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*SUMMARY: The **first section** provides a general introduction to the legal and regulatory framework applying to public procurement*

*The **second section** provides a high level overview of established processes together with some general observation on weaknesses in the system.*

*The **third section** highlights how these weaknesses were exploited during the COVID-19 crisis and how this exploitation has both damaged the public procurement profession<sup>1</sup> and undermined public faith in the procurement process.*

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## INTRODUCTION

Government contracts are estimated to account for around 12% of GDP, creating a lucrative source of income for business. The rules on public procurement serve several roles. They provide predictability, transparency and accountability, alongside ensuring the efficient use of public money, as well as ensuring fair access to the market for public contracts. To achieve an understanding how *normal* UK public procurement practices were impacted by COVID – 19, the PAC should familiarise itself with operational practices and the complexities that professional procurement practitioners are required to manage in their working environment.

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<sup>1</sup> See Melanie Phillips, Covid cronyism shows state machine is broken, *The Times*, November 24 2020.

## SECTION 1: THE LEGAL AND REGULATORY FRAMEWORK

Public procurement in the UK is regulated through The Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016. The Regulations are complemented by a myriad of Handbooks and Guidance Notes and the intertwined application of legislation such as the Equality Act 2010, Public Services (Social Value) Act 2012 and The Local Government (Transparency Requirements) (England) Regulations 2015. These domestic measures implement and enhance the underpinning EU regulation of Public procurement.<sup>2</sup> The UK was influential in the final shape of the EU rules, winning concessions for a “light touch” approach where social and health care services are involved.

Effective Public procurement is at risk of harmful anti-competitive practices and the interaction of procurement and competition (anti-trust) rules has increased in importance. Some forms of anti-competitive conduct such as collusive tendering (bid-rigging<sup>3</sup>) may infringe Article 101 TFEU (implemented by Chapter I of the Competition Act 1998) and may attract criminal sanctions in some countries.<sup>4</sup> In the UK, for example, *individuals* can be prosecuted under the Enterprise Act 2002.

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<sup>2</sup> Public Procurement is regulated through secondary legislation in the EU and does not have a specific EU Treaty base. Public procurement is designed to complement the implementation of an Internal Market and ensure fair competition in the E. The EU legal base underpinning the UK regulation is found in a series of Directives: Public Sector: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Concessions: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Utilities: Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Public procurement is also subject to the World Trade Organisation Government Procurement Agreement. The specific EU Public Procurement laws are enhanced by the application of the four core freedoms of the Internal Market: free movement of goods, services, persons and capital. Also the General Principles of Law apply. These include equality of treatment, non-discrimination transparency, mutual recognition and proportionality. This fact is acknowledged on the Government website: <https://www.gov.uk/guidance/public-sector-procurement-policy>.

<sup>3</sup> The most usual forms of bid rigging involve: Bid rotation (Suppliers may take it in turns to submit the lowest bid. Possible rotation criteria include project size, project location, participant size, or chronological order); Cover pricing or complementary bidding (Suppliers agree to submit artificially high bids, or bids that do not meet the tender criteria or will in some other way make them almost certain to be excluded from the tender; Bid suppression; Suppliers might agree, or be forced into, not submitting a bid, to ensure that a predetermined bidder wins; Subcontracting (risk sharing agreements);. The successful bidder will agree to subcontract to their ‘competitor’ at a later date as compensation for ‘losing’ the bid.  
See: <https://www.oecd.org/competition/cartels/42851044.pdf>

Other forms of anti-competitive behaviour may involve mergers of suppliers in small markets or the use of subsidiary companies to break up bids that interest a parent company.

Anti-competitive conduct may result from a dominant position (often a monopsony) on the demand side where there is one, or small number of strong buyers of products. The abuse of a dominant position would infringe Article 102 TFEU (implemented by Chapter II of the Competition Act 1998), but there may be possibilities of a justification for the abuse, for example in an emergency, creating an unusual market, or where it can be shown that a *Service of General Economic Interest* is involved.

The award of a public contract for a public service obligation (psa) may also attract attention from the state aid rules, found in Articles 107-109 TFEU. Following the *Altmark*<sup>5</sup> ruling it is possible to avoid the application of the state aid rules where certain criteria are met:

1. *The recipient undertaking is required to discharge psa and those obligations have been clearly defined;*
2. *The parameters to calculate the compensation have been established beforehand in an objective and transparent manner;*
3. *The compensation does not exceed the costs incurred in discharging the psa obligations, taking into account ... a reasonable profit;*
4. *Where the undertaking required to discharge the psa is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.*

Procurement for healthcare and social activities may be outside the reach of competition law where the activity is classified as a non-economic activity or the undertaking concerned is not classified as an economic entity, for example where it is exercising public powers.<sup>6</sup> Where the procurement activity is a purely social activity it may be classified as a *Social Service of General Interest* and the competition rules are switched off. Broadly speaking, the provision of healthcare services for a national healthcare

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<sup>4</sup> Most notably the United States, Germany and Japan.

<sup>5</sup> C-280/00, EU:C:2003:415.

<sup>6</sup> *Aanbestedingskalender BV, et al v European Commission*, C-687/17P ECLI: EU: C:2019:932.

scheme, or one complementing a national health care scheme based on the principle of solidarity,<sup>7</sup> has attracted protection either by a finding that activity is not economic in nature, or under the definition of a SGEI/SSGI: a safe harbour from the full application of the competition rules.

It should also be noted that the European Commission recognised the need for aid to be granted to develop medical and health responses to the COVID-19 pandemic and provision is made for such responses in the State aid ***Temporary Framework to support the economy in the context of the coronavirus outbreak.***<sup>8</sup>

## SECTION2: OVERVIEW OF ESTABLISHED PROCUREMENT PRACTICES

### 2.1. The Procurement Legal Framework

The regulatory framework governing the procurement of goods and services in England, Wales and Northern Ireland, above a specified financial threshold,<sup>9</sup> is firmly established in the Public Contracts Regulations 2015 (PCR2015).<sup>10</sup> Governance for controlling procurement processes below the PCR 2015 thresholds is usually established in a Contracting Authority's Standing Financial Instructions (SFI), an important manual that specifies mandatory rules that apply to a range of financial controls, including Procurements.

Procurement practitioners must adhere to both the statutory procurement regulations and the SFI and should pay due regard to other domestic legislation including the Small Business Enterprise and Employment (SBEE) Act 2015 alongside legislation dealing with late payments, energy efficiency, equality, Social value and local government transparency.

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<sup>7</sup> See *FENIN v European Commission*, Case C-205/03 P ECLI:EU:C:2006:453; *Commission and Slovak Republic v Dôvera zdravotná poisťovňa, a.s.* Joined Cases C-262/18 P and C-271/18 P ECLI:EU:C:2020:450;

<sup>8</sup> [Competition - State aid - State aid rules and coronavirus - European Commission \(europa.eu\)](#). For eg the European Commission approved a €23 million Dutch scheme to support certain providers of social support and health care in offering services at home during the coronavirus outbreak. SA.56915.

<sup>10</sup> Public Contracts Regulations 2015, SI 2015/102 (PCR2015). 2020 thresholds for Supplies & Services Schedule 1 bodies £122,976, other public bodies £189,330. For Works (including subsidised works contracts) all bodies £4,733,252. For the Light Touch Regime for Health and Social Care Services all bodies £663,540.

## 2.2 Procurement Policy

In the UK, public bodies delivering public services generally set their own procurement policy which reflect the services and functions they provide. There is an overarching requirement to comply with the fiscal principles and controls provided in the HM Treasury Publication *Managing Public Money*<sup>11</sup> which sets out how public resources are to be managed.

The UK Parliament grants the powers to “raise, commit and spend resources”<sup>12</sup> and Ministers for each of the government departments are responsible for managing their own department’s budgets and procurement policy. HM Treasury provides the link between Parliament and government departments and is responsible for negotiating and allocating departmental budgets as well as holding Ministers to Account for spending.

Government Ministers are also required to comply with the corporate governance code in central government departments *Code of good practice*<sup>13</sup>. This Code places obligations on Ministers to ensure that effective corporate governance is in place for their departments. It complements the principle in *Managing Public Money*.

The Crown Commercial Service (CCS), an executive agency, sponsored by the Cabinet Office<sup>14</sup> is a centralise procurement agency that is responsible for sourcing a range of common goods and services used across the whole of the public sector, maximising volume leverage and value for money.

Using framework agreements,<sup>15</sup> CCS has enabled public sector Contracting Authorities to call off commonly used goods and services without having to run their own full procurement

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<sup>11</sup> HM Treasury, *Managing public money* (OGL July 2013 with annexes revised as at September 2019). <https://www.gov.uk/government/publications/managing-public-money>

<sup>12</sup> Ibid 1.0 – 5.

<sup>13</sup> HM Treasury, *Corporate governance in central government departments: Code of practice* (HM Government 2017).

<sup>14</sup> Crown Commercial Services operate as a trading fund under the Government Trading Funds Act 1973.

<sup>15</sup> A procurement framework is an agreement put in place with a provider or range of providers that enables

process. The use of the CCS frameworks is discretionary, except for central government departments that are mandated to use them for certain specified products or services.

Outside of central government departments, public sector organisations have adopted their own procurement policies. For example, Local Government Authorities' procurement policy will be specific to the needs of residence and businesses residing within their geographical boundaries. Similarly, Police and Crime Commissioners will focus on procurement policy that support policing and crime prevention activities in their local areas.

The National Health Service (NHS) has the largest budget<sup>16</sup> of all government departments. Therefore it is constantly subjected to commercial scrutiny to provide the necessary value for money assurances. A 'free at the point of use' NHS is seen by many citizens as 'untouchable' and, as the response to the COVID-19 crisis has proven, this principle continues to enjoy the support of the majority of the public. However, the NHS, like any other national health-based service, will be expected to evolve to meet demographic challenges and technological advancements in healthcare practices. This will mean that it will need to consider adopting new business models that will attract significant levels of media and political scrutiny, particularly where this may include privatising some parts of the service.

This complex commercial and political environment means NHS procurement policy is currently implemented nationally from the Department of Health and Social Care, NHS England or Public Health England as well as locally by NHS Trusts for secondary care and Clinical Commissioning Groups for Primary Care. The outcome of which is often inconsistent, confusing and disruptive policies that hinder cross- agency working.<sup>17</sup>

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buyers to place orders for services without running lengthy full tendering exercises.

<sup>16</sup> Planned spending for the Department of Health and Social Care in England (prior to the COVID-19 Crisis) was £140.4 billion in 2019/20, The Kings Fund <https://www.kingsfund.org.uk/projects/nhs-in-a-nutshell/nhs-budget>.

<sup>17</sup> For example, a lack of advance planning and a lack of a joined-up strategy for the procurement of PPE in health and social care during the COVID-19 crisis. The Report by the National Audit Office *The supply of personal protective equipment (PPE) during the COVID-19 pandemic*, November 25, 2020 found that the lack of preparedness, alongside the increased global demand for PPE resulted in the Government paying an inflated price of over £10 billion for emergency supplies. Not only did the Government pay inflated prices there were issues of unsuitability as well as the fact that millions of pounds-worth of PPE will not be used for the original

## 2.3 Coal Face Procurement Practice

Procurement practice in each of the central government departments is controlled by one or more Commercial Directors and their reporting directorates. They are tasked with delivering programmes of work dictated by their department's ministerial agendas and supporting policies. Oversight of departmental commercial activities is provided by the Government Chief Commercial Officer<sup>18</sup> and support to the departmental Commercial Directors is provided by Government Commercial Function <sup>19</sup>(GCF) experts.

Outside of central government departments there is a mixture of procurement models and practices. These include a Contracting Authority's own stand-alone procurement function, outsourced services,<sup>20</sup> collaborations,<sup>21</sup> Inter Authority Agreements,<sup>22</sup> regional/national purchasing agencies<sup>23</sup> and purchasing consortia.<sup>24</sup>

The 2008 financial crisis and the UK's austerity programme, implemented as part of the recovery phase, firmly established procurement as a tool for driving out non-essential public sector expenditure. The need to rigorously apply a bureaucratic business case approval and

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intended purpose.

<sup>18</sup> The Government Chief Commercial Officer reports directly to the Chief Executive of the Civil Service.

<sup>19</sup> The Government Commercial Function is part of the Cabinet Office and is a cross-government network consisting of civil servants procuring, or supporting the procurement of goods and services for government.

<sup>20</sup> For example, the 5 Council (Hart District Council, Havant Borough Council, Mendip District Council, South Oxfordshire, and the Vale of White Horse District Councils) agreement with Capita and Vinci [https://www.hart.gov.uk/sites/default/files/4 The Council/About the council/5 councils/5C%20marketing%20brochure%201016.pdf](https://www.hart.gov.uk/sites/default/files/4%20The%20Council/About%20the%20council/5%20Councils/5C%20marketing%20brochure%201016.pdf) .

<sup>21</sup> For example, Hampshire County Council, Hampshire Constabulary, Hampshire Fire and Rescue and the Office of the Police and Crime Commissioner <https://www.hants.gov.uk/business/procurement> accessed 29 May 2020.

<sup>22</sup> For example, the Orbis Partnership between Brighton and Hove City Council, East Sussex County Council and Surrey County Council <https://www.orbispartnership.co.uk/> .

<sup>23</sup> For example, NHS Supply Chain <https://www.supplychain.nhs.uk/about-us/> .

<sup>24</sup> For example, the Southern Universities Purchasing Consortium (SUPC) which is an operating unit of Southern Universities Management Services, a Company limited by guarantee [www.supc.ac.uk](http://www.supc.ac.uk) .

procurement process in the immediate aftermath of the crisis, followed by the introduction of the government's lean procurement policy in 2012,<sup>25</sup> led to a 'silo working' culture in many public sector organisations, where engagement with procurement professionals was restricted to the management of the procurement process.

The lack of cross organisational engagement with procurement professionals has resulted in a dilution of skills and competencies within organisations procurement functions as well as fostering a transactional approach to sourcing. Historically, experienced procurement professionals have provided an important critical challenge in the business's decision-making process and been a good source of innovative thinking, which may also have been lost since 2008.

### 3. The Impact of COVID-19 on Public Procurement

#### 3.1 Government Procurement policy initiatives in response to COVID-19

On 18 March 2020 the UK Government issued guidance, in the form of a Procurement Policy Note (PPN), on the use of "extreme urgency" provision within the PCR2015 as a response to the COVID-19 outbreak.<sup>26</sup> The guidance confirmed a series of procedures that Contracting Authorities could apply during the COVID-19 emergency. These included:

- *The use of the negotiated procedure without prior publication of contracts due to extreme urgency under regulation 32(2)(c)<sup>27</sup> of the Public Contract Regulations 2015;*

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<sup>25</sup> Crown Commercial Services, Lean sourcing: guidance for public sector buyers which stipulated that all except the most complex procurements should take no longer than 120 days for advertising the opportunity to contract award decision date. Published 31 July 2012, last updated 29 June 2015 [www.gov.uk/government/publications/lean-sourcing-guidance-for-public-sector-buyers](http://www.gov.uk/government/publications/lean-sourcing-guidance-for-public-sector-buyers) .

<sup>26</sup> Cabinet Office, *Procurement Policy Note: Responding to COVID-19*, PPN01/02 (Cabinet Office 2020).

<sup>27</sup> The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts 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.



- *The use of the negotiated procedure without prior publication due to absence of competition or protection of exclusive rights under regulation 32(2)(b);*
- *Call off from an existing framework agreement or dynamic purchasing system under regulations 33 and 34;*
- *Call for competition using a standard procedure with accelerated timescales under regulations 27, 28 and 29;*
- *Extending or modifying a contract during its term under regulation 72(1)(c).*

The PPN outlined four tests that contracting authorities must have met before entering into contracts without competing or advertising the requirement. These tests were:

1. *There are genuine reasons for extreme urgency, eg: the contracting authority needs to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc; they are reacting to a current situation that is a genuine emergency - not planning for one.*
2. *The events that have led to the need for extreme urgency were unforeseeable, eg: the COVID-19 situation is so novel that the consequences are not something the contracting authority should have predicted.*
3. *It is impossible to comply with the usual timescales in the PCR2015, eg: there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation and there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.*
4. *The situation is not attributable to the contracting authority, eg: they have not done anything to cause or contribute to the need for extreme urgency.*

When undertaking the tests, the PPN placed requirements on contracting authorities to “keep a written justification that satisfies these tests” and to carry out “separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable”.

On 20 March 2020, the government published a second PPN.<sup>28</sup> This PPN provided guidance on the payment of suppliers to ensure service continuity during, and after the COVID-19 emergency. It stated that contracting authorities must take immediate action to “ensure suppliers at risk are in a position to resume normal contract delivery once the outbreak is over”.

The PPN required **contracting authorities to capture changes in payment terms through a contract variation or change note**. These should include a review provision or, time limit, and make clear that the changes relate only to the COVID-19 emergency and that the contracting authority decision on when things should return to normal is final.

These PPN’s were designed to send out a positive political message to show the public and business that the Government were doing everything possible to support the economy at a time of national crisis. However, it is likely that they had a negative impact on many organisational sourcing practices, simply because of the way the message was communicated. The publication of these Notices led many people to interpret them as government authorisation allowing them to defer or relax established procurement practices, local procurement controls and therefore traditional oversight of public expenditure.

In publishing the Notices, the Cabinet Office communication strategy had not understood that most Public Authorities outside of Government Departments have a more devolved structure for sourcing goods, works and services. Some had strong centralised procurement governance and oversight arrangements and others, due to the government’s austerity programmes, had deskilled their centralised procurement function in favour of their Head of Directorates, Departments or Divisions providing assurances that robust governance was being applied to all sourcing activities.

PPN 01/20, is written in a style that is difficult to interpret for anyone from a non-procurement background. It is likely to have been at best, noted, or at worst, ignored by most non-procurement management teams. It is most likely that the PPN would be interpreted as the Government relaxing normal tendering processes and allowing public bodies to adopt direct

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<sup>28</sup> Cabinet Office, *Procurement Policy Note: Supplier relief due to COVID-19*, PPN 02/20 (Cabinet Office 2020).

awards on everything they needed to meet the pressures of the COVID-19 pandemic, regardless of whether it met the compliance tests described in the Notice.

By publishing the PPN, suppliers would also have been quick to identify opportunities to avoid normal tendering processes and some of the less professional businesses would have immediately started to lobby or influence public sector clients to place direct award contracts that should normally have been subject to competitive tendering. It also opened the door to possible cronyism, influencing contract awards or promoting the extension to existing contracts.<sup>29</sup>

Following closely on the heels of PPN 01/20 came PPN 02/20 which, in summary, was an instruction to pay suppliers immediately on receipt of invoices and reconcile them later. This was designed to help businesses maintain cash flow during a period of significant economic stress. While the intention was well meaning, *unintentionally* it added to the procurement practitioner's problems. It was not recognised that human nature has a habit of parking administration requirements on the back burner when times are busy; reconciling invoices and procurement paperwork often ended up being missed, or on many occasions, ignored. A mentality of "*we have received the goods and the supplier has been paid so we don't need to worry*" soon takes over in busy departments or directorates and it is often left to procurement practitioners to try and retrospectively sort these issues out, especially when Audit becomes involved.

Yet the procurement rules are clear. The use of an exemption from standard procedures must be where exceptional circumstances occur, and as an exemption must be construed narrowly.

Any exemption from the normal rules may apply only to procurement that is *directly linked* to

<sup>29</sup> See Melanie Phillips, *Covid cronyism shows state machine is broken*, The Times, November 24, 2020.

<sup>30</sup> OJ 2020 C1081/1. See: Prof Albert Sanchez-Graells, [European Commission's Guidance on Extreme Emergency Procurement and COVID-19 -- some thoughts and a word on the Dyson contract: https://www.howtocrackanut.com/blog/2020/4/1/european-commissions-guidance-on-extreme-emergency-procurement-and-covid-19-some-thoughts](https://www.howtocrackanut.com/blog/2020/4/1/european-commissions-guidance-on-extreme-emergency-procurement-and-covid-19-some-thoughts) and Professor Pedro Telles, *Commission's Guidance on the use of the public procurement framework in the COVID-19 crisis*, <http://www.telles.eu/blog/2020/4/1/commissions-guidance-on-the-use-of-the-public-procurement-framework-in-the-covid-19-crisis>.

the extremely urgent need, and the scope of the directly awarded contract needs to be proportionate to that need. If the Government was in any doubt about the interpretation of the procurement rules the European Commission published its [\*Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis\*](#) on 1 April 2020.<sup>30</sup>

Eight months have passed since these two PPNs were issued and the full impact of how they were interpreted and applied is now being felt across the wider public sector. There are a number of legal challenges underway, led by *The Good Law Project*,<sup>31</sup> and media scrutiny is high in reaction to alleged cronyism in the direct award of public contracts. This is also likely to be an area of possible weakness identified in Audit reports over the coming months.

The open publication of PPN of 01/20 was not required because most professional public procurement practitioners are aware of the Regulation 32(2) (c) “Extreme Urgency” provision in the Public Contracts Regulations 2015 and would have been in a position to test procurements against the established criteria. They would have applied the eligibility criteria properly and in the most expedient way, ensuring a reasonable level of governance was used to assure public money was being spent wisely.

The open publication of the PPNs significantly undermined procurement authority and would have been seen as an opportunity for more senior level managers, or those with more dubious personal agendas, to take advantage of what many consider a complete relaxation of procurement governance.

The more considered approach would have been for the Cabinet Office to issue a confidential communication to all public sector Chief Financial Officers reminding them that the use of the “extreme urgency” provisions, whilst acceptable, also needed to be used in a managed environment run by their procurement team, with oversight from Finance in order to control maverick expenditure, ensure a reasonable level of compliance and maintained auditable records of each direct award. This would have restricted the ability of senior level managers

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<sup>31</sup> <https://goodlawproject.org/#cases>

and politicians in the organisation from misinterpreting the regulations and wrongly apply the criteria for the direct award of contracts.

The resultant free-for-all that followed the publication of these PPNs has left many procurement practitioners with a significant amount of retrospective governance and Audit work to wade through and some will still be suffering from a level of continued local non-compliance in procurement activities.

### 3.2 Political Interference during COVID -19

Political interference in major procurement projects has always been active in governments across the world. It is recognised that ill-judged political interference often leads to poor project outcomes, there are few solutions put forward for managing the problem. High levels of transparency and oversight at every stage of a major project lifecycle is generally adopted by the UK government as the principle mechanism for providing project assurance and there is increasing media/social media and public scrutiny on the rationale for political decision making.

A report titled *Political and other forms of corruption in the attribution of public procurement contracts and allocations of EU funds: extent of the phenomenon and overview of practices* by the EU Directorate General for Internal Policies, Policy Department D: Budgetary Affairs in 2013<sup>32</sup> suggested that while there is legal recourse available to suppliers to challenge unfair public procurement processes there is little protection for public procurement practitioners from political interference. Little has changed in the last seven years and the behaviour of some political actors has clearly been challenging during the COVID-19 crisis.

Political interference during the crisis seems to be more prominent at the supplier acquisition stage of a public procurement. The *Report of the National Audit Office* confirmed the news and social media accounts that a high priority channel had been created for willing suppliers with links to politicians and these suppliers were ten times more likely to win contracts, even where there was no previous expertise in dealing with PPE. <sup>33</sup>

<sup>32</sup> The Directorate General for Internal Policies, Policy Department D: Budgetary Affairs, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: extent of the phenomenon and overview of practices*, (IP/D/ALL/FWC/2009-056/LOT6/C2/SC4 PE490.676 2013).

Political interference in any procurement process would typically be a form of corruption, especially if political pressure was applied to directly influence the selection of a bidder. Collusion and, or, corrupt relationships between politicians and a bidder is often difficult to prove, but increasing investigative reporting by the media and the wider dissemination on social media of alleged political favouritism when awarding substantial contracts has increased scrutiny, this PAC inquiry being a prime example.

The media is an important mechanism for deterring politicians from getting too closely involved with the procurement selection process because even an unproven claim of political interference in the process will require a rebuttal and could damage political reputations. For example, on the 10 July 2020, openDemocracy, an independent media organisation published an article, *Revealed: Key Cummings and Gove ally given COVID-19 contract without open tender*. The article alleged that the UK Cabinet Office was “breaching [procurement] rules after handing a £840,000 contract to PR firm to run focus groups (initially listed as ‘EU Exit Comms’). The firm was run by co-author of the 2019 Tory manifesto and close associates of Dominic Cummings, the Prime Minister’s close advisor at the time, and Michael Gove MP, the Chancellor of the Duchy of Lancaster.

The publication is factually correct in respect of the Cabinet Office’s dubious use of the “Extreme Urgency” provision to award a contract that would normally have been subject to competition. But, Public First, the company awarded the contract was a qualified provider on a government wide Dynamic Purchasing System (DPS); any competition would have been restricted to only those on the framework and not an open tender as suggested by openDemocracy. However, more detailed scrutiny of *Contracts Finder*, the government’s own contract award publishing portal, suggests that Public First had not been awarded any previous contracts, so were unproven. This begs a number of questions:

- *Was the direct award of a contract under the “extreme urgency” exemption justified?*

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<sup>33</sup> Report by the Comptroller and Auditor General Cabinet Office Investigation into government procurement during the COVID-19 , HC 959 Session 2019 – 2021, November 18, 2020.

- *What rationale was used in choosing the preferred supplier, particularly if they are a new or unproven supplier?*
- *Who was involved in the selection process?*
- *Was there any conflict of interest?*
- *Were any fraudulent practices used to influence the decision making and award?*

The above example demonstrates the importance of absolute transparency in the procurement process and why politicians and their special advisors should ensure they avoid any suggestion of improper use of their powers to interfere in or influence the procurement processes.

A more detailed National Audit Office review should be carried out on all directly awarded contracts using the “extreme urgency” exemption during the COVID -19 crisis, applying these questions and the basis for the review

A significant amount of work is needed to re-build public faith in UK public procurement governance and, more importantly, to repair the damage done to the reputation of professional procurement practitioners, who provide an extremely important service to their organisations.

## **December 2020**