

Chief Regulator, Office of  
Qualifications and Examinations  
Regulation

**BY EMAIL ONLY:**  
**public.enquiries@ofqual.gov.uk**



23 August 2020

Dear Sir / Madam

Rook Irwin Sweeney LLP  
107—111 Fleet Street  
London  
EC4A 2AB

**LETTER BEFORE CLAIM UNDER THE PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW**

**Re: Public First Contract**

Our Ref: PS:AMI:117

We act for the Good Law Project Limited (“GLP”) which seeks to challenge the lawfulness of the decision of the Office of Qualifications and Examinations Regulation (“Ofqual”) to award a Public Service Contract within the meaning of Regulation 2 of the Public Contracts Regulations 2015 to Public First Limited (“Public First”) to assist Ofqual with communicating its A-level and GCSE results plan to help secure public confidence in the strategy (“the Contract” / “the Communications Services”). From the information available to us (which is extremely limited absent any contract award notice or contract having been provided by Ofqual), it appears that Ofqual entered into the contract with Public First on or around 13 June 2020 without any prior advertisement or any competitive tender process. It is understood that the Contract was let by direct award on grounds of urgency but to date no notice of award has been published on Contracts Finder nor any other procurement portal. It is understood that the value of the Contract is worth in excess of the applicable threshold for a Public Service Contract but Ofqual has, to date, refused to confirm the precise value of the award.

The GLP first learned of this award through reporting in a national newspaper on 20 August 2020,<sup>1</sup> no prior notice of the award of the Contract having been published by Ofqual before 20 August 2020. In light of the limited details available to GLP about the circumstances in - and basis on - which the Contract was awarded, GLP’s rights are fully reserved. In the circumstances, there can be no suggestion that the proposed claim could be said to be time barred. In the event that Ofqual considers otherwise, it is requested to so indicate by return, setting out its detailed reasons for any such position. If any such contention is made, GLP further reserves the right to issue protective proceedings.

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<sup>1</sup> <https://www.theguardian.com/education/2020/aug/20/firm-linked-to-gove-and-cummings-hired-to-work-with-ofqual-on-a-levels>

## **1 Proposed claim for judicial review**

To:

The Office of Qualifications and Examinations Regulation  
Earlsdon Park,  
53-55 Butts Rd,  
Coventry  
CV1 3BH

## **2 The claimant**

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

Please direct all correspondence to the proposed Claimant's solicitors whose details are set out in section 4 below.

## **3 The defendant's reference details**

Unknown

## **4 The details of the claimant's legal advisers dealing with this claim**

Anne-Marie Irwin  
Rook Irwin Sweeney LLP  
107-111 Fleet Street  
London  
EC4A 2AB

Reference: PS:AMI:117

Email:

Telephone:

## **5 The details of the matter being challenged**

The Claimant seeks to challenge the lawfulness of the decision of Ofqual on or around 13 June 2020 to award a public contract to Public First for the supply of the Communications Services. The Claimant understands that not a single other prospective supplier was given the opportunity to submit a tender for the Contract.

## **6 The details of any Interested Parties**

Public First Limited  
143 Tamworth Road  
Nottingham  
NG10 1BY

Public First is an interested party and it has been copied in this letter.

## 7 The issue

### Summary of facts

1. Public First is a company registered in England under company number 10149826. Its registered address is Ashleigh Villa, 143 Tamworth Road, Long Eaton, Nottingham, NG10 1BY. It is a public policy research agency and describes its work as follows: “We help organisations understand and influence public opinion through research and targeted communications campaigns. And we help businesses craft policy ideas that Governments can realistically apply to difficult issues.”<sup>2</sup>
2. The directors and owners of Public First are Ms Rachel Wolf and Mr James Frayne (who are married to one another). Ms Wolf and Mr Frayne appear to have close personal and professional connections with the Minister for the Cabinet Office (the Rt Hon Michael Gove MP), the Chief Adviser to the Prime Minister who works in the Cabinet Office and who is head of communications in Number 10 Downing Street (Mr Dominic Cummings) and the Conservative Party. In particular:
  - a. As to Mr Frayne:
    - i. Mr Cummings and Mr Frayne were co-founders of the New Frontiers Foundation think-tank.<sup>3</sup>
    - ii. According to Mr Cummings’ blog<sup>4</sup>, in 2004, he and Mr Frayne (together with Mr Cummings’ uncle) “*set up the campaign to fight the referendum on the North East Regional Assembly as a training exercise for an EU referendum*”.
    - iii. In 2011, the Rt Hon Mr Gove (then Secretary of State for Education) appointed Mr Frayne as Director of Communications for the Department for Education. In that position he worked alongside Mr Cummings, who was then Special Adviser to the Rt Hon Mr Gove at the Department for Education.

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<sup>2</sup> [www.publicfirst.co.uk](http://www.publicfirst.co.uk)

<sup>3</sup> [https://en.wikipedia.org/wiki/Dominic\\_Cummings](https://en.wikipedia.org/wiki/Dominic_Cummings)

<sup>4</sup> <https://dominiccummings.com/tag/echr/>

- b. As to Ms Wolf:
- i. She formerly worked as an advisor to the Rt Hon Mr Gove.<sup>5</sup>
  - ii. She has also worked for Mr Cummings.<sup>6</sup>
  - iii. She founded the “New Schools Network”, a charity which supported the ‘academisation’ of public schools, under a programme of reform designed by the Rt Hon Mr Gove and Mr Cummings. The New Schools Network drew public criticism for receiving £500,000 of public money without being required to undergo a competitive bidding process.<sup>7</sup>
  - iv. She has been a vocal public supporter of Mr Cummings’ plans for reform of the civil service.<sup>8</sup>
- c. Ms Wolf co-authored the Conservative Party’s manifesto for the 2017 general election.
3. It appears that Public First was included on a dynamic purchasing system (“DPS”) list – namely the “Research Marketplace Dynamic Purchasing System RM6018”. There are 314 suppliers on that particular DPS list. We note that contracts to suppliers on a DPS list must still be competitively tendered pursuant to regulation 34 of the Public Contracts Regulations 2015, which requires the use of the restricted procedure for DPS competitions. In particular, regulation 34(21) requires that, for any contract awarded under a DPS, the contracting authority must invite all suppliers on the DPS list to submit a tender.
4. Insofar as the Communications Services consisted of devising a strategy to enable Ofqual to communicate its A-level and GCSE results plan to help secure public confidence in the strategy, such communications arose from the decision of 18 March 2020 that public examinations (including GCSE and A-levels) would not take place in summer term of the 2019-2020 academic year. On 18 March 2020, the Secretary of State for Education Gavin Williamson stated in Parliament that:<sup>9</sup>

*“I can confirm that we will not go ahead with assessments or exams and that we will not be publishing performance tables for this academic year.*”

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<sup>5</sup> <https://www.independent.co.uk/news/education/schools/time-for-change-how-a-young-woman-plans-to-shake-up-the-school-system-1818636.html>.

<sup>6</sup> <https://www.conservativehome.com/thecolumnists/2019/09/rachel-wolf-in-defence-of-cameron.html>.

<sup>7</sup> <https://schoolsweek.co.uk/rachel-wolf-new-schools-network-founder-creator-parents-and-teachers-for-excellence-profile/>.

<sup>8</sup> <https://www.telegraph.co.uk/politics/2020/01/01/civil-servants-could-forced-sit-exams-prove-competence-sweeping/>.

<sup>9</sup> <https://hansard.parliament.uk/Commons/2020-03-18/debates/FCD4DEB2-86A8-4F95-8EB8-D0EF4C752D7D/EducationalSettings>

*We will work with the sector and Ofqual to ensure that children get the qualifications that they need.”*

Ofqual in turn stated:<sup>10</sup>

*“We welcome the certainty that the Secretary of State’s decision not to hold exams this summer provides in these challenging circumstances. We will now work urgently with the Department for Education to work through the detail of this decision and to provide more information as soon as possible.”*

5. On 3 April 2020, Ofqual released details on how, amongst other things, GCSEs and A-levels would be graded and awarded in 2020.<sup>11</sup> It stated that the process would involve teachers combining a number of factors to come up with a grade they believe a student would have got had they completed the year and sat their exams as normal. That was to include: (i) performance on mock exams and other non-exam assessments; (ii) attainment at previous education levels; and (iii) performance in any mock exams. Once submitted, it was proposed that all teachers’ grades would be moderated by Ofqual before a final grade is decided. Ofqual published guidance for teachers on when submission deadlines would be and a letter to students explaining how this would affect them. As GLP understands it, Public First had no involvement in the development of that strategy or the communication thereof.
6. On 14 April 2020, Ofqual announced how it proposed that BTEC qualifications would be graded and awarded in 2020.<sup>12</sup> As many students were unable to complete course work, students would receive results for their final qualification grades that would be calculated by their teachers, based on an analysis of all assessments completed before the COVID-19 restrictions came into force. Ofqual indicated that it would work alongside institutions who deliver BTEC courses to finalise what qualifications will be eligible to be given a calculated final grade. As GLP understands it, Public First had no involvement in the development of that further aspect of the proposed strategy or the communication thereof.
7. On 24 April 2020, Ofqual released further information on how BTEC qualifications would be graded and awarded in 2020.<sup>13</sup> Ofqual stated in a letter to the Secretary of State that it would *“provide those students who had planned to take exams and assessments this summer for progression with a grade calculated by awarding organisations, as long as we can be assured that those awards are sufficiently valid and reliable.”*<sup>14</sup> As GLP

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<sup>10</sup> <https://www.gov.uk/government/news/coronavirus-a-further-statement>

<sup>11</sup> <https://www.gov.uk/government/news/how-gcses-as-a-levels-will-be-awarded-in-summer-2020>

<sup>12</sup> <https://www.gov.uk/government/publications/vocational-technical-qualifications-summer-2020-guidance-for-centres>

<sup>13</sup> <https://www.gov.uk/government/news/ofqual-consultation-on-awarding-vocational-and-technical-qualifications-in-summer-2020>

<sup>14</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/880716/SC\\_letter\\_to\\_SoS\\_-\\_VTQ\\_direction\\_response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880716/SC_letter_to_SoS_-_VTQ_direction_response.pdf)

understands it, Public First had no involvement in the development of that further aspect of the proposed strategy or the communication thereof.

8. On 22 May 2020, and following a consultation, Ofqual outlined the appeals process for students studying A-Levels, GCSEs, an EPQ or an Advanced Extension Award in Maths.<sup>15</sup> It publicly stated: *“We have given serious consideration as to whether a student could challenge their centre assessment grades and position in their centre’s rank order.... We recognise the strength of feeling amongst students and have weighed carefully whether such an appeal could work fairly. On balance, we have decided it would not be in the interests of all students or the fairness of the arrangements overall...”*. As GLP understands it, Public First had no involvement in the development of that further aspect of its proposed strategy or the communication thereof.
9. It was, as it is presently understood, only in mid-June 2020 that Ofqual awarded the Contract to Public First, nearly three months after the initial announcement was made that public examinations would be cancelled, and three months into what had become a well-advanced strategy to deal with the consequences of the cancellation of those exams. On no view could it be said that it only became urgent to appoint an external communications consultant three months after the cancellation of public exams had been announced.
10. Although neither the Contract nor any Contract Award Notice has been published, it is understood that the Contract will run until the end of September 2020, at a time long after grades would have been awarded and university, college and further education places allocated to this year’s new students.
11. Public First does not appear on Ofqual’s public register of invoices above £25,000 issued by external suppliers, which was last updated on 29 July but whose most recent entry was dated 19 June – around a week after the Contract is understood to have been signed. As noted in the national press,<sup>16</sup> an Ofqual spokesperson said that usual tendering rules, which typically require open and competitive bids, were bypassed when granting the Public First contract because of *“exceptional circumstances”*, and that it planned to publish details of the contract at a future (but unspecified) date. That spokesperson continued:

*“Due to the exceptional circumstances presented by the cancellation of exams, the single tender justification process was used for this contract, due to the need to urgently procure the work, in line with our procurement policy.”*

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<sup>15</sup> <https://www.gov.uk/government/news/ofqual-gcse-and-a-level-consultation-outcomes-and-autumn-exam-series-proposals>

<sup>16</sup> <https://www.theguardian.com/education/2020/aug/20/firm-linked-to-gove-and-cummings-hired-to-work-with-ofqual-on-a-levels>

12. This is a further direct award that Government has made to Public First in addition to:

- a. A contract worth £840,000 awarded by the Cabinet Office on 3 March 2020 (retrospectively confirmed on 5 June 2020) to research public opinion about the government's handling of the coronavirus crisis and which is the subject of existing proceedings brought by GLP against the Cabinet Office under claim number HT-2020-290 / CO/2437/2020; and
- b. A contract worth £116,000 was awarded to Public First on 15 June 2020 by the Department of Health and Social Care to identify ways to "lock in the lessons learned" by the government during the Covid-19 crisis,<sup>17</sup> according to reports first appearing in the national press on 19 August 2020.<sup>18</sup>

13. Regulation 32 of the Public Contracts Regulations 2015 ("PCR 15") governs the use of the negotiated procedure without prior publication, the procurement procedure that, exceptionally, permits the award of a public contract without the need for advertisement or a competitive tender process. Regulation 32 of the PCR 15 materially provides:

*"(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.*

*General grounds*

*(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:—*

*(..)*

*(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."*

14. Guidance issued by the Cabinet Office in March 2020 in relation to regulation 32 and the COVID-19 pandemic (PPN 01/20) informs contracting authorities that: "You should ensure you keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If you make a direct award, you should publish a contract award notice (regulation 50) within 30 days of awarding the contract."

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<sup>17</sup> <https://www.contractsfinder.service.gov.uk/Notice/455df9c8-f749-49e2-bea5-131e962a54b3?origin=SearchResults&p=1>

<sup>18</sup> <https://www.mirror.co.uk/news/politics/dominic-cummings-allys-firm-given-22536284>

15. Ofqual has not published any contemporaneous record of its decision to enter into the Contract with Public First.
16. Further, insofar as the Contract was awarded on or around 13 June 2020, Ofqual's failure to publish details of the award is in violation of regulation 50 of PCR 15.
17. It appears that Ofqual did not seek or obtain any other tenders for the Contract. There was, in short, no advertisement or competition for this contract.

#### Summary of Grounds

18. Pending your response to this letter, it appears that the award of the Contract to Public First was unlawful for at least three reasons.
19. First, this was an unlawful direct award of a public contract contrary to PCR 15:
  - a. The award did not fall within the circumstances set out in regulation 32 of PCR 15. In particular, there was no 'strict necessity' to use the negotiated procedure without prior publication for this Contract; there was no 'extreme urgency' for the Communication Services; any need for such services was foreseeable at the latest on 18 March 2020 but those services were not procured for another three months; and therefore Ofqual could have complied with the time limits for the open/restricted/DPS procedures under PCR 15.
  - b. This was therefore an unlawful direct award, made in breach of:
    - i. the requirements under reg 34 of PCR 15 (especially at paragraphs 21 to 24), when purchasing using a DPS, to hold a competition open to all DPS participants;
    - ii. the requirements of equal treatment and transparency, both under the Treaty on the Functioning of the European Union, and under reg 18 of PCR 15;
    - iii. the requirement under reg 26(2) of PCR 15 to publish a 'call for competition' for the Contract; and
    - iv. the requirement under reg 26(1) of PCR 15 to apply a procedure conforming to Part 2 of PCR 15.
20. Secondly, the award of the Contract violated principles of equal treatment and transparency and was in any event disproportionate. That is because there was, as it is presently understood, no attempt to make any other economic operator aware of Ofqual's requirement or the proposed award of the contract and where no information at all has been published about the process by which the decision to make a direct award of a contract for the provision of the Communication Services.
21. Thirdly, the close personal and professional connections between key decision-makers in the Cabinet Office (namely, the Minister for the Cabinet Office and Mr Cummings) and Public First (as described in

paragraph 2 above), the other direct awards made to Public First, including by the Cabinet Office, and the centrality of Mr Cummings to the Government's overall communications strategy, give rise to apparent bias contrary to ordinary principles of public law.

- a. The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased.
- b. In choosing to award the Contract to Public First rather than any other supplier, Ofqual should have considered nothing other than issues of quality and price (i.e. value for money).
- c. The circumstances set out in paragraph 2 above, alongside Ofqual's decision to award the Contract to Public First without running any kind of competition for the Contract involving other providers, and the fact that the award appears to have been made for only 3 months' of Communications Services, would lead the fair-minded and informed observer to conclude that there was a real possibility that the decision to award the Contract to Public First rather than any other provider was based on favouritism that benefitted Public First.

#### Reserve grounds

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

#### Standing

23. This claim for judicial review is a public interest challenge to the lawfulness of a direct award in which, it would appear, no other economic operator was invited to participate or given the opportunity to submit a tender in relation to the proposed direct award. There is a strong public interest in the lawful award of public contracts (using taxpayers' money), without bias of any strain. In those circumstances, the GLP has a sufficient interest to challenge the expenditure of taxpayers' money. It is proper for litigation to be brought to seek to protect public funds from maladministration. This is therefore not a disappointed bidder challenge where there may be some limits on the scope for a disappointed bidder to bring a challenge outside of the PCR regime. The GLP has sufficient interest in accordance with the ordinary principles of standing, both to complain of breach of public law and to complain of breach of PCR 15.

### Limitation

24. This pre-action letter has been sent as soon as possible. As noted above, although it now appears that the Contract was entered into on or around 13 June 2020, the decision was not made public until 20 August 2020 as a result of press reporting. This letter has been sent three days (and only one working day) later.
25. We recognise that in accordance with CPR r. 54.5(6), where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015, the claim form must be filed within the time required by regulation 92(2) of those Regulations, that being within 30 days beginning with the date when the Claimant “first knew or ought to have known that grounds for starting the proceedings had arisen.” It cannot be said that GLP either knew or ought to have known that grounds for starting proceedings had arisen before 20 August 2020.

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

26. The Claimant would, were the claim to proceed, seek a declaration that the award of the Contract was unlawful and that the Contract is *ultra vires*. However, the Claimant does not wish to divert Ofqual resources to litigation that could, through taking sensible steps, be readily avoided. It therefore invites Ofqual to agree that the Contract was *ultra vires*, terminate its contract with Public First, and procure any further Communications Services by way of a fair and lawful competition.
27. For the reasons set out in this letter, there are serious and important questions raised by the direct award that has been made to Public First. The Claimant reminds Ofqual of its duty of candour. Whether the Claimant proceeds with the claim will therefore depend heavily on whether the requests for information and documentation set out below – and which are raised to seek an explanation for the questions which the Public First contract raises – are answered fully and candidly by Ofqual.

### **9 Directions**

28. In circumstances where no details at all have been provided about the Contract and in circumstances where Ofqual may seek to contend that the proposed claim is time barred, GLP proposes the following:
  - a. That Ofqual replies by return setting out its position on limitation such that GLP is permitted to issue protectively in the event that it is said that the claim is time barred or will become so on or before 19 September 2020;
  - b. That Ofqual otherwise provides a letter of response by 7 September 2020.

## **10 ADR proposals**

29. GLP would be amenable to any alternative means of resolving this matter consensually such as would avoid the need to commence a claim for judicial review. GLP is therefore willing to consider any proposed ADR made by Ofqual, although Ofqual would in all likelihood need to indicate that it is amenable to taking the action it is now requested to take as set out above.

## **11 The details of any information sought**

30. Ofqual is urgently required to provide the following information:

- a. Was the opportunity to tender for the Contract awarded to Public First advertised anywhere, and how long was that opportunity accessible to the public/tenderers?
- b. When does Ofqual contend that it became aware of the need to source the Communication Services? Is it Ofqual's position that the need to procure these services was unforeseen before mid-June 2020?
- c. Did Public First approach Ofqual first (and if so when) or did Ofqual approach Public First (and if so, when and on whose instigation) in relation to its proposed sourcing of the Communications Services? If Public First was the only agency to submit an expression of interest why did Ofqual not seek to have discussions with any other established providers before entering into the Contract?
- d. Which individual(s) were involved in the decision to award the Contract to Public First? Did Mr Cummings and/or any members of the Conservative Party have any part in or influence over that decision?
- e. If Ofqual did have any discussions with any other commercial undertakings in relation to the proposed supply of the Communications Services, please identify with whom those discussions took place, when they took place, and why they did not come to fruition and/or why Ofqual opted to contract with Public First notwithstanding that discussions with other undertakings were ongoing.
- f. What consideration, if any, was given to the running of an accelerated competition in respect of the apparent need for Communications Services? In that regard, please explain when (if at all) that possibility was first raised, the reasons why it was decided that an accelerated competition would not be run, and the date on which that decision was taken.

- g. What was the value of the Contract and what sums have been paid to Public First since the Contract's inception?
- h. What services have Public First provided under the Contract to date, and what further services fall to be provided under the remainder of the Contract?
- i. Why has the fact of the award of the Contract not been made public, whether in accordance with regulation 50 of the PCR 15 or at all, and when is a Contract Award Notice proposed to be published and where?

**12 The details of any documents that are considered relevant and necessary**

31. Please, unless by a date otherwise specified, by the date set out for a response to this letter:
- a. Provide, by return, a copy of the Contract and any accompanying Regulation 84 Report;
  - b. Provide copies of any information publicly posted about the Contract, including any information about how providers could tender for the Contract;
  - c. Provide the written justification that Notice PPN 01/20 requires contracting authorities to keep to support its use of the Regulation 32(2)(c) procedure;
  - d. Provide any documentation demonstrating that a "separate assessment" of each of the tests of urgency and foreseeability set out in Notice PPN 01/20 was carried out such as to support the decision to utilise the emergency procedure both at all, and in the context of the decision to award to Public First;
  - e. Provide all emails and other communications from or to (i) staff employed by Public First (ii) its Board members and (iii) external consultants relating to the decision to appoint Public First up to the date of signature of the Contract;
  - f. Provide any documentation of consideration as to whether, and the decision, to award the Contract to Public First, along with any communications from Public First by which it sought the Contract or the kind of work covered by the Contract;
  - g. Provide any documentation by which Ofqual and Public First negotiated the terms of the Contract.

**13 The address for reply and service of court documents**

Anne-Marie Irwin  
Rook Irwin Sweeney LLP  
107-111 Fleet Street  
London  
EC4A 2AB

We request that all documents and correspondence are sent to us by email at

**14 Reply date**

32. We request a reply **by 4pm on 7 September 2020**, save that in respect of (i) Ofqual's position on limitation as per section 9 (Directions) set out above; and (ii) provision of the Contract and regulation 84 report as per paragraph 31(a) above, each of which Ofqual is requested to address / supply by return.

Yours faithfully

*Rook Irwin Sweeney*

**ROOK IRWIN SWEENEY LLP**

cc **Public First Limited**  
**The Government Legal Department**