHE) … and was based on World Health Organisation (WHO) and IPC expertise …"

362. The technical specifications were published by the Defendant on the '.gov' website and were updated from time to time, so that potential suppliers were aware of the benchmark that would be required to be satisfied. They included technical specifications for gloves, aprons, gowns, coveralls and masks.

363. The Portal identified for potential suppliers the information that was required to be submitted as part of any offer through the online questionnaire, including the type of PPE available, information about the supplier, technical compliance, pricing and delivery timescales.

364. The PPE Cell was issued with guidance as to the assessment of offers and applied the identified criteria when carrying out the technical and financial appraisals, as set out in the witness statements of Messrs James, Moore, Beard, and Young, summarised in the background facts section above. The Opportunities Team was issued with the "Opportunity Case Worker Guide", which included a reference to the online specifications and a list of the PPE products that were needed, so that case workers

could inform potential suppliers of what was in demand when contact was made with them. The steps required for consideration of an offer at each stage of the assessment were set out in the "PPE E2E supply chain process" document dated April 2020.

365. Mr Williams states in his witness statement that the final decision on any offer was made, taking into account not just technical suitability and ability to supply, but also considering the urgency of demand for the PPE offered as part of an overall risk assessment. These were factors that the Defendant was entitled to include, as part of its wide discretion in determining the appropriate selection and evaluation criteria to apply.

366. For the above reasons, the court is satisfied that the Defendant has produced evidence demonstrating that it put in place procedures that identified the selection criteria to be used and guidance as to how those criteria would be applied, so as to ensure a fair and transparent form of negotiated process.

367. The Claimants further allege that the Defendant failed to publish its selection and evaluation criteria. The Defendant objects to this additional allegation on the ground that it does not form part of the pleaded grounds for which permission has been granted. The Claimants' allegation does go beyond the pleaded case but it can be dealt with shortly.

368. In Case C-T/16 *TNS Dimarso*, in the context of a competitive procurement, the ECJ stated that there was no obligation on the contracting authority to bring to the attention of potential tenderers, by publication in the contract notice or in the tender specifications, the method of evaluation applied by the contracting authority in order to effectively evaluate and assess the tenders. In this case, the Defendant issued an open invitation for anyone to step up and indicate what PPE they could supply. There was no competition. Therefore, there was no obligation on the Defendant to publish its selection criteria or evaluation rules. It was sufficient for the Defendant to identify the criteria it used for selection, based on the general descriptions of PPE required, the technical specifications published and the information required from potential suppliers through the Portal, and to demonstrate that it put in place a system that ensured equal treatment of such potential suppliers.

Operation of the High Priority Lane

369. The issue is whether operation of the High Priority Lane was in breach of any obligations of equal treatment and transparency.

370. The Claimants' case is that allocation to the High Priority Lane conferred a clear advantage on potential suppliers. Their offers were expedited, they were guided through the process from offer to contract and they were supplied with privileged information about the Defendant's priorities. Allocation to the High Priority Lane did not guarantee a contract for PPE but it increased significantly the chances of obtaining a contract. Prioritising suppliers based on who they know, rather than what they can deliver, is a breach of the duty of equal treatment and cannot be objectively justified. Further, the operation of the High Priority Lane was not disclosed to potential suppliers, breaching the duty of transparency.

371. The Defendant's case is that the fact that some offers were dealt with through the High Priority Lane was not an infringement of the principles of equal treatment and transparency. First, the fact that an offer had come to the PPE Cell via the High Priority Lane was not taken into account when taking decisions to award contracts. Only the Accounting Officers had power to decide to award contracts and their decisions were made on the basis of the information in the submission packs assembled as a result of the technical assurance and due diligence stages. Second, offers placed into the High Priority Lane were assessed to be relatively different from other opportunities only at the Opportunities Team stage because the level of stakeholder management for such offers required more time and effort. This could be dealt with more efficiently by the use of a dedicated email and team, through the High Priority Lane and was a proportionate measure given the public health emergency.

372. As set out in Mr Cairnduff's witness statement, the High Priority Lane was set up as an entry point to the PPE Cell running in parallel with the Portal. Senior Referrers were able to direct opportunities from potential suppliers to a dedicated priority email address, from which the High Priority Team would contact suppliers to obtain information about the offer which could then be filtered through to the Technical Assurance Team.

373. The priority email address was used by Ministers, MPs and other senior officials. On 6 April 2020 Mr Cairnduff sent the following email to the Cabinet in respect of offers to supply PPE and other items:

> "For the vast majority of PPE offers, including those which look like credible offers of high volumes of critical kit, the potential supplier should be directed to complete the online survey at https://www.gov.uk/coronavirus-support-from-business.
>
> That feeds them into the triage process, which will pick up if they are credible high priority orders and allocate them accordingly…
>
> If a PPE offer is a personal recommendation from or contact of a minister or senior official (which if it comes to you it often will be) please direct it to this email address: (covid-ppe-priority-appraisals@cabinetoffice.gov.uk)."

374. A PPE team structure document dated 7 April 2020 identified the priority email address as serving the following purpose:

> "To receive and handle requests or communications with organisations donating PPE or with people of senior importance within government or strategic suppliers."

375. Dr Patterson suggests in her fourth witness statement that the medical profession did not have access to the High Priority Lane:

> "I am aware other that national medical organisations with enormous expertise were also prevented from making referrals

> to the VIP lane. In particular, I am aware that both the British Medical Association ('BMA') and the Royal College of Nursing ('RCN') have said that they did not have access to the high-priority lane, even though they were contacted by, and therefore would have been able to put forward, credible leads based on the knowledge of their members. These organisations had existing relationships with suppliers, through their members or directly, and were therefore well-placed to assess the credibility of potential PPE suppliers. The BMA alone was contacted by 70 private companies who were able to supply PPE, but who were struggling to communicate their offers to relevant people at DHSC, or not getting responses."

376. In his seventh witness statement, Mr Marron refutes that suggestion and explains that Dr Patterson's understanding is incorrect.

> "… groups from the medical profession could and did make referrals which were either progressed through the High Priority Lane, or otherwise prioritised, through numerous points of access.
>
> … many referrals to the High Priority Lane were made by Ministers on behalf of other referees (such as constituents, Union groups or other contacts), which meant in effect that those referrers had the ability to refer suppliers to the HPL, though they may not have been aware that their offer had been dealt with in this way.
>
> Furthermore, Dr Patterson is wrong to suggest that groups such as the RCN or BMA specifically lacked access to the HPL, or that their offers were not dealt with as credible priorities. The Secretary of State personally received a number of referrals from the RCN and passed these on to me directly to ensure they were progressed as credible, priority offers … the BMA acknowledges … that when it was contacted by suppliers, it "responded by forwarding the details of these companies to the DHSC". In this way it should be plain to see that RCN BMA and others absolutely were able to funnel opportunities directly to the PPE team, and had meaningful access to the HPL."

377. The point of entry into the PPE Cell was different for those allocated to the High Priority Lane. In the Opportunities Teams the point of entry was the questionnaire on the Portal. For the High Priority Lane, it was an email to the dedicated inbox from a Senior Referrer.

378. The Claimants suggest that those on the High Priority Lane received more guidance on the types of PPE that were in demand, and therefore their offers were more likely to result in a contract. That is not borne out by examination of the Defendant's evidence. Requests to potential suppliers for other PPE supplies that were not identified in the initial questionnaire were extended to all suppliers, including those who did not come through the High Priority Lane. Mr Wood sets out in his second

witness statement reference to the guidance issued to the Opportunities Team, including:

> "The Opportunity Case Worker Guide … shows that suppliers were asked / were able to offer additional PPE products during their contact with the case workers – this was the case whether the supplier was dealing with the HPL team or another Opportunities Team. In the spreadsheet embedded in the Opportunity Case Worker Guide, the case worker could include details of other PPE the supplier had to offer (column entitled "Please describe other medical products offered (which are not specified in the previous question) using the box below:")…
>
> Case workers were briefed to encourage offers of any kind of PPE the supplier could find and this was the case whether the case worker was on the HPL team or a different Opportunities Team. The documentation they were provided with was intended to produce a consistency and fairness of approach which gave every supplier the same opportunity…"

379. Even the initial questionnaire on the Portal gave potential suppliers an opportunity to indicate an offer of something other than the list of PPE identified, by the question "Can you offer another product?". The later questionnaire included a separate text box enabling potential suppliers to provide details as to any alternative offers. The first direct contact that most suppliers had was with a member of the Opportunities Team, who were able to discuss offers of PPE not listed on the website. Therefore, all suppliers were given the opportunity to offer PPE that was in demand, whether or not it had been published as such when they submitted their offer.

380. Mr Cairnduff states that once an offer was passed to Technical Assurance the process was the same for offers made through the Portal and through the High Priority Lane, in that the same steps were taken, although he accepts that the Senior Referrers were kept much more in touch about the progress of the case than would have been the case in the other teams:

> "We had no influence on the speed of progress of an opportunity once the papers were passed to Technical Assurance and beyond.
>
> Cases were prioritised on the HPL. This was on the basis of clinical demand and on the quality of the product and proposition generally. Priority was given to good offers from both HPL and the main channel. No offer from HPL which we thought was mediocre or poor was prioritised. From early April, cases were marked as "VIP" going through the system, including in the Mendix case management system. I can see why it might be thought that this would confer an unfair advantage on VIP cases. That was not, however, how it worked. Because Technical Assurance was … totally and fiercely impartial, no preference was given and all cases were treated equally on the basis of merit and urgency… Over time,

> there was a specific point of contact in the Technical Assurance team who HPL caseworkers would refer things to there."

381. The Claimants allege that offers through the High Priority Lane were marked "VIP" and thereafter treated with priority. It is correct that such offers were marked "VIP" but closer reading of the examples relied on indicate that priority was given to the offers for high volumes of PPE in demand. Mr Cairnduff's email dated 13 April 2020 for aprons was identified as a priority because he understood that they were required urgently. Ms Washer's email dated 10 April 2020 identified the IIR masks offered by PestFix as a priority because the opportunity trackers stated that they were items that should be purchased. Ms Burdon's email dated 15 April 2020 sought expedition of Ayanda's offer of IIR masks on the basis that the offer comprised the full manufacturing output from the factory and others were interested. Mr Blackburn's email dated 17 April 2020 likewise identified Ayanda's offer for expedition on the basis that the offer was for 50 million masks. These would all be legitimate grounds for expediting potential offers.

382. Mr Moore confirms that:

> "It is absolutely correct to say that some HPL cases were prioritised through TA, but that was because they were seen as being potentially good offers of priority products in high volumes. Similar offers were prioritised from the other Opportunities Teams as well as the China and Make Teams."

383. However, there is evidence that opportunities were treated as high priority even where there were no objectively justifiable grounds for expediting the offer. The initial triage criteria set out in the PPE E2E supply chain process document dated April 2020 stated:

> "A product will be marked as high priority if (A+B) OR C are true
>
> A: Company size > 250 employees (except if marked as an agent)
>
> B: Volumes: if any of the below are true then High priority = yes
>
> i. FFP3:Volume =>1,000,000
>
> ii. FFP2: Volume =>1,000,000
>
> iii. IIR@ Volume =>1,000,000
>
> iv. Glasses: Volume => 1,000,000
>
> v. Hand Sanitizer = All
>
> vi. Gloves = All
>
> vii. Gowns: Volumes = All

> Update every week
>
> C: If donation or VIP (this is also captured by the VIP and donation flags in the system as well)."

384. The size of the company and volume of an offer of PPE items in demand would justify treating the offer as high priority; this would not necessarily be the case for all offers allocated to the High Priority Lane by reason of notification by the Senior Referrers to the priority email address.

385. Mr Cairnduff accepts that the Senior Referrers were given regular updates about the progress of the offers they referred and had more contact with the High Priority Team than would otherwise have been the case but otherwise there were limited benefits from being within the High Priority Lane:

> "All suppliers who wanted to supply PPE had to provide information about themselves, their products and commercial offer. For most of the Opportunities Teams this was done by the supplier completing an online survey form on the Portal at gov.uk. On the HPL, few if any of the referred suppliers had completed that survey (as they had usually contacted a Senior Referrer instead) and the information was gathered in phone calls, which some suppliers found to be more convenient. Phone calls to suppliers would also be made by caseworkers on Opportunities teams to find out further information, but in those teams that would be after the supplier had completed the online survey form. But the information which all teams needed in order to determine whether an opportunity was worthwhile and should be progressed to Technical Assurance was the same."

386. On 9 April 2020 Mr Cairnduff sent the following email to Mr Moore:

> "Re the VIP priority thing, the key bit is knowing where they are in the process and an ETA for them coming back out of it. If we have that we can (usually) manage them. Without it they tend to escalate to ministers (or even the press) and it creates a surprising volume of headwinds for the programme. Speaking personally, I don't want a middling VIP lead prioritised over a credible high priority lead any more than you do. We're totally on the same page on that. However, if two leads are otherwise equal priority and one is VIP, some weighting to the VIP is helpful. Even where that's not practical though intel on timings is invaluable."

387. Mr Moore's position regarding the procedure and attention to be given to referrals through the High Priority Lane was set out in his email of 9 April 2020:

> "Can you put VIP in the SUBJECT title to make sure we can see the nature of the submission - this will not increase priority as I do not worry about hurting a VIP feelings that is for you guys to manage.

> Make sure you define the MUST DELIVER BY time and DATE as this is the real priority - please be aware that if you bring this forward to a very short time scale then
>
> a. It may still be missed because of the volume we are dealing with
>
> b. If it is shortened because of the VIP status then that will DIRECTLY IMPACT real submissions and could put NHS staff at risk of no PPE
>
> c. Timescale must be driven by Delivery impact and Closure"

388. Mr Cairnduff voiced his frustration at this position in an email to Mr Hall on 9 April 2020:

> "Assurance have said that VIP submissions won't be prioritised which rather breaks the system (I get they shouldn't be prioritised over high quality leads of high volumes of kit, but not at all doesn't really work)."

389. Mr Cairnduff accepts in his witness evidence that he attempted to confer advantage on offers that emanated from the High Priority Lane but his efforts were rejected by Mr Moore:

> "I raised all other factors being equal, an HPL case with merit should be given priority over a case of equal merit which came from another route. When I raised this in emails on 9 April with David Moore, who ran the technical assurance team, he was very clear to me that he would not work that way and that the only consideration would be quality and urgency of need. David was of course right and I therefore accepted that position."

390. This is supported by the contemporaneous documents, including the email dated 29 April 2020 from Mr Moore, stating:

> "I can appreciate it is going to be tough with VIP submission but from the discussions on priority there seems to be a consensus that quantity and product is king, this is also reinforced by the NHS who repeatedly say to us that they do not recognise a VIP status other than those on the frontline."

391. Mr Young and Mr Fundrey, Accounting Officers, set out in their witness evidence that their decisions on whether or not to approve the award of a contract was not influenced by presence, or otherwise, of the offer on the High Priority Lane. Mr Young states:

> "I understand that some of the submissions I saw would have stated that an offer had come from the HPL. I do not recall noticing that at the time on any of the submissions that I

> approved. Had I noticed this detail, it would not have altered my decision and I would not have taken it into account."

392. Mr Cairnduff's evidence is that there was no material advantage conferred on a potential supplier by use of the High Priority Lane:

> "From the point of view of a supplier looking to get a contract award I do not think there was any benefit. I know proportionately more suppliers coming through HPL were awarded contracts, but I think those contracts ended up on the HPL because they were credible, perhaps by reason of offering high priority goods in high volume. They did not become credible by being on the HPL. All suppliers still had to go through the same process and being dealt with by the HPL team did not entitle you to skip any steps."

393. In his fifth witness statement, Mr Marron responds to the Claimants' case that allocation to the High Priority Lane conferred an advantage, as evidenced by the statistics published in the NAO Report:

> "The Report states that there were around 493 offerors which were processed through the HPL and of the 493 offerors on the HPL, 47 offerors were awarded contracts (the "HPL Suppliers"). The parallel Opportunities Teams considered 14,892 offerors, and of the 14,892 offerors, 104 offerors were awarded contracts (the "Parallel Opportunities Team Suppliers").
>
> … At face value, this indicates a disproportionately high success rate in the HPL. However, this doesn't account for the fact that there was inevitably a much higher rate of attrition within the 14,892 offerors, which includes all other offers received from the open call to industry. Huge numbers of these offers were simply unviable – this volume includes (i) suppliers immediately rejected as obvious frauds, (ii) suppliers offering handmade PPE in small volumes, and (iii) suppliers offering services or products that simply weren't for PPE. By contrast, the small volume of offers in HPL were almost all more mature offers made through a range of referrals – naturally filtering out offers from non-existent suppliers or bids for small handmade volumes. Therefore, there is a high risk that any inference drawn from the statistics above would be misleading."

394. The statistics published in the NAO report are not of assistance to the court in determining this issue because there is no analysis of the merits of the respective offers or the underlying reasons for success or rejection. The Defendant's evidence as to the opportunities given to all potential suppliers to offer items of PPE for which there was high demand, the selection criteria used to identify credible offers from potential suppliers, the standards against which technical assurance and financial due diligence were carried out, and the factors taken into account when deciding whether

or not to award a contract, establishes that presence on the High Priority Lane did not confer any advantage at the decision-making stage of the process.

395. However, what is clear is that offers that were introduced through the Senior Referrers received earlier consideration at the outset of the process. The High Priority Lane Team was better resourced and able to respond to such offers on the same day that they arrived, in contrast to the Opportunities Team, where the sheer volume of offers prevented such swift consideration. This is implicitly recognised by Mr Cairnduff, who states that the High Priority Lane had no influence on the speed of progress of an opportunity once the papers were passed to Technical Assurance. But speed in getting an offer to Technical Assurance improved the chances of securing a contract.

396. As noted by Mr Cairnduff in his statement, the High Priority Lane did not act as a quality filter. Therefore, it did not simply send to Technical Assurance the offers that were assessed to be of superior quality; it processed all offers in the High Priority Lane provided that they were credible. The flawed basis on which offers were allocated to the High Priority Lane was recognised by Mr Cairnduff who reviewed the process and proposed changes in his email dated 25 April 2020:

> "I've been reviewing the VIP team caseload, backlog and processes. I think we can improve things.
>
> Ask
>
> A route to allocate certain categories of cases from VIP out to the wider sourcing cells, with feedback to VIP on progress.
>
> Problem
>
> We're getting far more cases in VIP than Wendy and her team can sensibly be expected to manage (even with the ten additional team members coming in, for which thank you).
>
> Equally, we now have a substantial backlog of unallocated VIP cases (over 80 by my current count, but that may already be out of date).
>
> This is all despite the fact that Wendy is doing a fantastic job. There's simply too much volume.
>
> Analysis
>
> Currently our cases come in through the following broad routes:
>
> 1. Suppliers who filled in the survey, didn't hear back and escalated to ministers either directly or through their MPs.
>
> 2. Suppliers who are forwarded to us from other points in the system as a means of escalation, despite no ministerial or similar involvement (often offers with short time frames to

> close); otherwise typically because they have used the survey, not had a response and lodged a complaint somewhere. ..
>
> 3. Suppliers who have obtained a ministerial private office email address and directly contacted the minister's office with their offer. The private office then flips it to us. Often no evidence the minister is even aware of the offer.
>
> 4. Suppliers who have got our mailbox address from somewhere and just contact us directly.
>
> 5. Suppliers who are personally recommended by ministers directly (rather than through their private offices).
>
> 6. Major corporate or intergovernmental offers or donations, often coming through from the FCO.
>
> Routes 1-4 cover the majority of our cases. In my view almost all of them could be handled by caseworkers outside the VIP team just as well as they can by VIP caseworkers.
>
> Potential solution
>
> I suggest that when cases come to VIP through any of routes 1-4 we review them and decide whether they are allocated to Wendy's team or to the wider sourcing team."

397. Further, contrary to Mr Cairnduff's understanding, a dedicated Technical Assurance resource was allocated to offers sent from the High Priority Lane Team, as set out in Ms Burdon's email dated 24 April 2020. This does not suggest that offers from the High Priority Lane were assessed against different benchmarks to those used in respect of other offers but it does indicate that such offers were likely to be subject to Technical Assurance within a shorter period of time. Timeous consideration of an offer was a material advantage in obtaining the award of a contract given the urgency of the procurement. As Mr Moore explained, the size of the backlog of offers and the speed with which the market was moving necessitated a system whereby the most recent submissions were given priority and older submissions discarded.

398. The difficulty faced by the Defendant in responding on this issue is that the criteria used to allocate offers to the High Priority Lane did not treat comparable offers in the same way. The size of a supplier company, the type of PPE and the volume of an offer were factors that were justifiable objectively as a basis for early consideration. However, the mere fact that an offer was sent to the priority email address from a Senior Referrer did not justify preferential treatment over a similar offer that was made through the Portal. That amounted to a breach of the principle of equal treatment.

399. The Claimants make a further argument, seeking to rely on the Defendant's failure to disclose the existence of the High Priority Lane as a breach of the principle of transparency. That basis of challenge is rejected because, as set out above, the Defendant did not have any obligation to publish its selection and evaluation criteria.

Conclusion on Ground 2

400. For the reasons set out above:

i) the Defendant was obliged to comply with the principles of equal treatment and transparency set out in regulation 18 in relation to the process chosen by the Defendant for making direct contract awards without prior publication pursuant to regulation 32(2)(c) of the PCR;

ii) use of the 'open source' procurement complied with the obligations of equal treatment and transparency;

iii) the Defendant put in place the selection criteria to be used and issued guidance to the evaluators as to the application of such criteria so that the offers could be properly evaluated;

iv) operation of the High Priority Lane was in breach of the obligation of equal treatment.

401. It was unlawful to confer on PestFix preferential treatment simply on the basis of its allocation to the High Priority Lane. However, for the reasons set out in Mr Dawson's witness statement, the PestFix opportunity justified priority treatment on its merits. PestFix offered high volumes of a range of PPE items that were in urgent demand. It had an established business in sourcing PPE, plausible contacts with manufacturers in the PRC and could provide a logistical solution to transport the PPE from the manufacturers to the UK. These skills, experience, contacts and credibility justified priority consideration of the high volume offers. Regardless whether they were made through the Portal and assessed by the Opportunities Team, or were assessed by the High Priority Lane Team, it is very likely that the offers would have resulted in the award of the PestFix Contracts.

402. The offers by Clandeboye were not allocated to the High Priority Lane and the Claimants accept that no challenge to lawfulness of the Clandeboye Contracts can be made on that basis. For the reasons set out above in respect of the other issues raised under Ground 2, the Claimants' challenge to the Clandeboye Contracts on Ground 2 is dismissed.

403. It was unlawful to confer on Ayanda preferential treatment simply on the basis of its allocation to the High Priority Lane. However, the offer made by Ayanda justified priority treatment on its merits. It was a unique opportunity to acquire very high volumes of PPE, through exclusive access to the full manufacturing output of a plant in the PRC. The DIT was entitled to have regard to Mr Mills' previous position as an advisor to the Board of Trade as an indication that he had the relevant knowledge and experience to ascertain whether the proposal was credible. The nature of the opportunity, and the concern that the offer would disappear if not pursued with alacrity, justified priority consideration of the same. Regardless whether made through the Portal and assessed by the Opportunities Team, or assessed by the High Priority Lane Team, it is very likely that the offer would have resulted in the award of the Ayanda Contract.

Ground 3 – failure to give sufficient reasons

404. The Claimants allege that prior to the issue of proceedings, the Defendant failed to comply with his duty to give clear and sufficient reasons for awarding the contracts under challenge. The pleaded case is that:

i) The Claimants in their letter of claim made targeted requests for information and documentation specifically in order to understand the nature of the process that the Defendant followed upon receipt of the 24,000 offers from 16,000 businesses.

ii) Public law and procurement law each impose an obligation to provide reasons that are sufficient to enable a party to understand the basis for a decision or procedure. In the context of the award of public contracts, the need for sufficient reasons relating to how a process was conducted or an award made is (i) to enable parties to understand and if necessary challenge the basis of that decision and (ii) to enable a court to assess whether that procedure and the award made pursuant thereto was itself lawful: *Case 272/06 Evropaiki Dynamiki* [2008] ECR-II 00169 at [27]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) per Stuart-Smith J at [49]-[50].

iii) Absent any or any proper explanation of the procedure by which the Defendant assessed offers to supply PPE and by which it decided to make awards of the contracts, neither the Claimants nor the Court can understand the basis of these awards or fully exercise the power of review of the process of the awards which, for that further reason, were unlawful.

405. The Defendant disputes the allegation and submits that it is academic:

i) The Claimants' reliance on the principles set out in procurement cases is misplaced. The PCR does not govern the obligations imposed on the Defendant to provide pre-action information and no relevant breaches of the PCR have been alleged or can be substantiated.

ii) The public law principles required the Defendant to provide sufficient reasoning for its decisions to enable a potential challenge to be identified. That requirement was satisfied. The Claimants had sufficient information to commence these proceedings on substantive grounds, including irrationality.

iii) The Defendant complied with its obligations under the Pre-Action Protocol and its duty of candour. Full information about the procurement process and detailed reasons for the awards of the contracts under challenge are now before the court through the Defendant's pre-action correspondence, the witness statements and disclosed documents.

Pre-action correspondence

406. On 10 June 2020, Rook Irwin Sweeney, solicitors acting for the First Claimant, sent a letter before action in respect of the first PestFix claim to the Defendant, stating its intention to challenge the lawfulness of the FPC on the grounds of irrationality, failure to provide reasons for award and disproportionate contract award. It invited the Defendant 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. Information sought from the Defendant included details of the procurement process used, technical and financial assessment, contractual terms and PPE delivered. The documents requested included communications with PestFix, information publicly posted about the FPC and a copy of the FPC.

407. Subsequently, by letter dated 15 June 2020, the First Claimant's solicitors informed the Defendant that they also acted on behalf of the Second Claimant, who sought to challenge the FPC on the same grounds.

408. On the same date, the Claimants issued the claim for judicial review against the Defendant in respect of the FPC, on the grounds that: (i) there was no basis for making a direct award under regulation 32(2)(c); (ii) breach of the principles of equal treatment and transparency; (iii) disproportionate contract award; and (iv) irrationality.

409. By letter dated 1 July 2020, the Defendant provided its response to the letters of claim, setting out the open source procurement approach, details of the FPC and a brief response to each ground of challenge. The requests for information were answered. Copies of the FPC and the regulation 84 report were supplied separately. Correspondence between PestFix and the Defendant was not provided on the basis that an account of their dealings was set out in the letter.

410. On 6 November 2020 the Claimants' solicitors sent a pre-action protocol letter to the Defendant in respect of the further five PestFix Contracts the subject of this challenge. The grounds relied on were the same as those pleaded in respect of the FPC, subject to amendments drafted on 15 July 2020 including the addition of ground 3, failure to give proper reasons to permit the court to assess the lawfulness of the procedure. Information sought included details of the process by which the further five PestFix Contracts were awarded, including whether they were handled under a "VIP" or special "Cabinet Office" procurement process, together with details of the PPE supplied. Documents requested included communications between PestFix and the Defendant regarding the further PestFix Contracts together with copies of the same.

411. By letter dated 19 November 2020, before the court granted permission to proceed on ground 5 (irrationality), the Defendant responded to the letter of 6 November 2020, relying on the matters set out in its Summary Grounds of Resistance served on 29 July 2020. Copies of the key contract documents, including the regulation 84 reports, were provided to the Claimants.

412. In respect of the Clandeboye claim, a letter before action was sent by the Claimants to the Defendant on 29 June 2020, seeking similar information and documents. By letter dated 13 July 2020, the Defendant provided its response.

413. In respect of the Ayanda claim, a letter before action was sent by the Claimants to the Defendant on 13 July 2020, seeking similar information and documents. By letter dated 29 July 2020, the Defendant provided its response.

PCR obligation to give reasons

414. Regulation 50 of the PCR (reflecting Article 50 of Directive 2014/24/EU) provides at (1):

> "Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, contracting authorities shall submit for publication a contract award notice on the results of the procurement procedure."

415. Regulation 55 of the PCR (reflecting Article 55 of the 2014 Directive) provides:

> "(1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning … the award of a contract …
>
> (2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform –
>
> (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
>
> (b) any unsuccessful tenderer of the reasons for the rejection of its tender …
>
> (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer …
>
> (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers."

416. Regulation 84 of the PCR (reflecting Article 84 of the 2014 Directive) provides at (1):

> "For every contract … covered by this Part, contracting authorities shall draw up a written report which shall include at least the following: … (f) for negotiated procedures without prior publication, the circumstances referred to in regulation 32 which justify the use of this procedure."

417. Regulation 55 imposes a duty on a contracting authority to provide any unsuccessful tenderer, on request, with details of, and reasons for, its decision to reject such tender that are sufficient to enable the unsuccessful party to understand the basis for such decision, to exercise its right to challenge the decision, and enable the court to exercise its supervisory jurisdiction: Case T-183/00 *Strabag Benelux NV v Council of the European Union* at [55]; *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49 per Lord Reed, giving the judgment of the court, at [17]; *EnergySolutions (EU) Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) per Fraser J at [278]-[297].

418. The level of detail which must be given in order to satisfy this duty will be context and fact specific. There is no obligation on the contracting authority to undertake a detailed comparative analysis of the successful and unsuccessful tenderers: Case 272/06 *Evropaiki Dynamiki* [2008] ECR-II 00169 at [25]-[27]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) per Stuart-Smith J (as he then was) at [49]-[50]; *Stagecoach East Midlands Trains Limited v Secretary of State for Transport* [2020] EWHC 1568 (TCC) per Stuart-Smith J (as he then was) at [75]-[76].

419. The above cases all concerned consideration of the obligation to provide reasons for the decision in question in the context of duties imposed by the relevant procurement directive or regulations. In this case, the duty imposed by regulation 55 of the PCR does not arise because the Claimants are not unsuccessful tenderers and there was no competitive tender process.

420. There was a successful challenge by the First Claimant under regulation 50 of the PCR in respect of the Defendant's failure to publish the PPE contract award notices: *Good Law Project Limited v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin). As a result, this is not a challenge that could be, or has been, pursued in these proceedings.

421. The Defendant produced and provided to the Claimants regulation 84 reports in respect of each of the material contracts and no challenge to them has been pursued in these proceedings.

422. In consequence, the line of reasoning set out in the authorities relied on by the Claimants is not applicable in this case.

Public law principles as to the requirement for reasons

423. The issue as to whether there is any obligation on a public authority to give reasons for its decision was considered in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71 (CA) per Elias LJ:

> "[26] There are powerful reasons why it is desirable for administrative bodies to give reasons for their decisions. They include improving the quality of decisions by focusing the mind of the decision-making body and thereby increasing the likelihood that the decision will be lawfully made; promoting public confidence in the decision-making process; providing, or at least facilitating, the opportunity for those affected to consider whether the decision was lawfully reached, thereby facilitating the process of judicial review or the exercise of any right of appeal; and respecting the individual's interest in understanding and perhaps thereby more readily accepting why a decision affecting him has been made. This last consideration is reinforced where an interested third party has taken an active part in the decision making-process, for example by making representations in the course of consultations. Indeed, the process of consultation is arguably undermined if potential

> consultees are left in the dark as to what influence, if any, their representations had.
>
> [27] The disadvantage, accepted by Jay J in this case, is that having to provide reasons, particularly where they have to withstand careful scrutiny by lawyers, might involve an undue burden on the decision-maker…
>
> [28] Statute frequently, and in a wide range of circumstances, obliges an administrative body to give reasons, although the content of that duty, in the sense of the degree of specificity of the reasons required, will vary from context to context. However, absent some statutory obligation, the question whether reasons are required depends upon the common law.
>
> [29] It is firmly established that there is no general obligation to give reasons at common law, as confirmed by Lord Mustill in *Ex p Doody* [1994] 1AC 531. However, the tendency increasingly is to require them rather than not.
>
> [30] In view of this, it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so."

424. The reasoning that is required is that which is sufficient to enable a challenge to be identified, as explained by Hickinbottom LJ in *R (Help Refugees Ltd) v SSHC* [2018] EWCA Civ 2098 (CA) at [122]:

> "The general principles concerning the duty of fairness at common law - in particular when that duty requires reasons to be given and, where it does, the adequacy of reasons given - were considered by Singh LJ in Citizens UK [2018] 4 WLR 123 at para 68 and following. It is unnecessary for me to repeat them. So far as this appeal is concerned, the following propositions are relevant and uncontroversial.
>
> (i) The common law will readily imply requirements of procedural fairness into a statutory framework even where the legislation itself is silent.
>
> (ii) When procedural fairness is in question, the court's function is "not merely to review the reasonableness of the decision-maker's judgment of what fairness required" (*R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, para 65, per Lord Reed JSC), but to consider objectively whether there has been procedural unfairness.
>
> (iii) The rule of law requires effective access to justice. Therefore, generally, unless (e.g.) excluded by Parliament,

> there must be a proper opportunity to challenge an administrative decision in the court system. As a consequence, unless rendered impractical by operational requirements, sufficient reasons must be given for an administrative decision to allow a realistic prospect of such a challenge. Where the reasons given do not enable such a challenge, they will be legally inadequate."

425. Thus, in the absence of a statutory requirement, there is no general common law obligation on a public authority to give reasons for its decisions but, where the decision is of significant public interest, or raises an issue of procedural fairness, sufficient reasons should be given to enable a potential challenge to be made by way of judicial review, unless there is proper justification for not doing so.

426. The level of detail required, where reasons are given, will depend on the circumstances of each case. The starting point is the guidance set out in the Pre-Action Protocol for Judicial Review, which provides at paragraph 13:

> "Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions."

Alleged failures

427. The Claimants' case is that the Defendant failed to comply with his duty to give clear and sufficient reasons for awarding the contracts under challenge:

i) In respect of the first PestFix claim, the Defendant failed to explain that no requirements were imposed on PestFix as to its financial standing and wrongly asserted that the Defendant purchased isolation suits as opposed to coveralls from Pestfix.

ii) In respect of the Clandeboye claim, the Defendant failed to refer to its recognition that Clandeboye should be given an amber rating for financial standing, that this had been actively considered by Mr Fundrey as Accounting Officer, and that the financial risks posed by the FCC were mitigated by arrangements for ring-fencing the Defendant's funds.

iii) In respect of the Ayanda claim, the Defendant failed to explain that Ayanda had been given a red financial due diligence rating by the Cabinet Office, that neither this rating nor any other information about financial due diligence on Ayanda was referred to the Accounting Officers who decided to award the

contract, and that due diligence on Ayanda's manufacturer was also not referred to the Accounting Officers.

iv) In respect of the further PestFix claim, the Defendant failed to provide information as to whether the further PestFix contracts had been handled under a 'VIP' process, financial due diligence and technical assurance of the offers, or any explanation as to the reasons for the contract awards.

428. Mr Coppel submits that the Defendant's omissions and misleading responses deprived the Claimants of any realistic prospect of challenging the contracts on the grounds that: (i) there was no financial due diligence on PestFix; (ii) the award of the Clandeboye contracts were based on an amber risk rating; (iii) there were financial due diligence failures regarding Ayanda; (iv) the reasons for the awards of SPC1-5; and (v) the role of the VIP lane in the awards of contracts to PestFix and Ayanda.

429. Ashlie Whelan-Johnson, a barrister employed as a Senior Lawyer in the Government Legal Department, sets out in her fourth witness statement the document review exercise carried out by the Defendant and the responses provided to the Claimants in the pre-action correspondence. She also explains the decision taken not to provide all information and documents requested by the Claimants at the pre-action stage:

> "In circumstances where 329 contracts for PPE had been awarded since the start of the pandemic and the SofS was still in the process of publishing those contracts, it was neither practical nor proportionate to provide the disclosure requested. Nor did the Claimants require details of all 329 contracts awarded to understand why the decision was taken to award the challenged contract to Pestfix. The Claimants subsequently made an application for disclosure of all the contracts awarded to Pestfix by the SofS since the start of the pandemic and this application was refused by Mrs Justice Jefford on 18 August 2020, which further supports the position taken by the SofS in pre-action correspondence."

430. Mr Bowsher submits that these steps were sufficient to comply with the Pre-Action Protocol and no further information or documents were required. In the procurement context, where there are regulations which govern the amount of information to be provided, to whom it is to be provided and when it is to be provided, the requirements of public law do not serve to broaden the requirements under the PCR. Certainly, they would not do so on the facts of these cases, where the emergency context would serve to narrow rather than broaden the public law duty to give reasons. Alternatively, this is one of the exceptional circumstances anticipated in *Oakley* (above), in which there is a proper justification for the Defendant not to give reasons, namely more than 15,000 offers to supply PPE and the urgency of the public health crisis.

Adequacy of reasons given

431. In respect of the first PestFix claim, the Defendant provided details of the offers made by PestFix, the process of consideration of the offers and its decision to award the FPC in its response letter dated 31 July 2020. The Claimants requested in paragraph 32f of their letter dated 10 June 2020 requirements imposed on PestFix so that the

Defendant could satisfy itself as to PestFix's financial standing and technical capabilities or, if none imposed, the basis on which the Defendant was satisfied. The Defendant replied to this request at paragraph 44 of its response, stating that appropriate due diligence was carried out, rejecting the suggestion that regulation 58 imposed mandatory requirements. The basis on which the Defendant considered that PestFix had sufficient financial standing and the PPE would achieve technical compliance was set out in sufficient detail at paragraphs 35 to 40 for the Claimants to determine whether or not to make a challenge. Indeed, the Claimants did make a challenge on the ground that there was inadequate financial and technical due diligence.

432. The complaint that the Defendant wrongly asserted that it purchased isolation suits as opposed to coveralls from PestFix is not material to the reasons required to be provided for the decision to award the contract in question. In any event, this was explained in the Defendants' witness statements and documents as a discrepancy in the labelling of the coveralls as isolation suits.

433. In respect of the Clandeboye claim, the Claimants asked the Defendant at paragraph 51e of its letter dated 29 June 2020 to explain the basis on which Clandeboye was considered to be more suitable than other suppliers and, at paragraph 51i the requirements imposed on Clandeboye so that the Defendant could satisfy itself as to Clandeboye's financial standing and technical capabilities or, if none imposed, the basis on which the Defendant was satisfied. The Defendant replied to this request at paragraphs 52 and 53 of its response dated 13 July 2020, stating that appropriate due diligence was carried out. The basis on which the Defendant considered that Clandeboye had sufficient financial standing and technical capabilities was set out in sufficient detail at paragraphs 37 to 41 for the Claimants to determine whether or not to make a challenge. The absence of any reference to the amber rating did not impede a challenge on the ground of irrationality. Indeed, the Claimants did make a challenge on the ground that there was insufficient financial and technical verification, specifically relying on its assessment of Clandeboye's resources. It has chosen not to pursue that challenge in these proceedings having regard to the evidence subsequently provided but it was not incumbent on the Defendant to provide its evidence in advance of the claim.

434. In respect of the Ayanda claim, the Claimants asked the Defendant at paragraph 59g of its letter dated 13 July 2020 to explain the basis on which Ayanda's offer was evaluated and at paragraph 59h to explain the basis on which Ayanda was considered to be more suitable than other suppliers. The Defendant replied to this request at paragraphs 12 to 17 of its response dated 29 July 2020, setting out the basis on which the Defendant considered that Ayanda's offer was acceptable, specifically stating that control measures were required by Ayanda's bank as risk mitigation. This was sufficient detail for the Claimants to determine whether or not to make a challenge. The absence of any reference to the red rating did not impede a challenge on grounds of irrationality. Indeed, the Claimants did make a challenge on the ground that there was insufficient financial and technical verification, specifically relying on its assessment of Ayanda's resources.

435. Contrary to the Claimants' complaint, the Defendant did refer to the existence of the "High Priority Appraisals Team" in its letter dated 29 July 2020, when responding to the Ayanda letter before claim. In any event, the Claimants were permitted to amend

their case to advance a challenge based on the operation of the High Priority Lane and such claim has been scrutinised by the court.

436. In respect of the second PestFix claim, the Claimants requested in paragraph 10a and 10h of their letter dated 6 November 2020 whether the further PestFix contracts had been handled under a 'VIP' process, and the financial due diligence and technical assurance carried out. The Defendant's response was given in its letter dated 19 November 2020. Ms Whelan-Johnson explains in her fourth witness statement that by this stage, proceedings had been issued in the other claims and permission had been granted on the papers but the oral renewal hearing was pending. Further, the Claimants issued the second PestFix claim on 12 November 2020 without waiting for the Defendant's response. In those circumstances, it was reasonable and proportionate for the Defendant to await the outcome of oral renewal hearing before providing any further information. Clearly, it did not impede the ability of the Claimants to challenge the award of the further PestFix Contracts.

437. The complaints made by the Claimants concern specific evidential details that were not provided by the Defendant at the pre-action stage. But there was no obligation on the Defendant to go further than providing reasons for the decisions that it made. It discharged that obligation. It was not required at that stage to undertake a detailed analysis of all evidence before it, particularly given the size of such an exercise in the circumstances of this procurement. When considered against the applicable test, namely, that sufficient reasons must be given for the decisions to allow a realistic prospect of a challenge, the Defendant's responses clearly satisfied that test.

438. For the reasons set out above, the court rejects the Claimants' challenge on Ground 3.

Ground 5 – Irrationality

439. The Claimants' case is that the decisions to award the contracts to PestFix and Ayanda were irrational in that no, or no sufficient, financial or technical verification was carried out in respect of the interested parties or their suppliers, and by operation of the High Priority Lane:

i) In awarding the contracts to PestFix and Ayanda, the Defendant placed reliance on their referral to the High Priority Lane, in the absence of any stated criteria for such referrals.

ii) In awarding the contracts to PestFix and Ayanda, insufficient financial due diligence was carried out in respect of the interested parties or their suppliers.

iii) In respect of three contracts awarded to PestFix, insufficient technical verification was carried out:

a) the contract terms failed to specify PPE which matched the requirements of the Defendant and the NHS (aprons bought under SPC 1 and under SPC 4; and FFP2 and FFP3 masks under SPC 3);

b) the FPC was purportedly for isolation gowns but PestFix delivered disposable coveralls;

c) the gowns purchased under SPC 2 have not passed testing.

iv) In respect of the contract awarded to Ayanda, insufficient technical verification was carried out:

a) Ayanda has never procured any goods on any market for the supply of any public contract;

b) the PPE sought to be procured was not, before contracting or after its supply, subject to any proper quality assurance or testing;

c) excessive quantities of masks were ordered and supplied at a time when there was no immediate need for a supply of anything like the magnitude contracted for;

d) over £150m of the masks are unusable; and

e) the balance of masks has not yet been tested for compliance with technical and safety standards since its arrival in the UK, has not been delivered to a single frontline NHS worker, and remains in storage unused.

440. The Defendant makes the following general points in response:

i) The award of PPE contracts during the 'first wave' of the pandemic is an area in which the Defendant had to make difficult judgments about medical and scientific issues and did so after taking advice from relevant experts. Such matters are not suited to intervention or determination by the court on grounds of rationality.

ii) The decision-makers in this case had the relevant knowledge, experience and expertise to mean they were well-placed to take the contract award decision. In these circumstances, the court should be slow to interfere.

iii) The Claimants' rationality challenge is in substance a challenge to the merits of the decision but that is impermissible as a ground of public law challenge.

iv) The Claimants have pleaded their allegations of irrationality with the benefit of hindsight. In April 2020 the Defendant did not have the benefit of the knowledge that it has since acquired regarding the nature of COVID-19; it had no choice but to make decisions rapidly and without the usual level of detailed information.

v) Rationality should be assessed taking due account of the context in which the decisions were taken, namely, a state of national emergency, responding to an unprecedented threat to health and life, necessitating swift decisions before opportunities to secure urgently-needed supplies of PPE were lost.

Legal principles

441. In a case concerning decisions made by the Defendant, where it was required to make a complex evaluation of a wide range of overlapping criteria, all of which involved

difficult and technical judgments, the purpose of which was to safeguard front line workers in a public health crisis, the court must accord proper respect to the fact that the decision-maker was much better placed to carry out the assessment than the judiciary by way of judicial review: *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41 at [40]; *R (Rotherham Metropolitan BC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, per Lord Sumption at [22]-[23]; per Lord Neuberger at [62]-[63].

442. The court will interfere with the decision of a public body only if the decision is outside the range of reasonable decisions open to the decision-maker or there is a demonstrable flaw in the reasoning which led to it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 per Lord Greene MR at pp. 228 – 231; *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 per Carr J (as she then was) at [98].

443. The decision-maker must take into account all legally relevant considerations and avoid taking into account those that are irrelevant. That requires reasonable steps to be taken to provide the decision-maker with the relevant information to enable it to make a rational decision: *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL) per Lord Wilberforce at pp.1047-8, Lord Diplock at pp.1064-5; *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673 per Underhill LJ at [70].

444. The scope and content of the *Tameside* duty is context specific; it is for the decision-maker and not the court, subject only to *Wednesbury* review, to decide upon the manner and intensity of the inquiry to be undertaken into any relevant factor: *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55 per Laws LJ at [35]; *Flintshire County Council v Jayes* [2018] EWCA Civ 1089 per Hickinbottom LJ at [14].

445. The decision-maker must be briefed on everything that is relevant, namely, enough to enable an informed judgment to be made; fairness requires that the issues are put to the decision-maker in a balanced way so that a decision may be made on a rational basis: *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 per Sedley LJ at [60]-[62]; *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 per Thomas LJ at Paras.[73]-[75].

446. The question of what is a material or relevant consideration is a question of law, but the weight to be given to it is a matter for the decision-maker, subject only to *Wednesbury* review: *Khatun* (above); *R (Heathrow Hub Limited) v Secretary of State for Transport* [2020] EWCA Civ 213 at [144]-[146].

447. The court must not substitute its own decision for that of the decision-maker; there is a high threshold for a challenge based on irrationality: *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 per Lord Carnwath and Lord Mance (with whom Lord Clarke and Lord Toulson agreed) at [66]. Where a decision is made by a responsible decision-maker after consultation with those who have material knowledge and expertise, it is not to be lightly overridden: *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6 per Lord Dyson MR at [79]; *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 per Lord Burnett of Maldon CJ, King LJ and Singh LJ at [89].

448. Finally, the margin of appreciation accorded to the decision-maker may be particularly wide in the context of a national emergency, such as the COVID-19 pandemic: *Pickwell v Camden London Borough Council* [1983] QB 962 per Forbes J at p.989E; *R (Adiatu) v Her Majesty's Treasury* [2020] EWHC 1554 at [44], [81] and [258].

Context in which the contracts were awarded

449. It was a matter for the Defendant, exercising its executive power, having regard to advice from medical and scientific experts, to determine what type of PPE it would purchase, the quantities to be bought, when it would be purchased and the commercial terms on which it was prepared to contract.

450. In April 2020, when the contracts under challenge were awarded, the UK was in the grip of 'the first wave' of the pandemic. There was a very urgent demand for PPE to provide protection for those working in circumstances where they were, or might be, exposed to COVID-19.

451. At that time, the global shortage of PPE created a marketplace in which governments and other agencies were bidding against each other in a race to secure precious supplies needed to protect their healthcare workers; it was a seller's market.

452. In those circumstances, the Defendant was required to make decisions very rapidly. There was little time to consider the merits of the offers as they arrived, or to carry out the checks that would usually be undertaken in a planned and cautious public procurement exercise.

453. This was not a procurement competition and the rationality challenge is not based on breach of the PCR. The procedures set out in the PCR (as opposed to the general principles) were not applicable to the open source process which this court has found the Defendant was entitled to adopt. The process adopted by the Defendant did not have fixed award criteria against which each bidder was marked. The priorities for different types of PPE constantly changed as potential shortfalls were predicted. The decision-makers were cognisant of the requirement for any proposed contract to comply with standards of public conduct and represent value for money but there was an appetite for higher than usual levels of risk. Unlike a regular procurement exercise, there were two overriding questions when considering each potential supplier: (i) did the supplier have a credible and reliable offer to supply substantial amounts of PPE; and (ii) how pressing was the need for that PPE?

454. Mr Wood sums up in his witness statement the challenges faced by the Defendant when carrying out the procurement of PPE in the midst of a global shortage and the COVID-19 pandemic:

> "Over 700 civil servants and contractors came together in a virtual environment to buy PPE. They spent very long hours doing this – working past midnight and over weekends and public holidays was the norm. They operated under unimaginable pressure. On one level, they were acutely aware of how important their work was from the information we were provided with regarding the magnitude of demand and via daily

> media reports. If we did not secure supplies quickly and in great volume, our doctors and nurses would be facing coronavirus in our NHS hospitals without proper protective equipment. On another level, the market put great stress on them. The speed with which offers came and went from the market was astonishing and the stress of trying to bring an opportunity to fruition was immensely challenging. It was perhaps the most difficult, highly pressurised environment I have ever worked in."

455. It is against that background, applying the above legal principles, that the court considers the Claimants' challenge on rationality.

High Priority Lane

456. The Claimants' case is that, in awarding the contracts to PestFix and Ayanda, the Defendant placed reliance on their referral to the High Priority Lane, in the absence of any stated criteria for such referrals.

457. For the reasons set out in discussion of the High Priority Lane under Ground 2 above, although the operation of the High Priority Lane used unlawful criteria for allocation to the same, it did not play any material part in the award of the contracts to PestFix or Ayanda. There was objective justification for treating the offers from PestFix and Ayanda as high priority offers and the court is satisfied that they would have been identified as such if triaged from a Portal submission.

458. Further, the evidence of Mr Cairnduff, Mr Moore, Mr Young, Mr Fundrey and Mr Williams, discussed above in relation to Ground 2 and which the court accepts, is that no reliance was placed on any allocation to the High Priority Lane at the technical assessment or final decision-making stage of any offer.

459. It follows that this ground of challenge is rejected.

Financial due diligence

460. The Claimants' case is that, in awarding the contracts to PestFix and Ayanda, insufficient financial due diligence was carried out in respect of the interested parties or their suppliers.

461. Mr Coppel submits that financial due diligence is a necessary element of any large contract. Any rational contracting authority should assure itself that its contractual counterparty has deep enough pockets not only to perform its contract, but also to ensure that the authority has enforceable remedies in the event that the supplier breaches the contract. Financial due diligence was especially important in the context of the contracts subject to challenge. They involved very large pre-payments going far beyond what would usually be permitted for NHS purchases. The suppliers were intermediaries, rather than manufacturers, who would pass the pre-payments to their manufacturers overseas. Therefore, the contracts were high risk. In such circumstances, adequate due diligence was required, together with appropriate steps to mitigate such risks, such as bank guarantees, parent company guarantees or ring-fencing of the pre-payments.

462. Mr Bowsher submits that the context in which the Defendant was required to carry out due diligence and make these decisions was not 'business as usual' - resources were scarce and there were immense time pressures to conclude contracts for the supplies urgently needed. Although the exact form of the due diligence varied overtime, the evidence before the court is that the Defendant always had in place a process of carrying out due diligence, a process of ensuring that the accounting officers had regard to the due diligence, and those processes were applied on the facts of the claims before the court. It was not irrational for the Defendant to use its best endeavours to do all that it could realistically and reasonably do to carry out due diligence checks within the limited time available before the deal would be lost to another buyer. The fact that an improved process was subsequently developed at a time when the Defendant had better resources does not impugn the rationality of the earlier processes.

PestFix due diligence

463. The Claimants' allegation is that the Defendant failed to perform any financial due diligence on PestFix prior to the Accounting Officer approvals of the relevant contracts and that such failure was irrational. PestFix had negligible assets and the contracts were very high value. The Accounting Officers failed to take reasonable steps to acquaint themselves with relevant information about PestFix's finances and failed to have regard to a material consideration, namely, PestFix's standing. Officials failed to draw to the Accounting Officers' attention the salient facts regarding PestFix and the absence of due diligence.

464. Mr Beard's evidence was that during the relevant period, the Cabinet Office simply did not have the resources necessary to undertake due diligence in respect of the volume of suppliers under consideration. Mr Young is frank that they did not have the time to carry out the kind of due diligence which would usually be done because of the time-limited nature of many of the offers:

> "We always carried out some form of due diligence, but it is important to understand that the DD was looked at on a risk based and proportionate basis. Because of the extremely time limited nature of so many of the offers we did not have the time to carry out the kind of due diligence which would be done in a BAU [business as usual] situation. We were dealing with a lot of global suppliers who were not normally in the PPE market and trying to do BAU style DD exercise, often at geographical distance, would have meant losing the deal to someone else if we delayed. Our approach therefore reflected the heightened risk appetite and decisions that were taken on a balance of risk…. If we did not secure what we could of the limited product available on the market during the initial phase, we would be certain to run out of PPE."

465. In those circumstances, the Defendant had to rely on the best evidence that could be obtained within the available time. As Mr Beard noted, due diligence was not simply about the financial information. The case worker would form a broader view based on all available information, including dealings with the supplier, emerging knowledge of the market and the collective experience within the PPE Cell.

466. Contrary to what is submitted by the Claimants, financial due diligence was carried out in respect of PestFix. There was no Cabinet Office due diligence report as a result of a shortage of resources at the time but Ms Washer carried out a basic check using online resources and satisfied herself that PestFix was a real entity, based in the UK and which was trading in the UK. Mr Maugham suggests that enhanced checks could have been carried out and has identified the additional information that could have been obtained regarding the financial standing of the company. Of course that would have improved the due diligence exercise but, given the time-sensitive nature of the work, it was not irrational for the Defendant to decide that it was prepared to take more risk that would usually be acceptable.

467. Mr Fundrey, the Accounting Officer for the FPC and SPC 5, was told that due diligence was confirmed but knew that there was uncertainty as to what that meant. Significantly, he was aware that there was no due diligence report from the Cabinet Office and that the exercise was therefore imperfect. In the knowledge that there was no due diligence report, taking into account all the circumstances, including the high demand for the PPE offered by PestFix, he determined that it was adequate to justify proceeding to award the contract.

468. Likewise, Mr Young, the Accounting Officer for SPC 1, SPC 2, SPC 3 and SPC 4, states that he did not see a Cabinet Office due diligence report and nothing suggested to him that one had been done. Therefore, he was mindful of the limited due diligence when considering whether to approve the contract awards.

469. It was a matter for Mr Fundrey and Mr Young, as the Accounting Officers, to decide upon the manner and intensity of the inquiry to be undertaken into relevant factors, such as due diligence. They were aware of the limitations of the due diligence exercise undertaken. It was a matter for them to decide what weight should be given to that factor. Their decisions to award the PestFix Contracts were well within the available margin of appreciation, particularly given the urgency of the demand for PPE to meet the public health crisis.

470. Mr Williams was not aware of the details of the due diligence undertaken but he was entitled to have regard to the fact that Mr Young had already considered the material offer as Accounting Officer. His primary focus was whether he should approve the contract for the volume of PPE and price quoted having regard to demand. In his witness evidence he explains the basis on which he considered it appropriate to approve FPC 4, including the increased risk that it posed, and sets out the reason the Defendant was prepared to accept it.

471. The Claimants suggest that the Defendant should have taken steps to mitigate the financial risks, such as guarantees or ring-fencing of funds, but that seeks to stray beyond the pleaded case, which is that it was irrational to award the contracts in the absence of due diligence. Steps in mitigation may be taken as a consequence of due diligence but they do not constitute due diligence; in any event, they would fall within the margin of appreciation as part of the overall assessment of risks and benefits of the offer.

Ayanda due diligence

472. The Claimants' allegation is that the Defendant failed to perform any financial due diligence on Ayanda prior to the Accounting Officers' approval of the contract and that such failure was irrational. The Ayanda contract was high risk based on the value of the contract and the advance payment required. Mr Fundrey and Mr Williams failed to take reasonable steps to acquaint themselves with relevant information about Ayanda's finances and failed to have regard to a material consideration, namely, Ayanda's standing. Officials failed to draw to their attention the salient facts regarding Ayanda, in particular, the red rating set out in the Cabinet Office report, simply stating that due diligence was confirmed.

473. At the time of the decision to award the contract to Ayanda, due diligence had been carried out on Zhende, the manufacturer, resulting in an amber risk rating (*"slight concerns but can continue to consider/use supplier until resolved"*). The Cabinet Office due diligence for Ayanda resulted in a red rating (*"major issues or concerns, these would need to be resolved before we use them"*), based on the absence of filed accounts, noting that significant assurances would be required to ensure delivery.

474. The report on Ayanda was not placed before Mr Fundrey, the Accounting Officer; the submission pack simply stated: "DD confirmed". Therefore, he was not given a full picture of the gaps in available information. However, Mr Fundrey was aware that the due diligence report on the manufacturer was amber and that Ayanda was not a business which had any direct experience in the manufacture, supply or distribution of PPE. He expressly states in his witness statement that those were factors that he weighed in the balance. Despite those adverse indications, he considered that the most important factor was Ayanda's ability to source technically approved type IIR masks on a regular supply over a prolonged period at a good price. Taking into account all the circumstances, including the high demand for the type IIR masks offered by Ayanda, Mr Fundrey determined that the risks associated with the supplier and manufacturer were outweighed by the benefits of the contract.

475. Mr Williams was not provided with the due diligence reports but was content to approve the contract award on the basis that Ms Lawson, Mr Marron and Mr Fundrey confirmed demand for the masks and the offer would provide security of supply through exclusive use of the manufacturing capacity of the factory.

476. As in the case of PestFix, it was a matter for Mr Fundrey and Mr Williams to decide upon the manner and intensity of the inquiry to be undertaken into relevant factors, such as due diligence. Although they did not have the Cabinet Office report, they were aware of the risks raised by contracting with a new supplier and making a substantial advance payment. Clearly, on the evidence, this was a very high risk contract. However, it was a matter for them to decide what weight should be given to such risks. The decision to approve the Ayanda Contract was within the available margin of appreciation, particularly given the urgency of the demand for PPE to meet the public health crisis.

477. Concerns were raised following the execution of the contract and, as a result, risk mitigation measures were put in place by ring-fencing the advance payment. As for the initial contract, it was a matter for the Defendant to assess whether, in those circumstances, he was prepared to take a higher level of risk to secure the very substantial quantities of PPE on offer.

Conclusion on due diligence

478. The Defendant carried out due diligence in respect of PestFix and Ayanda. In each case, the due diligence was limited as a consequence of sparse resources and time, and the Accounting Officers were required to make their decisions absent full information. In a standard procurement under the PCR, where due diligence is identified as part of the award criteria, it is unlikely that such due diligence would be considered adequate to enable an evaluator to assess financial standing so as to avoid an allegation of manifest error. However, this was not a standard procurement under the PCR. The Defendant was entitled to assume a greater degree of risk in circumstances where the paramount concern was to obtain the PPE needed to ensure the safety of health and care workers. The court's role is not to second-guess an appropriate calculation of the risks involved or substitute its own assessment as to the propriety of the contracts awarded. The court is satisfied that the Defendant's decisions to enter into the contracts without full due diligence were within the range of reasonable decisions open to him.

PestFix technical verification

479. The Claimants' case is that insufficient technical verification was carried out in respect of parts of the contracts awarded to PestFix.

Coveralls - FPC

480. It is said that the FPC was purportedly for isolation gowns but PestFix delivered disposable coveralls. This ground of challenge is misconceived. There was no issue between the contracting parties as to the nature of the PPE on offer. Although the communications and supporting documents provided by PestFix referred to isolation suits, in fact the protective clothing offered comprised coveralls. There was a discrepancy as to the description of the PPE by the Chinese manufacturer but, as explained by Mr Moore, this stemmed from the fact that 'coveralls' was not a phrase used in the PRC. What is clear from the contemporaneous documents is that those carrying out technical assurance knew that the offer was for coveralls, had sight of a test report demonstrating compliance with the required standard EN 14126:2003, and approved them on the basis that they were coveralls. There was also a discrepancy in respect of the labelling, in that they were incorrectly identified as isolation gowns and not correctly labelled as type 6B coveralls. However, the HSE report dated 6 August 2020 confirmed that the clothing supplied was in fact type 6B coveralls that met the required specification.

481. The Claimants' allegation does not come close to establishing irrationality. The Defendant has provided clear evidence that there was demand for coveralls, they were offered by PestFix, they were approved by technical assurance following production of an appropriate test report and the FPC was for coveralls, which were supplied.

482. In their submissions, the Claimants raise a new point that it was irrational to assess the coveralls against the BS EN 14126:2003 standard because PestFix did not specify the type of coverall it would supply. This ground of complaint is rejected. Mr England's email dated 5 April 2020 stated that the coveralls had been tested against BS EN 14126:2003 and that PestFix could supply whatever type of coverall, and degree of protection, was required. This information was considered separately by Ms

McCarthy of CAPA and by Mr Moore; both, independently, assessed the offer as passing technical assurance. In those circumstances, where the offer was considered by those with appropriate technical knowledge and experience, it would not be appropriate for the court to interfere.

Aprons – SPC 1 and SPC 4

483. It is said that the contract terms failed to specify PPE which matched the requirements of the Defendant and the NHS. The aprons purchased under SPC 1 and SPC 4 were required to satisfy the quality assurance standards in EN 1186 but that was a food industry standard and the aprons did not satisfy the relevant NHS specification in respect of thickness or dimensions.

484. At the time that technical assurance was carried out, Mr Moore was aware that the aprons were too wide (710mm as opposed to the NHS specified maximum width of 701mm) and there was uncertainty as to the thickness (the aprons were 31 microns as opposed to the NHS specified thickness of 12-20 microns). When supplied, the aprons failed testing on gravimetric thickness and because the neck holes were too small.

485. The Claimants' case is that it was irrational to order PPE which was unusable for its intended purpose and the Accounting Officers were not informed of such non-compliance when making their decisions. Mr Moore's evidence is that he was satisfied that the technical assurance team concluded that the aprons on offer were sufficiently durable and robust to be used for their intended purpose. Given the purpose of this type of PPE, namely to provide temporary, additional protection over gowns, that was a view that he was entitled to reach. Having made that assessment, it was not necessary to draw to the attention of the Accounting Officers the non-compliance issues. As the Defendant submits, had there been an acute shortage of aprons by the time they arrived, aprons that were a little too thick and deviated marginally from the specified dimensions would have been used to save lives.

Gowns – SPC 2 and SPC 4

486. The Claimants' pleaded case alleges that the gowns purchased under SPC 2 have not passed testing. This complaint is not a proper ground of challenge. Performance of a contract is not relevant to the lawfulness of the procurement procedure. During April 2020, it was not possible to visit the PRC to verify factory conditions, obtain physical samples for testing or carry out in situ quality assurance, as set out in Mr England's evidence. The Defendant was aware that in the circumstances prevailing at that time there was an increased risk that PPE ordered might not be delivered or prove to be unsuitable for use, as summarised by Mr Dawson in his email dated 28 April 2020. It was a matter for the Defendant to determine whether he was prepared to accept that increased level of risk. There is an ongoing dispute between the Defendant and PestFix in respect of the gowns delivered but that is not a matter for this court to determine.

487. In their submissions, the Claimants raise a further point that there was no technical assurance in respect of the gowns, apart from limited checks carried out by the Chief Operating Officer of an NHS Trust, and Mr Young failed to discharge his duty as Accounting Officer by verifying that the gowns met the necessary technical standards. Mr Young was entitled to exercise his judgment in deciding what information was

necessary for him to reach a decision. In his witness statement, he expressly states that he was concerned about the risk emanating from a lack of technical assurance but considered that this was a risk worth taking given the urgent need for surgical gowns and their scarcity of supply. On 15 April 2020, when he was asked to consider this offer, the Decision Brief showed that the daily outgoing stock of gowns was 31,106, with an available supply of only 16,323. Such critical shortage of gowns was ample justification for Mr Young's decision to go ahead with the contract without requiring more detailed information.

488. The Claimants' additional points do not affect that conclusion. The absence of a declaration of conformity from the submission pack provided by PestFix was part of the limited technical assurance of which Mr Young was aware. The failure to comply with the fire resistance requirements of BS EN 11810:2015 is immaterial because that requirement had been waived by Ms McCarthy before approval of the contract award.

489. A further point has now been raised. It transpires that no separate technical assurance was carried out in respect of the offer to supply gowns the subject of SPC 4; it was erroneously understood that technical assurance had already been undertaken for the purpose of SPC 2 but the offers for these additional gowns emanated from different manufacturers. Further, the Claimants correctly point out that on its face, SPC 4 provided for the supply of non-sterile gowns, rather than sterile gowns. This suggests that a mistake may have been made by the Defendant when preparing the contractual documentation, although the technical specifications indicated a demand for both sterile and non-sterile gowns. The contemporaneous correspondence is not clear on the issue. The documents exhibited by Mr England indicate that email discussions surrounding PestFix's offers for SPC 2 and SPC 4 concerned surgical, sterile gowns; there were references to non-sterile gowns in the technical documentation but Mr England indicated that the gowns could be put through a sterilisation process.

490. The question that arises is whether, in those circumstances, the Defendant's decision to purchase the gowns was irrational. It is unfortunate that this issue arose during the course of the hearing as it did not allow time for the Defendant or the Interested Party to carry out a full investigation into the matter and provide careful and detailed witness statements dealing with the point. The court has given anxious consideration to this issue, having regard to the size and value of SPC 4. Following a review of the documents before the court, in my judgment, any mistake as to whether the order was for sterile or non-sterile gowns, if made, was not such as to render the decision to award the contract irrational and therefore unlawful. The matter before the court is not a commercial dispute or alleged manifest error in the context of a competition under the PCR. The context in which the decision was made was an urgent demand for surgical gowns, requiring and a rapid decision to secure the order. In those circumstances, it is not appropriate for the court to scrutinise every aspect of it in minute detail or substitute its own decision.

Masks – SPC 3

491. The FFP2 masks purchased under SPC 3 did not comply with the technical specification because they had ear loops instead of head straps; further, PestFix did not provide appropriate certification for the FFP2 or FFP3 masks purchased under SPC 3.

492. Mr Moore accepts that he approved the FFP2 masks despite the fact that they did not comply with the technical specification and NHS preference for head straps. That was an error and, if judged as part of a competitive procurement under the PCR procedures, might constitute a manifest error. However, in the absence of a competition, in the context of the public health emergency, it was not an error that amounted to irrationality, given that the masks complied with the specified standard BS EN149+A1:2001. In that regard, it is significant that the masks did not fail testing on the grounds that they had ear loops rather than head straps, indicating that this error was not material.

493. Schedule 1 to SPC 3 referred to the wrong standard of BS EN 13485, instead of BS EN 149+A1:2001; but that did not reflect the basis on which the technical assessment had been carried out, which was against the correct standard, or the decision to award the contract. The FFP3 masks were approved by the technical assurance team based on an ECM certificate, issued by an Italian certification body, that was acceptable at the time (although it was not acceptable at a later date). That was a matter of judgment for the Defendant to make.

Ayanda technical verification

494. The Claimants' case is that, in respect of the contract awarded to Ayanda, insufficient technical verification was carried out.

495. First, it is said that Ayanda has never procured any goods on any market for the supply of any public contract but the open source procurement approach was intended to identify those who were not established suppliers of PPE. That ground of challenge is rejected. Ayanda did not hold itself out as a supplier of PPE, or even as an agent. It identified a unique opportunity for the Defendant to obtain access to a factory that could produce PPE, using existing contacts.

496. Second, the Claimants allege that the PPE sought to be procured was not subject to any proper quality assurance or testing. The FCO report on Zhende, the manufacturer, identified a risk of non-compliance, based on its history of penalties for failing local authority quality inspections, but gave it an overall rating of amber. This report was not drawn to the attention of Mr Fundrey, the Accounting Officer, but he was aware that due diligence had been undertaken. It was a matter for him to identify any additional information underlying technical assurance that he needed to make his decision. Given the time constraints within which the decision was made, it was rational for him to rely on the exercises carried out by others.

497. The purchase of FFP2 masks with ear loops rather than head straps is addressed in respect of SPC 3 above.

498. Third, it is said that excessive quantities of masks were ordered and supplied at a time when there was no immediate need. This is not a valid ground of challenge. It was a matter for the Defendant to determine what quantities of masks were required and when.

499. Finally, it is said that the masks are unusable or have not been tested for compliance with technical and safety standards but that would not be a valid ground of challenge, as it is concerned with performance.

Conclusion on Ground 5

500. In conclusion, for the reasons set out above:

i) the Defendant did not place any reliance on their referral to the High Priority Lane when awarding the contracts to PestFix and Ayanda;

ii) sufficient financial due diligence was carried out in respect of the Interested Parties and their suppliers when awarding the contracts to PestFix and Ayanda;

iii) sufficient technical verification was carried out in respect of the contracts awarded to PestFix and Ayanda.

Standing

501. Section 31(3) of the Senior Courts Act 1981 provides that in order to bring a claim for judicial review, a claimant must have sufficient interest in the matter to which the claim relates.

502. When granting permission for the Claimants to proceed to judicial review in respect of the contracts under challenge, Jefford J expressly reserved the question of standing to be determined at the substantive hearing.

503. The Defendant's position is that the Claimants do not have standing to bring their challenge under Ground 2 (equal treatment and transparency) or that part of Ground 3 (reasons) relating to the PCR. It is accepted that they have standing to bring the challenge in respect of the public law elements of Ground 3 and in respect of Ground 5.

504. The test and the relevant factors to be considered are set out in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, per Arden LJ, giving the judgment of the court, at [77] and *R (Good Law Project Limited & Others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) per Chamberlain J at [99]. It is not necessary for this court to repeat those principles here.

505. The court is satisfied that the Claimants have sufficient interest to bring the challenge on each ground for the following reasons. Firstly, Good Law Project is a not-for-profit company which aims to use the law to protect the interests of the public. It has a sincere interest, and some expertise, in scrutinising government conduct in this area. Secondly, EveryDoctor's interest in the challenge arises from its concerns regarding good governance and lawful procurement of PPE for the NHS. Thirdly, it is not realistic to expect economic operators to mount a challenge to the award of the contracts which are at issue in these proceedings, particularly in circumstances where there has been no competition and therefore, no obviously identifiable disappointed bidders who might reasonably be in a position to identify causation and loss. Fourthly, the gravity of the alleged breaches, concerning issues as to the lawfulness of the awards of public contracts, support a finding of standing so as to enable review by the courts.

Amenability to judicial review

506. CPR 54.1(2)(a) defines a claim for judicial review as a claim to review the lawfulness of an enactment, or a decision, action or failure to act in relation to the exercise of a public function. Even if grounds of judicial review are established, and the court is satisfied that a public body has acted unlawfully, the remedies available are discretionary: section 31(2) Senior Courts Act 1981.

507. The Defendant's position is that to the extent that the matters in issue: (i) fall under the PCR and the principles provided for in those regulations; (ii) are matters concerning the performance and administration of the challenged contracts; or (iii) are matters concerning performance of pre-action protocol obligations, they are matters that are not properly subject to judicial review. Further, it is submitted that the claims are academic, particularly where the contracts under challenge have been performed and the open source procurement has been completed.

508. As to the matters of challenge identified in (i), the court is satisfied that breach of the PCR by a public body is an appropriate matter for the court's review: *Chandler* (above) at [77].

509. The other matters of challenge falling into categories (ii) and (iii) have been dismissed on their merits.

510. The sole remedy sought by the Claimants is declaratory relief. The court is satisfied that a claimant who establishes that a public body has acted unlawfully will normally be entitled to a declaration to mark the illegality in cases where no other relief is appropriate: *R (Good Law Project Limited & Others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) per Chamberlain J at [152].

511. However, section 31(2A) of the Senior Courts Act 1981 provides that the court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, unless, as set out in section 31(2B), the court considers that it is appropriate to grant relief for reasons of exceptional public interest.

512. In these proceedings, the Claimants have established that operation of the High Priority Lane was in breach of the obligation of equal treatment under the PCR. However, the court has found that, even if PestFix and Ayanda had not been allocated to the High Priority Lane, nevertheless they would have been treated as priority offers because of the substantial volumes of PPE they could supply that were urgently needed. Although there is public interest in the outcome of this challenge, the contracts in question have been performed (or expired) and it is sufficient that the illegality is marked by this judgment. Therefore the granting of relief does not meet the test in section 31(2B). In those circumstances, the court must refuse to grant the relief sought.

Conclusion

513. For the reasons set out above, on Ground 2:

i) the Defendant was obliged to comply with the principles of equal treatment and transparency set out in regulation 18 in relation to the process chosen by

the Defendant for making direct contract awards without prior publication pursuant to regulation 32(2)(c) of the PCR;

ii) use of the 'open source' procurement complied with the obligations of equal treatment and transparency;

iii) the Defendant put in place the selection criteria to be used and issued guidance to the evaluators as to the application of such criteria so that the offers could be properly evaluated;

iv) operation of the High Priority Lane was in breach of the obligation of equal treatment.

514. For the reasons set out above, on Ground 3, prior to the issue of proceedings, the Defendant complied with his duty to give clear and sufficient reasons for awarding the contracts the subject of challenge.

515. For the reasons set out above, on Ground 5:

i) the Defendant did not place any reliance on their referral to the High Priority Lane when awarding the contracts to PestFix and Ayanda;

ii) sufficient financial due diligence was carried out in respect of the Interested Parties and their suppliers when awarding the contracts to PestFix and Ayanda;

iii) sufficient technical verification was carried out in respect of the contracts awarded to PestFix and Ayanda

516. The Claimants' challenge to the Defendant's decisions to award the contracts to the Interested Parties fails on Grounds 3 and 5.

517. The Claimants' challenge in respect of the contracts awarded to Clandeboye is dismissed.

518. Although operation of the High Priority Lane was in breach of the obligation of equal treatment under the PCR and therefore unlawful, it is highly likely that the outcome would not be substantially different and the contracts would have been awarded to PestFix and Ayanda. In those circumstances, pursuant to section 31(2A) and (2B) of the Senior Courts Act 1981, the court refuses to grant declaratory relief.

519. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.