



Letter to all County Councillors from Community R4C

23rd July 2020

Dear Councillors,

As you will have seen, His Honour Judge Russen, QC, has recently ruled in the Preliminary Issues trial relating to the 'Javelin Park' case between Community R4C and Gloucestershire County Council. Your officers may have told you, as they have told the press, that they have 'won' that case. This is not correct: **each side won one of the two technical issues under judgement** and we are now considering an appeal on the issue where we did not win.

You will recall that Community R4C brought this case in the public interest - not because of any desire to sue the Council - because it was the only way to have confirmed in open court that a small group within the Council, acting in your name, breached the 2015 Public Procurement Regulations. They secretly agreed the second £613m contract with Urbaser Balfour Beatty with an increase of approximately £150m (30%) without competitive tender. We believe that this represents illegal State Aid which should be returned by UBB to GCC.

I have attached a copy of the letter we sent to you in February, explaining our actions.

What happened in Court

The High Court judge accepted in his ruling that that GCC and the lawyers they employed at public expense concealed the financial details of the second (January 2016) contract for two years, preventing any challenge. The Council's lawyers then tried to block our claim by saying that we were out of time because we should have known about the breach well before the details were released.

The judge completely rejected this argument. He ruled instead that we were in time to challenge what he described as "*sufficiently clear and apparent factual indication that the Regulations had been breached*" (para 279)¹

"It was only after the abandonment of the Council's appeal that the unredacted version of the EY Report was then disclosed (on 20th December 2018) and most of the terms of the 2016 Contract were made publicly available. Only then was CR4C able to see what had previously been masked in relation to the increased costs resulting from the RPP process".

While suing for nominal damages was the only legal option open to CR4C to challenge the perceived wrongdoing of the council, the Judge clearly understood "*the claim did not appear to be first and foremost one about money.*"

Our barrister, Mr Sinclair, summarised our purpose, as quoted by the Judge, as follows:

"C4RC instead brings this case for non-commercial reasons in the public interest.

These include:

- (a) *Public (judicial) recognition that GCC breached the law, ultimately signing a revised contract unlawfully that cost it some £140-£160m more than the competitive result signed in 2013. As a public letter signed by Councillors and others in January 2019 and sent to GCC puts it, GCC consistently wrongly and publicly represented the contract cost was £500m right up until disclosure in December 2018.*

¹ All quotes in italics taken from the Judge's ruling

- (b) *The issue of secrecy is particularly at issue at this stage of the case as your Lordship will have to decide (preliminary Issue 1) whether, as we submit, C4RC did not and could not have known of the breach of law until GCC released material on 20 December 2018, nearly 6 years after the early 2013 contract and nearly 3 years after the February 2016 contract. The Court need only address what was known or could have been known by C4RC, but as the Judge will no doubt appreciate it is the Claimant's belief and stated position that there was deliberate concealment of important facts.*
- (c) *It is a matter of important principle that GCC obtains the best value for money available on behalf of taxpayers and this is only possible by compliance with the procurement rules.*
- (d) *Finally, and importantly, if ultimately a breach of procurement law is found at final trial, there will be a solid basis for the UK Government/GCC to find that the overpayment to UBB is unlawful State aid. Any overpayment to date will be recoverable from UBB (GCC may immediately have £10's of millions to spend on public services) and any future overpayment will not be payable."*

The second objection raised by GCC's lawyers was that, had there been a competitive tender we could not have won. The argument is complicated because the court was considering the chances of a hypothetical bid for a hypothetical competitive tender that should have taken place but did not. The Judge ruled that CR4C was not an economic operator that could have pre-qualified, but our barrister believes we have firm legal grounds to appeal.

Why you should get involved

As a result of the facts now made public, it is clear that a breach of procurement rules took place, rules that exist to ensure value for money for citizens, and we believe that there is already sufficient evidence to move forward to recover illegal state aid from UBB.

The Judge states: *"In his oral closing submissions, Mr Sinclair noted the irony in the position that his client's claim could produce such ultimate financial benefit for the Council."*

We completely agree that the Council itself should be taking the lead in this. We are therefore asking all Councillors to join us in this endeavour by calling for an immediate review committee – free from the influence of those that wrongly signed up to a new contract and kept it secret – to look into how GCC can recover this illegal overpayment.

We are also going to follow up with Grant Thornton, who still have not ruled on our objection made in March 2017, in large part because they were prevented by the Council from sharing the new, 2016 contract and because they claim the matter was *sub judice*. They have formal, quasi-judicial, legal duties and we now expect them to issue a report in the public interest and act to help reclaim the illegal state aid. We ask that Councillors help by closely monitoring and scrutinising Grant Thornton's actions on this matter.

Finally, we are keen to 'meet' with Councillors individually or collectively to discuss the case in more detail and to determine how we can work together in the future. Please do contact me at sueoppenheimer@gmail.com

Kind regards



Sue Oppenheimer

CoChair Community R4C