

The Good Law Project makes the case for civil society

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I was pleased by a particular dimension of the decision in the Judicial Review brought by the [Good Law Project](#) on the Department for Health's failure to publish PPE contracts on time. This was its decision that the Good Law Project had what is called 'standing' to bring the case.

The Department for Health had, it seems, relied entirely on the fact that the judge hearing the case would decide that neither the Good Law Project or the MPs bringing the case would have the capacity to do so because they could not have suffered loss as a result of the contracts being offered to the people who got them.

The critical suggestion was this [from para 103 onwards](#). The Mr Moser referred to was the lawyer acting for the Department of Health:

103 Mr Moser's response was to say that even conduct of this kind would in principle be challengeable by an economic operator if (but only if) he could show that, in consequence, he had suffered, or risked suffering, loss or damage. But it is difficult to envisage how that test could ever be satisfied in practice. An important purpose of the requirement to publish a CAN is to alert the public, including economic operators who might have hoped to be awarded the contract themselves, to the fact that a contract has been awarded. This purpose is particularly important in a case where the contract has been awarded without a competitive tender, because in such a case the public, including economic operators, may have no idea that the public body concerned was even looking to award the contract. If the failure complained of is a failure to comply with transparency obligations, an economic operator seeking to satisfy Mr Moser's test would presumably have to argue that, had the obligation been complied with, the public body *might* have published a CAN for a contract in which he *might* have had an interest and this CAN *might* have revealed something that would have enabled him to bring a claim for damages. It seems very doubtful that this would satisfy Mr Moser's test: there are just too many imponderables. But even if the test could in principle be satisfied, an economic operator would have little incentive to bring a challenge in circumstances where the prospect of any material benefit was so speculative.

104 A challenge alleging breach of the transparency obligations imposed by the PCR 2015, and by associated policies, is accordingly not one that an economic operator can realistically be relied upon to bring. The position of the First Claimant in this regard is relevantly analogous to that of the World Development Movement. It has a sincere interest, and some expertise, in scrutinising government conduct in this area. There is no allegation (and no evidence) that it is seeking to use the public procurement regime as a tool for challenging decisions which it opposes for other reasons. There is no dispute about the importance of the transparency obligations it claims have been breached. As to the "gravity" of the alleged breaches, they relate to contracts worth (at least) several billion pounds; and there is a pleaded allegation (in respect of which permission has been granted) that they result from a deliberate policy on the part of the Secretary of State. To my mind, there is a powerful public interest in the resolution, one way or the other, of the issues raised.

105 For these reasons, the First Claimant has standing to bring this claim.

In effect, there could be no complaint from a commercial rival if no one even knew the contract was on offer because it was not tendered. There had, then, to be another party who could complain, so long as well motivated but without seeking gain. The Good Law Project was deemed to have standing in that capacity. The MPs were not: it was suggested they had another route for remedy.

So why does this please me? Because it suggests that civil society does have the legal capacity to challenge the government on the externalities it creates that impose a cost on society. And that is a rare bit of good news.

My thanks to Jolyon Maugham and his team.

I should declare that I donate to the work of the Good Law Project.