Community R4C Ltd

- and -

Gloucester County Council

Note on Grant Thornton Investigation:
Provisional Views 14 November 2018

Introduction

1. Grant Thornton is exercising powers under the Local Audit and Accountability Act 2014 ('the 2014 Act') to investigate an objection raised in respect of the waste PFI contract entered into between Gloucester County Council ('GCC') and UBB in 2016. This involved, it is only now apparent, a material change from the 2013 contract; unless subject to an exception those changes and the signing in 2016 was unlawful.

2. I am instructed by (1) Gregg Latchams solicitors in respect of a procurement law claim (filed on 18 January 2019) and (2) the Environmental Law Foundation in respect of the GT investigation and related matters. This note is primarily in relation to the second set of issues, though there are obvious overlaps (and some prospect that they coincide).

3. This note is provided to both C4RC and to those raising the objection with Grant Thornton. It is understood that it may be shared with GT and/or GCC (including its audit committee).

Grant Thornton is exercising legislative functions and is subject to public law including rights of appeal and judicial review

Public law context

4. The NAO Auditor Guidance Note AGN 04 (latest version 9 February 2018)[1] helpfully sets out the role of an auditor in such a process as being conducted by GT (this is statutory guidance issued under powers in the 2014 Act). I agree with the propositions made by the NAO on all relevant issues of substance, and would also note that by operation of public law principles this guidance must be followed absent cogent reasons not to[2].

5. In summary of the public law nature of the functions (§numbers are references to AGN 04):

   a) GT is exercising a statutory function. This has been referred to (accurately and consistent with case law in similar contexts) as a "quasi-judicial" function: §4.

   b) GT (therefore) *must* comply with public law (§4 and §§49-50) including requirements to give reasons and to "ensure they have properly understood the relevant law" (§4). These clearly reflect public law principles, including the requirement of a body to properly investigate and acquaint itself with the relevant facts (and law) under the *Tameside* principle[3].

   c) The application of public law follows as a matter of law: the *Datafin* principles are now well established. A judicial review may be commenced against any decision of GT (with the exception of where there is another suitable remedy: JR being a remedy of last resort).

[1] https://www.nao.org.uk/code-audit-practice/wp-content/uploads/sites/29/2017/01/Auditor-Guidance-Note-04-Auditors-Additional-Powers-and-Duties.pdf
[2] E.g. *R (Lumba) v SSHD* [2011] UKSC 12 at [26] per Lord Dyson: "a decision-maker must follow his published policy….unless there is good reason not to do so".
[3] *SSES v Tameside* [1977] AC 1014 at 1065B per Lord Diplock: "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". This reflects the need to (i) understand the law and (ii) understand.sufficinetly investigate the facts.

6. Of particular importance in the exercise of the quasi-judicial function in this case is giving parties a proper right to be heard (this follows both from Art. 6 ECHR as implemented by the HRA 1998 and established principles of public law[4]). The importance in this case is that without enabling parties to be heard, GT not only breaches that principle, but is all the more likely to miss relevant facts (or legal issues).

Non-disclosure and its impact

7. I have been surprised not only at the refusal of GCC to disclose relevant information to the objectors under FOIA, but that *GT has paid so little regard* to its own ability (in the circumstances, the need) to disclose relevant information to the objectors. AGN 04 at §§41-47 deals with this, and one important legislative source is the power in s.26 of the 2014 Act of persons interested to inspect documents. Whilst subject to commercial confidentiality (which GT has relied upon for quite some time), it is clear from s.26(5) that this *only* applies where "there is no overriding public interest in favour of its disclosure".

8. The failure to disclose was only resolved on 20 December 2018 when GCC dropped its appeal against the ICO ruling. The consequence is that the objectors have so far been deprived of the opportunity to make properly informed representations (and that if GT failed to give proper opportunity to hear such representations and to familiarise itself with the relevant legal issues, its investigation will be flawed). GT indeed noted in its Provisional Views sent on 14 November 2018, in the penultimate paragraph on page 5, that the objectors have expressed concern about their ability to comment meaningfully without access to certain relevant information, and have raised concerns about procurement. Why it proceeded nonetheless is unclear.

9. Given the nature of the information now disclosed and the representations above, it is *entirely insufficient* for GT to have purported to present, on 14 November 2018, "updated provisional views" based on the situation prior to disclosure on 20 December 2018.

[4] R (Shoesmith) v Ofsted [2011] EWCA Civ 642 at [66] per Maurice Kay LJ: "Accountability requires that the accountable person is obliged to explain the state of affairs to which it attaches. The corollary is that there must be a proper opportunity to do so.").

Potential actions by GT and alternative actions by the objectors

10. In light of the late disclosure and the commencement of proceedings, the only sensible approach is for GT to stay its investigation or at least refrain from taking any final position until it has had full further representations (after the outcome of the procurement proceedings[5]). Notwithstanding that, the following outcomes are possible (i.e. under the legislation and public law):

    a) GT might, as set out in its provisional views, take no action/decide to end its investigation with no other steps. This would enable the objectors to do either or both of the following:

        (i) Require reasons (within 6 weeks) from GT as to its decision not to apply for a declaration and (within 21 days from those reasons) bring an appeal under s.28 of the 2014 Act against the failure to seek a Declaration. The court then has the same powers as it would have had GT made an application (i.e. to declare an item on the account unlawful). The objectors may in such a case seek an order for payment of their costs by the GCC (and in such a case I would advise considering this being sought by way of interim order).

            - I would note that GT's expressions of concerns about taxpayer's expenses are in this sense (amongst others) inapt: GT should fulfil its role properly using its powers appropriately, and any alternative will only *increase* the costs to taxpayers.

        (ii) Bring a judicial review as regards other issues/flaws in the final decision including failure to inform itself on the law or facts, failure to give the objectors a chance to be heard in light of recent disclosure etc. The remedy may be to

[5] Litigation of this type is not straightforward, but if the case proceeds to final judgment or liability admitted, this will have dramatic implications for the GT investigation: for instance, if a breach of the procurement rules is established, then GT must *at least consider* whether to seek a court declaration.

quash the decision and remit the matter for proper consideration, or a declaration.

(iii) In either case the matters may be conjoined (at the court's discretion either on application or as part of its own case management powers) with each other and/or with the procurement law claim.

b) GT might alternatively take one of the following actions ('positive actions')

(1) Issue a public interest report;

(2) Seek a court declaration;

(3) Issue statutory or non-statutory recommendations, advisory notices; or

(4) Bring a judicial review.

11. A satisfactory, properly reasoned positive action that is consistent with public law would be difficult to challenge (the routes being either of those set out at §10(a)(i)-(ii) above depending on the circumstances).

12. However, importantly, as things stand and in particular given the recent belated disclosure of key information, GT (and the GCC) would be immediately exposed to legal challenge should GT decide to take no action (as set out at §10 above).

The Provisional Views and subsequent developments

13. I will take it that not only my clients but any party with whom this note is shared will have had sight of the grounds of claim in the procurement law action against GCC. It sets out in particular:

a) That there has been an increase in contract value of c.£150m outside competitive pressure; and

b) In principle this was required to be re-tendered and no exception applies (there has been an unlawful contract award as a consequence).

14. Regardless of how that case proceeds (it *may* be settled, discontinued due to procedural issues rather than merits, it may indeed ultimately succeed), those two points above are critical to any analysis by GT and final conclusions.

15. To fail to properly consider those issues would be a failure by GT to acquaint itself with the relevant facts and law (contrary to public law principles – including as set out in AGN 04 and above). It would amount to an unlawful abrogation of its statutory duty.

16. To the extent GT seeks to rely on the "costs" of properly fulfilling its role[6] it would be patently irrational: at stake is a *prima facie* illegality that led to an overpayment to the tune of c.£150m (or will do so unless prevented). Further, if unlawful, then the market price has not (presumptively) been attained and there is an unlawful overpayment: that would almost certainly be unlawful state aid, recoverable by GCC. At stake, in short, is some £150 million of taxpayers' money (which issue the procurement litigation will not, on its own, address).

17. I would here recall that GT has the power to seek a court declaration that an item of expenditure is unlawful. Where, as here, the apparent illegality is breach of procurement law and unlawful state aid, those issues – central issues to legality and to protecting taxpayers, must be properly considered.

What has GT said?

18. It is now evident that GT in its provisional view has *prima facie* reasons to consider there was a breach of the procurement rules, that this was unlawful, and that it has nonetheless suggested it would not be appropriate to engage in further expense in order to seek an expert view. As well as a disregard (a failure to properly inform itself of, perhaps a deliberate failure to consider)

[6] The "cost" of taking expert advice in particular cannot feasibly be said to be disproportionate to the magnitude of the issue and cost to the public purse of failing to take properly informed action.

relevant law, it has had regard to irrelevant facts (a further failure of public law that would be able to be pursued if GT proceeded with their provisional views).

19. First, under a heading "The Law", GT has restricted itself to duties under the EPA 1990. This is relevant, but only part of the picture.

20. Indeed, on a proper inquiry (in particular in light of the information only recently disclosed to the objectors) the "relevant law" evidently includes:

    a) The Public Contracts Regulations 2015 and other aspects of procurement law; and

    b) The state aid rules.

21. The first issue has been brought to GT's attention previously (on a somewhat speculative basis given the lack of disclosure); the latter can only now be brought to GT's attention since disclosure.

22. What is now clear is that GT would be falling into serious legal error and abrogation of its statutory function and duties if it were to (in effect) rely on its own failure to disclose information to the objectors so as to now take the view that it need only consider the EPA 2015 in detail, that it can "touch upon" procurement issues without resolving them (or waiting until the court case has been concluded[7]).

23. That GT has – at least in some form – considered procurement law is apparent from its provisional views. GT:

    (1) Cites GCC's reliance on these rules on page 6;

    (2) Recognises at page 7 that the fixed price for capital costs (EPC costs) was only fixed up to a "long stop date" or "planning longstop date" of January 2015 (whereas the

[7] If a breach of procurement law is found, then not seeking a declaration under s.28 would be a serious abrogation of its duty, and an appeal to the Court would be bound to succeed. In principle, the objectors may commence an appeal and themselves ask for it to be stayed pending the outcome of the procurement action or conjoined with that case.

negotiations continued until February 2016 – *prima facie* therefore outside a precise and certain clause providing for changes that may otherwise have provided for an exception under Regulation 72);

(3) At page 8 GT, largely adopting E&Y has regard to entirely irrelevant considerations (as regards compliance with procurement law) including:

(a) That the VfM of the RPP in comparison to landfill was *relevant*. It is not: the procurement rules do not provide for a benchmark against a "do nothing" option, but only against a competitive, market price for the services contracted for.

(b) The proposition that the Council "had limited options" due to termination expenditure or (temporarily) continuing with landfill whilst conducting another procurement process. The procurement rules do not provide for an exception to the requirement to procure because terminating a previous (ultimately unlawful) contract carried termination costs (however high).

(c) Nor is it at all relevant to procurement law that a second procedure to ensure compliance with the law would entail procurement costs. This is noted as a "key consideration" for any such steps (i.e. in the premises, *complying* with procurement rules).

(d) All the above analysis adopted by E&Y and cited by GT is of course entirely circular as anyone with any knowledge of procurement law will immediately see.

24. Despite entertaining considerations which are so clearly irrelevant to any procurement law analysis, in the final paragraph on page 8 GT appeared to have a moment of clarity: it opines on the case law on Regulation 72(1)(a) of the PCR 2015 and that "on the face of it, there are reasons why compliance with procurement law might be in question". In passing, the GT "findings" on this point are internally contradictory and irrational: at page 10 it is said in terms that "in our provisional view the Council *has followed* appropriate processes in entering into the contract for the EfW plant" (it then goes on to conflate this issue with assessing VfM by other processes).

25. The GT provisional findings, in the abstract, are therefore simply confusing (and confused).

26. What has only become apparent to the objectors (or me) post disclosure on 20 December 2018 is the critical importance of this comment: GT apparently knew that there was a considerable material variation both outside competitive pressure and outside the longstop date. The focus on the provision GCC (it appears) relied on in their dealings with GT (namely Schedule 26) is mentioned. Whilst before disclosure, GCC had suggested consistently that the change was not material (and it was assumed they sought to rely on changes up to 10% value), recent disclosure has shown this is not the case.

27. The critical importance of this can be seen from the expression by GT in the provisional views of the following (at page 10):

> "It is difficult to conclude from available empirical data whether the contract actually achieves good value for money…. But even if the Council's contract is at a relatively high cost, as long as it followed appropriate procurement processes, this must be as a result of the operation of the market at the relevant point in time."

28. That final point is absolutely crucial: it is well established that there is a presumption in law that a properly conducted lawful procurement process will identify the market price (*London Underground PPP* UK state aid notification decision 2002). But it is on precisely this point that GT said there is reason to believe there was a failure (albeit not consistently, though now there has been disclosure it is apparent they had good reason to say so).

The legal errors in a nutshell and the importance to the proper conduct of the investigation and outcome to taxpayers

29. It is now clear not only that GT has considered procurement law albeit it is intimated without expert advice, and at one point has even considered the exceptions in Regulation 72 of the PCR 2015 and suggests: "there are reasons why compliance with procurement law may be in question" (unhelpfully this was not maintained consistently, nor was any disclosure made in the public interest that enabled the objectors to understand or assess this). There is then a

recognition that *if* procurement law had been complied with that would establish the market price and value for money.

30. Again, I, and the objectors have only been able to make any sense of this since the disclosure on 20 December 2018.

31. It is now apparent that where GT, with respect, go wrong is to amalgamate/conflate and confuse the legal issue: "has there been a breach of procurement law (and unlawful state aid)?" with a more "holistic" assessment of VfM. This is put most clearly at the top of page 9, where it is suggested that demonstrating VfM "is complex and there are at least two approaches", namely (first bullet point) some form of comparative analysis and (second bullet point) compliance with procurement law.

32. This is a surprising approach to compliance in respect of a £600m contract. GT is exercising a statutory function to determine, in particular, if an item on account was lawful or not. If the contract award was unlawful, it has the power to seek a court declaration (and if it fails to do so, the objectors may seek the same – and seek their costs from GCC).

33. A breach of the procurement rules is a serious failure. It is not "remedied" by some ex post analysis of value for money based on *inter alia* termination fees, a landfill alternative, or the "costs" of complying with procurement law. The only relevant question as to state aid is a comparison with the market price, for which in this case there is a clear starting point: the terms of the contract negotiated under competitive pressure and signed in 2013.

34. GT presents one preliminary view (albeit at the time in a manner that could not be understood): that there may have been a breach of procurement law, only to suggest at other points that the process was properly conducted, and finally that it would not be proportionate to seek expert advice to reach a firm conclusion. Reference is made to the costs to taxpayers, which is rather rum in this context:

    (1) If the contract was unlawfully awarded, this is a significant matter of public interest.

(2) In particular this was the largest contract ever awarded by GCC. Whether or not it is as much as £150m over the market price (the correct benchmark, not "landfill + termination costs + procurement costs" vs the revised contract) then it is clearly in the financial and broader public interests of taxpayers to have this resolved.

(3) Any procurement/state aid specialist will readily see that there is a single highly probative measure of the market price in this case: the price attained in 2013 by competitive tender. That must be the starting point (and with some allowance for inflation etc likely close to any final end point sustainable in court or by the relevant state aid authority) of any legal analysis.

(4) If, as appears on the bare face of the facts as now disclosed, there has been an overpayment of c£150m by way of a contract awarded in breach of procurement law, then there is likely to be an equivalent amount of unlawful state aid. Unlawful state aid is repayable to (in this case) GCC, and any future payments that are in excess of the market price will not be payable.

(5) A failure to even take "expert advice" on this is an irrational abrogation of statutory functions. In particular it is not relevant that no procurement case had been commenced previously (given the absence of disclosure this was impossible), nor would it be critical if the current case did not reach final resolution (for procedural or other reasons). GT is able to seek a court declaration of illegality and thereby fulfil its role in the public interest.

Concluding remarks

35. In summary: the more that is revealed the greater the legal concerns. That GT has considered it appropriate, to date, to fail to disclose critical information, and (I understand) to inform the GCC that "all is well", is in the circumstances very surprising.

36. I would expect GCC (/its audit committee) to seek to properly investigate this themselves and/or engage with GT to ensure that they do not feel constrained by any conflict of interest (viz. their ongoing role as auditor to GCC on the one hand and their role in uncovering issues

in this investigation on the other). Indeed, the GCC as a responsible public body might *either* waive privilege in their legal advice on procurement law and state aid and to disclose it to GT so that it can consider that advice with its own independent experts *or* failing that to seek a second opinion on how it was advised in relation to the 2016 amendments. That *something* has gone seriously wrong is becoming increasingly apparent. Nor is this 'merely historical' – unlawful state aid does not become lawful by lapse of time, and repayment of any amounts above the market price will continue to be in the public interest until this matter is resolved.

37. It is not too late for GT to properly deal with this matter, and should it fail to do so the objectors have the ability to (in essence) "step into its shoes" by way of court appeal under s.28 and/or seek to have any "do nothing" decision quashed and remitted to GT by way of urgent judicial review. Certainly GT's provisional views as they currently stand would be readily amenable to legal challenge on a number of the grounds (only outlined above).

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