NCN: [2022] UKFTT 00333 (GRC)

Appeal Number: EA/2022/0030

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

Between:

George Greenwood

Appellant:

and

The Information Commissioner

First Respondent:

and

The Department of Health and Social Care

Second Respondent

Date and type of Hearing: Oral hearing on Tribunal CVP.

Panel: Brian Kennedy QC, Marion Saunders, and Jo Murphy**.**

Representation:

For the Appellant: George Greenwood, as litigant in person.

For the First Respondent: Harry Gillow, of Counsel.

For the Second Respondent: Paul Mertens of Counsel.

Decision: The Tribunal dismiss the Appeal.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 20 January 2022 (reference IC-123646-FSTI), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN. The appeal concerns a request for information relating to the companies and individuals who made bids for contracts to supply PPE in March 2020. The Department of Health and Social Care ("DHSC") withheld the information on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner held that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure.

[3] The Commissioner maintains the position set out in her DN - namely that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Appellant appeals against the DN. The Commissioner does not understand the Appellant to be challenging the application of the exemption, but rather only the Commissioner's assessment of the balance of public interests. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology

[4] On 2 December 2020 the Appellant requested information from the DHSC in the following terms:

"1) Please provide a list of the 493 companies and individuals that were processed through the high-priority lane for PPE procurement, as referenced in the NAO's report into PPE procurement.
2) Please provide a list of the 47 companies and individuals that were processed through the high priority lane and received contracts, as referenced in the NAOs report into PPE procurement"

[5] On the 29 March 2021, the DHSC responded confirming that it held the requested information, but stating that it was exempt from disclosure under FOIA, s.43(2) (Response FOI-1279159). Noting that the s.43(2) exemption is a qualified exemption, the DHSC explained why it considered the balance of the public interest favoured withholding the information:

"There is a strong public interest in openness and transparency, particularly with reference to accountability for spending public money. Furthermore, private sector companies engaging, or seeking to engage, in commercial activities with the public sector must expect some information about those activities to be disclosed.

Considerations against disclosure include the recognition that disclosure may damage a supplier's reputation, affecting the supplier's competitive position in their respective market and confidence that its customers, suppliers or investors may have in its commercial operations. Disclosure of a list of the 47 successful suppliers – or a list of the 493 which also includes the unsuccessful suppliers - would be likely to deter potential bidders for future contracts from competing as they would potentially face adverse publicity unrelated to the terms of their particular contracts or ability to deliver contracted outcomes. This would therefore negatively impact the quality and quantity of Government's supplier base, as future potential suppliers would be deterred by the prospect of unsuccessful

aspects of their tenders being open to publication. DHSC, and indeed Government, must retain commercial confidence of third-party potential suppliers when they choose to engage in commercial activities with us. The release of this information may jeopardise this commercial confidence.

Having carefully considered the above considerations, I have determined that it is not in the public interest to prejudice the commercial interests of relevant suppliers. As such the information you have requested in this respect has been deemed exempt from disclosure under section 43(2) of the Act."

[6] On the 31 March 2021, the Appellant sought an internal review of the DHSC's decision.

[7] The internal review was completed on the 06 August 2021 (the "Review"). As a result of the review, the DHSC changed its position in respect of the list of the successful bidders, stating that this information would be published once it had been checked and verified. As regards the list of unsuccessful bidders, however, it maintained its position that this was exempt from disclosure under FOIA s.43(2) (the "withheld Information").

[8] On the 16 August 2021, the Appellant wrote to the Commissioner challenging the DHSC's response to his Request.

Legal Framework

S1 FOIA – General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny".

Section 43 FOIA is a qualified exemption to disclosure, and is therefore subject to the public interest test under section 2(2)(b) FOIA. This states that a public authority does not have to provide the information if *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*.

Commissioner's Decision Notice:

[9] The Commissioner investigated the matter and concluded that the DHSC had correctly applied section 43(2) FOIA. In applying the public interest, the Commissioner held that the balance of interests was ultimately in favour of non-disclosure of the withheld information.

[10] The Commissioner believed there was a definite public interest in openness and transparency, and in understanding the UK's conduction of economic, industrial, and commercial policy during the pandemic.

[11] Against this, however, the Commissioner determined that it was important for DHSC to be able to retain the commercial confidence of parties when they chose to engage in commercial activities with the Department, and while private sector companies must expect some disclosure of information about those activities, DHSC considered that this applied primarily in respect of successful bidders. The Commissioner argued that it was important to minimise any damage to a supplier's reputation or competitive position in their field, so as to preserve the Government's ability to secure high quality and good value offers.

[12] The Commissioner was satisfied that there was no evidence of corruption or "*wildly unsuitable companies"* having been referred to the VIP list, and that any corruption in respect of successful companies would have been revealed when that list was published. There was a clear public interest in DHSC being able to secure the best value for money, and the Commissioner was not satisfied that there was any grounds for saying that referrals to the VIP list may have slowed down procurement of PPE.

Grounds of Appeal:

[13] The Appellant's Grounds of Appeal argued that the Commissioner failed to engage with the evidence that referral of parties to the High Priority Lane ("HPL") did impact on the wider process of PPE procurement. Further that preferential treatment of potential suppliers simply on the basis of referral by a minister, MP or official was unlawful, per *Good Law Project Limited v The Secretary of State for Health* [2022] EWHC 46 (TCC), and was of clear benefit to the supplier in question.

[14] The Appellant argued that there is a very strong public interest in transparency about who was referred to the HPL in these circumstances. It is therefore clear that the HPL conferred unequal benefits to companies referred to it by political contacts, at a cost to other suppliers and the overall PPE procurement system.

For the purposes of accountability in how public resources were utilised in a crisis, there is a very clear public interest in understanding which companies received these benefits, particularly if MPs or ministers had received donations from those companies.

[15] The Appellant argues inter-alia that the Commissioner could have matched the company names with the Electoral Commission political donations database. "*It is not clear the ICO has taken such a step. As the Commissioner did not set out the process taken."* In this way the Appellant suggests and alternative investigative method that might have been used in the Commissioner's investigation.

[16] This interest in whether companies exploited political connections at a time of crisis clearly outweighs the interests' companies have in anonymity. It is unlikely that companies with no questions to answer as to their inclusion on the list would be prejudiced.

[17] The conditions in question are unlikely to be replicated in future due to the unique conditions of the pandemic. The public is also likely to appreciate the situation so as to reduce any prejudice arising from disclosure.

The Commissioner's Response:

[18] The Commissioner maintained his position as outlined in the DN and resists the appeal. The Commissioner relies on his findings and reasons for those findings as set out in the DN. In relation to the Commissioner's conduct, the Commissioner's conduct of investigations is outside the scope of the Tribunal's considerations. As stated in the case of *Almeida v IC* EA/2009/0105 at [22]-[24]. Therefore, the Tribunal is requested to disregard those elements of the appeal.

[19] In response to section 43(2), the Commissioner noted that the public interest must be assessed as of the date of the final refusal of the request, per *R (Evans) v Attorney-General* [2015] UKSC 21 and *Maurizi v IC, CPS & FCO* [2019] UKUT

262 (AAC). The Commissioner accepted that there is a public interest in disclosing information related to the expenditure of public money, and that there is a strong public interest in the openness and transparency of decision-making by public bodies, including in the present case. The Commissioner also accepted that there is a strong public interest in understanding the degree to which political connections assisted companies in securing contracts during the crisis.

[20] Furthermore, the Commissioner accepts the relevance of the decision in *Good Law Project Limited v The Secretary of State for Health* [2022] EWHC 46 (TCC). However, the Commissioner does not accept that the quotation citied at No A§15 of the Open Bundle is compelling evidence for any significant, or indeed any, detriment to the overall conduct of PPE procurement during the crisis. Similarly, the Commissioner does not accept that there is no significant detriment to suppliers and DHSC from publication of unsuccessful bidders. In addition, there is likely in the Commissioner's view, to be speculation as to the reasons why suppliers were included in the High Priority Lane, which might well have a detrimental impact on their reputation and standing.

[21] The Commissioner noted that at the time when the public interest falls to be determined, the pandemic was still ongoing, and there was no guarantee that crisis procurement of PPE might not be required in the near future. Finally, as per the High Court's findings in *Good Law Project Limited v The Secretary of State for Health* [2022] EWHC 46 (TCC), there was only limited benefit to inclusion in the HPL, and the Commissioner does not consider the public interest in scrutiny of the process as regards unsuccessful bidders to be overwhelming. The Commissioner submitted that the balance of interests should be assessed as favouring the withholding of the information (as per the DN).

Appellant's Reply to the Commissioner's Response:

[22] The Appellant lodged a reply to the Commissioner's response on 10th March 2022. The Appellant argued that the Commissioner may have failed to conduct appropriate checks for malpractice or corruption before reaching his conclusion and that the there was no evidence of corruption or unsuitable companies on the list.

[23] Further the Appellant stated that the Commissioner appears not to have taken into account fully correspondence demonstrating the detrimental effect of the operation of the high-priority lane on PPE procurement generally at this time.

[24] The Appellant submitted that it appears unlikely that companies would face issues with being perceived as "poor suppliers" in all the circumstances if named as unsuccessful bidders.

[25] It is, he argued, inappropriate to rely on potential lack of nuance in media coverage as a reason to refuse disclosure.

The Second Respondent's Response:

[26] The Second Respondent agrees with the Commissioner's submission on the scope of the appeal that any criticism of the Commissioner's conduct of the investigation leading to the DN is legally irrelevant as er *Almeida v IC* EA/2009/0105.

[27] The DHSC agreed with the written submissions made on behalf of the Commissioner and made the following further submissions

[28] The DHSC submitted that the public interest must be assessed within the context of, and having regard to, the impact of the Covid-19 pandemic on the PPE market and related markets.

[29] The DHSC submitted that its extensive experience of public procurement enables it to assess,

a. the likely prejudice to the commercial interests of the unsuccessful bidders and to government; and

b. the likely reaction of those bidders who were unsuccessful to the proposed publication of their identities, without having contacted each of them to seek their views.

[30] The DHSC recognised the public interest in openness and transparency and being able to understand the UK's conduct of economic, industrial and commercial policy during the Covid-19 pandemic. It submitted that the publication which has taken place in this case, in respect of the awarded contracts, meets that public interest in accordance with the legal obligations to which it is subject, whilst balancing and respecting the commercial interests of the unsuccessful bidders.

[31] The DHSC does not accept that the disclosure of the identities of the unsuccessful bidders would materially further the public's understanding of the impact of the HPL on the wider procurement process. Even if, as the Appellant suggests, the "...*requests for consideration by VIPs placed additional pressure on officials trying to manage the procurement process*", such an effect would have resulted from the quantity of those bidders, which is information that has already been provided to the Appellant in response to his Request.

[32] Further, the DHSC submitted that the DHSC's publication of the successful bidders list already enables the Appellant (like any other interested party) to investigate those companies which were awarded contracts, to satisfy himself that there was no corruption involved in the operation of the HPL. The DHSC respectfully reminds the Tribunal that the High Court in the *Good Law Project Limited* cases did not make any findings to suggest corruption either.

[33] Further, in balancing the public interests, the DHSC does not accept that the possibility that an examination of the unsuccessful bidders list might reveal a supplier that had 'questions to answer', outweighs the commercial prejudice that

will be caused, or would be likely to be caused, to the several hundred companies that were referred through the High Priority Lane but were unsuccessful.

Appellant's Response to the Second Respondent:

[34] The Appellant suggests that there is evidence to indicate that in some cases offers provided to the high-priority lane were treated with "*undue priority*", and the offerors were able to lobby Government ministers.

[35] The Appellant considers that the suggestion in Mason 1 at paragraph 30 disclosure could negatively impact the quality and quantity of the Government's supplier base to the detriment of future procurement exercises "*catastrophisation*" which fails to take into account the unique circumstances of the pandemic and the time at which the high-priority lane was in use.

[36] The Appellant argues that the fact that certain businesses were unable to meet Government standards or requirements in the extreme circumstances of that time does not make it likely that they would suffer any reputational damage from disclosure as this would be perceived as due to a failure to meet certain specific requirements.

[37] The Appellant maintains that his criticisms of the Commissioner's investigation were not intended to allege any failure to follow due process, but merely to point out that a lack of subject specific knowledge could have led to the Commissioner to underestimate the public interest in disclosure.

[38] The Appellant contends that it is disingenuous for the DHSC to allege that public attention that the HPL has received, means there is a stronger case to withhold the Information. The attention followed revelations of how "*politically exposed persons*" benefited from the scheme, and strongly supports greater transparency and therefore disclosure of the Information.

[39] The Appellant states that it is not sufficient for the Government to disclose the volume of referrals which were not awarded contracts – or the nature of the referrals.

The Commissioner's Skeleton Argument:

[40] In relation to the application of the public interest test, the Commissioner referred to the Upper Tribunal's decision in *Montague v Information Commissioner and DIT* [2022] UKUT 104 (AAC). Following *Montague*, the relevant date for assessing the public interest test is 29 March 2021.

[41] This is particularly relevant in circumstances where, as here, the Appellant appears to ignore the timing of the Request. As of 29 March 2021, the UK was under lockdown, with certain restrictions easing on that date. There was no guarantee that further emergency measures would not be required in the near future. As such, the public interest test falls to be assessed against that background.

[42] The Commissioner adopted his arguments found in his response at paragraph 20 in relation to the need for openness and transparency. Further, the Commissioner accepted the conclusions of the High Court in *Good Law Project Limited v The Secretary of State for Health* [2022] EWHC 46 (TCC). However, the Commissioner does not accept that this case is compelling evidence for any significant, or indeed any, detriment to the overall conduct of PPE procurement during the crisis.

[43] The Commissioner considered that this conclusion is supported by the witness statement of Lucy Mason. In particular, and again as noted in the Commissioner's Response, the DHSC has provided evidence for significant detriment to suppliers and DHSC from publication of unsuccessful bidders. As noted by DHSC during the Commissioner's investigation, many of the suppliers in question operate in a highly competitive environment, and at the time when the public interest falls to be assessed, there was significant demand for PPE worldwide. Disclosure of the unsuccessful suppliers, given the high level of publicity received, would reveal that they had failed to meet the technical and commercial assurance processes for this exercise and would potentially adversely affect their ability to attract the financial services, investment and supply chain support from other businesses, which could go elsewhere, as well as their business opportunities for future sales and weaken their position relative to their competitors in future competitions, in the UK or otherwise. It does seem likely to the Commissioner that on the basis of Mason 1 and the evidence received during the Commissioner's investigation, there would be potential prejudice arising from disclosure in respect of any future pandemic-related efforts to procure PPE. The Commissioner also does not agree that there would be no harm to suppliers' reputations from disclosure.

[44] The Commissioner does not accept either that detriment arising from public scrutiny would solely be limited to those with "*questions to answer*", nor that; – in light particularly of the large amount of publicity any disclosure would be likely to receive – that public scrutiny and opinion would necessarily be balanced, and all the circumstances of the matter appreciated fully by the public.

[45] The Commissioner also does not accept the Appellant's criticisms of any reliance of the likely use that will be made of this information by the media. While the Commissioner in no way intends to impugn the journalistic integrity of the

Appellant himself, the information, once disclosed, is disclosed to the public generally and the world at large.

[46] Where, as per the High Court's findings in the *Good Law Project* case, there was only limited benefit to inclusion in the HPL (and no advantage at the actual decision-making stage), the Commissioner does not consider the public interest in scrutiny of the process as regards unsuccessful bidders to be overwhelming, as suggested by the Appellant.

The Second Respondent's Skeleton Argument:

[47] The Second Respondent agrees with the Commissioner's submission on the scope of the appeal that any criticism of the Commissioner's conduct of the investigation leading to the DN is legally irrelevant as er *Almeida v IC* EA/2009/0105.

[48] The DHSC submitted that its extensive experience of public procurement enables it to assess:

a. the likely prejudice to the commercial interests of the unsuccessful bidders and to government; and
b. the likely reaction of those bidders who were unsuccessful to the proposed publication of their identities, without having contacted each of them to seek their views.

[49] The Second Respondent further submitted that the release of the withheld Information would be likely to deter some suppliers from participating in and competing for future opportunities, due to the risk of adverse publicity unrelated to the terms of their contracts, or their ability to deliver contracted outcomes. In turn, this risk to reputation is likely negatively to impact the quality and quantity of the Government's supplier base by deterring companies from making bids for Government contracts in future. This could potentially lead to higher prices for essential equipment and services and/or a lack of availability of suitable equipment and services.

[50] The department submits that if details concerning the unsuccessful bidders were to be disclosed on this occasion, there is a significant risk that suppliers may decline to engage with Government in future exercises, which is of particular concern in the context of a potential future need for health and safety equipment, such as PPE.

[51] The DHSC submits that the publication which has taken place in this case, in respect of the awarded contracts, meets the public interest in accordance with the legal obligations to which it is subject, whilst balancing and respecting the commercial interests of the unsuccessful bidders.

[52] The DHSC submits the disclosure of the identities of the unsuccessful bidders would not materially further the public's understanding of the impact of the High Priority Lane on the wider procurement process. Even if, as the Appellant suggests, the *"...requests for consideration by VIPs placed additional pressure on officials trying to manage the procurement process",* it is submitted such an effect would have resulted from the quantity of those bidders, which is information that has already been provided to the Appellant in response to his Request.

[53] It is further submitted that the DHSC's publication of the successful bidders list already enables the Appellant (like any other interested party) to investigate those companies which were awarded contracts, to satisfy himself that there was no "corruption" involved in the operation of the HPL. The DHSC respectfully reminds the Tribunal that the High Court in the Good Law Project Limited cases did not make any findings to suggest "corruption" either.

[54] Further, in balancing the public interests, the DHSC does not accept that the possibility that an examination of the unsuccessful bidders list might reveal a supplier that had 'questions to answer', outweighs the commercial prejudice that would be caused, or would be likely to be caused, to the several hundred companies that were referred through the HPL but were unsuccessful.

The Evidence:

[55] The Tribunal heard at length from Ms. Lucy Mason, Commercial Deputy Director within the DHSC, responsible for heading up the Departments' strategic procurement team and who since April 2022 has become responsible for commercial assurance, policy, systems, and intelligence.

[56] Ms. Mason explained that following the review, the DHSC changed its position regarding paragraph 2 of the Appellant's request, publishing the list of successful bidders on 17 November 2021. She explained in her evidence to the Tribunal: *"We were very much in the thick of the emergency, and extremely high demand for PPE".* She explained*: "In my 20 years I have never experienced anything like this - - ".* Ms. Mason also conceded that transparency and accountability are a matter of concern and are a matter that may require disclosure in the Public Interest. These factors, in the review, resulted in the unusual position to decide to publish the list of successful bidders and details relating to their referrals.

[57] Ms. Mason explained this publication was to demonstrate the DHSC's commitment to openness about procurement processes during the pandemic by going above and beyond the standard transparency obligations.

[58] Ms. Mason stated that the DHSC has extensive experience of public procurement and does not usually publicise the names of unsuccessful bidders as a matter of course – it is also not required to do so under the Public Contracts Regulations 2015 (the "PCR"). Further, that the DHSC also respects the fact that even successful bidders involved in a procurement process can have a legitimate interest in keeping parts of their bids confidential, and work with them to support this where possible. She explained that the Department respect confidentiality and primarily regards the information provided in applications as the applicants' information.

[59] However, in considering what information should not be released when the contracts are published on Contracts Finder, the DHSC follows the PCR and Cabinet Office guidance by redacting from these published versions information on payment terms, delivery schedules and suppliers' costing mechanisms that could allow others to deduce unit pricing, discounts and pricing strategies, the disclosure of which would weaken a suppliers' competitive advantage when bidding on future contracts. The DHSC does, however, recognise that it is subject to FOIA and that it is obliged to disclose information if requested, subject to the various exemptions contained in the Act. In doing so, the DHSC considers each request individually on its own merits.

[60] In relation to the HPL, Miss Mason stated that as of June 2020, when the peak of COVID-19 had passed, all the procurement routes were closed down. Further, concerning the HPL mailbox, Miss Mason stated that all offers that came to the mailbox were triaged by an official from the high-priority appraisals team to be processed and responded to.

[61] All offers, regardless of the route through which they were identified, underwent rigorous financial, commercial, legal and policy assessment, led by officials from various government departments as part of the PPE Cell. End to end, the process of assessing an offer and awarding a contract was led by officials on the basis of published specifications and commercial expertise. Being referred to the high-priority lane was emphatically not a guarantee of a contract; indeed, nearly

90% of offers referred through this route were unsuccessful. Those to whom contracts were awarded helped enormously, securing more than 5 billion items of PPE for the frontline.

[62] In relation to the likely prejudice to Government's own commercial interests, Miss Mason stated that release of the requested information would be likely to deter suppliers from participating in and competing for future opportunities as they would potentially face adverse publicity unrelated to the terms of their contracts or ability to deliver contracted outcomes. This would therefore negatively impact the quality and quantity of the Governments' supplier base, potentially leading to higher prices for essential equipment and services and/or lack of availability of suitable equipment and services. The DHSC, and indeed Government, must retain commercial confidence of third-party potential suppliers when they choose to engage in commercial activities with us. The release of this information may jeopardise this commercial confidence thus impairing commercial relationships to the detriment of future procurement exercises.

[63] Ms. Mason was of the view that the information they provided, and their expectations of how this would be handled, including decisions about whether they would be 'named', are much the same but with the additional factor of being forever associated with the PPE - 'HPL'. When questioned further on this she specifically explained that this can potentially have effects on the markets they are working in, or hoping to deal in, in the future. Ms. Mason was unable to say who other than ministers knew of the priority lane mailbox and could therefore forward referrals.

[64] Ms. Mason maintained that there is sufficient evidence to reach the view that disclosure of the list of unsuccessful bidders would prejudice the interests of the relevant suppliers without engaging with each of them to seek their views.

[65] Ms. Mason indicated regarding the commercial interests of suppliers, that it is the DHSC's view that disclosure of the names of the 'unsuccessful' suppliers, and in turn the knowledge that their offerings to Government had been rejected, would be likely to harm the business reputation of those suppliers. The reasons suppliers were not successful were varied, ranging from failure to meet particular specification requirements for specific products to failure to demonstrate adequate financial standing. Many of the suppliers referred to the HPL operate within a very competitive commercial environment, in which other suppliers of PPE or related products are seeking to sell these products to Government departments and other bodies, both in the UK and abroad.

[66] Ms. Mason testified that the DHSC noted that to support the above, the onus rests with the DHSC to evidence that the exemption is engaged. The DHSC also noted that it is not always necessary to contact suppliers for evidence in this regard. The DHSC considered this very carefully and, in this case, they consider that it would; not be practical to contact the unsuccessful suppliers. This was for two reasons:

(i) There are about 400 suppliers, which is many more than would have been invited to submit bids in response to a standard Government competitive tender exercise. It would be impractical to write out to all these unsuccessful suppliers, await and process responses and deal with the inevitable queries and subsequent correspondence.

(ii) Linked to the above, is that there has been widespread coverage in the media about the operation of the high priority lane and the "open-source" approach for this PPE procurement exercise, using mainly direct contract awards - i.e., without the usual advertised competitive tender - which is an option under the Public Contracts Regulations in cases of extreme urgency. This has led to questions and in our view misrepresentations about its fairness and transparency, which is likely to mean that suppliers are far less likely to provide impartial and reasoned views on the matters

we would be asking them about and are more likely to want to engage on wider issues which would be irrelevant to this exercise.

[67] Ms. Mason explained that on balance, the DHSC considered that there was sufficient evidence for them to reach the view that disclosure of the information requested would indeed be likely to prejudice the commercial interests of the relevant suppliers without contacting them to seek their views in this instance. This evidence is founded on the DHSC's and the Government's experience of engaging with all potential suppliers of PPE – not just unsuccessful ones - throughout the pandemic. Suppliers often did not know that they had been placed in the HPL– in many cases they had simply sent an email, which had been forwarded to the HPL mailbox and someone then contacted them as discussed above this was an internal management process. If suppliers did not know they were in the HPL, then it was regarded as unfair for their name to be forever linked to the HPL in a way which would negatively impact on their business and commercial reputation when they voluntarily put themselves forward to help at a time of crisis.

Conclusions:

Is S43(2) engaged?

[68] We find it unfortunate that there was no first-hand evidence from those companies on the withheld list of the likely harm of disclosure. We were not persuaded that it was impractical to seek the views of those on the list. A bulk email could have been sent to all 400 (perhaps with a FAQs to reduce the number of follow-up queries). We did, however, accept the point that a random survey could disadvantage those who were not asked for their views.

[69] In the absence of any first-hand information from those on the withheld information list (Closed Bundle), we noted from the evidence of Ms. Mason that she was aware of 2 or 3 of the successful bidders who had been adversely affected by their inclusion in the HPL and were therefore persuaded by her evidence that unsuccessful bidders, particularly smaller ones who were less likely

to have sophisticated PR arrangements, would be likely to be similarly adversely affected by disclosure.

[70] The Appellant wishes to scrutinise the companies in the HPL, and expose any perceived or actual cronyism, political interference, wrongdoing etc. which would be damaging for those involved. Even where such scrutiny is justified, it doesn't mean that the companies involved won't suffer harm or that those not involved will not have their reputation tarnished by their connection to the HPL. We do not accept that those with nothing to hide will not be affected by the disclosure, particularly in this era of social media and the high profile pertaining at the relevant time.

[71] In response to questions from the Tribunal, the Appellant conceded that in other circumstances the release of unsuccessful bidders' identities would not be reasonable. This the Tribunal acknowledge, and on all the evidence before us find that there is in effect a general acceptance that some adverse effect would be likely to occur on disclosure of the withheld information.

[72] In conclusion, we find that S43(2) is engaged for the companies on the withheld information list, as disclosure would or would be likely to adversely affect their commercial interests, even if it is only a small number or even just one.

[73] We were less persuaded that the DHSC's interests would be harmed by disclosure. It seems to us that companies are not less likely to bid for Government contracts, either generally or in a crisis, simply because their identity as an unsuccessful bidder is made public. The examples provided by Ms. Mason of an exceptionally competitive market, where prices were soaring and shipments being '*gazumped'* on the runway, are related to the global nature of the pandemic and it seems unlikely to us that disclosure would discourage bidders from coming forward in future in response to a '*call for arms'* or in more normal times. Companies who bid for public contracts will be aware of the public nature of that business.

The Public Interest Test:

[74] Factors in favour of disclosure;

- There is broad public interest in understanding the Government's response to the pandemic and the handling of PPE purchasing.
- Transparency around the HPL and whether it had an impact on the broader PPE process.
- The Good Law case has found the HPL to be unlawful, although has not identified any wrongdoing, so there is public interest in scrutinising the HPL process further.
- Allowing scrutiny by investigative journalists and others to understand how and why companies were referred to the HPL.
- As it was such exceptional circumstances it is unlikely to set a precedent for future similar requests.
- The requester identifies FOI as an anti-corruption tool.
- Defamation action through the courts would be available to those who were subject to inaccurate harmful speculation as a result of the disclosure.

Factors in favour of withholding the withheld information.

- The reasonable expectation of the companies on the list – the Department Policy - is that the names of unsuccessful bidders are not published.
- There is no obligation to publish information under the Public Contracts Regulations or other transparency legislation.
- The Department has already published a list of those who received contracts that came through the HPL, including the sponsor/referrer which is above and beyond what is required.
- The unsuccessful bidders have not received any contracts or public money but would still be associated with a controversial process.
- The companies are likely to be subject to negative reporting, particularly following the findings in the Good Law Case, which would cause reputational damage and subsequent adversely affect their commercial interests, whether justified or not, e.g., share price, ability to gain contracts, raise finance etc.
- All bidders in the HPL were subject to the same credibility filter as those not referred to the HPL and the majority did not receive contracts. They did not get any special treatment, only earlier consideration.

- Some were unaware that they were in the HPL.
- The number of companies in the HPL has been disclosed, regardless of whether they received orders, therefore it is argued that that is sufficient information to understand the impact of the HPL on the overall process.

[75] Fundamentally, it's a balance between the public being able to scrutinise the handling of PPE purchasing during the pandemic, and in particular the operation of the HPL versus the interests of the companies who did not receive a contract or any benefit from the HPL and may not even have been aware they were in the HPL and who have a reasonable expectation that their involvement would not be made public. Further there is no evidence of wrongdoing or malfeasance before us. We find there is insufficient evidence to persuade us, on the facts of this case, that on balance it is in the public interest to disclose the withheld information.

[76] We are even more convinced this is the position because of the exceptional circumstances pertaining in the urgent need for procurement. The Second Respondent has taken the unusual step of releasing the names of the successful candidates and further the names of their referees. Furthermore, in all these circumstances, there is no evidence before us of any wrongdoing or exposure of any perceived or actual cronyism, political interference, etc.

[77] We accept the Public Interest test is on a fine line in this case but for the above reasons are satisfied that the balance lies in favour of withholding the withheld information. This is particularly so considering the review when it was decided to release significant information about the successful bidders.

[78] We find no foundation for the comparison of the Commissioners conduct of his investigation with alternative methods as might be used by an investigative journalist and in any event agree if such conduct were to be criticised it is not a matter for this Tribunal.

[79] For all the reasons above we find that the Commissioner has not erred in Law nor on the Facts, and nor do we find any error in the exercise of his discretion, in the impugned DN and accordingly we must dismiss this appeal.

Brian Kennedy QC 12 September 2022.

Promulgation Date : 14 September 2022