IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

BETWEEN

Community R4C Ltd

Claimant

- and -

Gloucester County Council

Defendant

PARTICULARS OF CLAIM

Introduction and parties

1. This claim relates to breach of the Public Contracts Regulations 2015 ("PCR 2015") and/or directly applicable principles of EU law by the Defendant in relation to a large contract for services (waste disposal) which was awarded to UBB Waste (Gloucestershire) Limited (the "Contractor") in February 2016.

2. The Defendant is a County Council and a contracting authority under the PCR 2015. It is also subject to directly applicable principles of EU law including non-discrimination, equal treatment of tenderers and transparency in the context of procurement by public authorities.¹

3. The Claimant is an economic entity (as defined in Regulation 2 of PCR 2015), the legal form being a registered Community Benefit Society. The Claimant had previously (in 2015-16)

¹ See Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) and others [2008] E.C.R. I-4401 at [31]-[32] referring to the established principles and case law.
taken steps to form a consortium to win a contract for waste disposal from the Defendant (this was ultimately abandoned only once it became clear the UBB contract left no realistic scope for any other provision of services) and it would have used that consortium to bid had a procurement exercise taken place.

4. It is averred that if the 2016 contract (the “Second Contract” referred to below) had been tendered properly or at all the Claimant would (i) have bid for such contract as the coordinating party in a consortium and (ii) have been awarded a contract, or (iii) alternatively was unlawfully deprived of a significant chance of winning such contract.

**Background to the procurement failure**

5. This matter has a lengthy history, including the following:

   a) A procurement process under the Public Contracts Regulations 2006 (‘PCR 2006’ was commenced by the Defendant in 2008 for waste disposal services, and a Contract Notice was published in the OJEU on 30 January 2009 “for the provision of residual waste treatment capacity that will divert municipal solid waste from landfill”;

   b) Down-selection and ultimate award of a contract ‘the First Contract’ was made on 22 February 2013 to the Contractor;

   c) Planning delays (including legal challenge) occurred after contract award; and

   d) A new contract, called an “amended and restated” contract (‘the Second Contract’) was entered into in or about February 2016 between the same parties.

6. The terms ‘First Contract’ and ‘Second Contract’ are used to differentiate the agreement signed on 22 February 2013 on the one hand and that agreement signed in or about February 2016 on the other. This terminology accords with the distinction drawn in procurement law as to material change as set out below.

**The First Contract and the Second Contract**
7. It is averred that the Second Contract is a new contract in procurement law terms (i.e. regardless of any characterisation by the parties or in domestic law) on the basis of (inter alia) Pressetext in which the CJEU held (at [34]) that material “amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract”.

8. As further held in Pressetext at [37] (considering the precursor EU Directive, though equally applicable to subsequent Directives which deliberately and necessarily reflected EU case law and which have been implemented by PCR 2015 – see below) an amendment may be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract. It is averred that the material changes did so change the economic balance in favour of the Contractor in this instance.

9. The PCR 2015 implements directly effective EU Directives and codify the law, in particular the scope and circumstances of permissible changes post-award. Regulation 72 sets out an exhaustive list of circumstances in which changes to a contract post-award will not require a new procurement exercise (this being on the basis that outside these exceptions there is a “new contract” under the Pressetext principles and such new contract must itself be put out to tender).

10. It is averred that the changes were significantly above the 10% threshold in 72(5) (sometimes referred to as the de minimis exception).

11. It is further averred that none of the other exceptions set out in Regulation 72 applied: the delays due to planning were foreseeable (indeed were foreseen); there was no necessary change in scope; there was no sufficiently clear and precise review clause.

12. In light of the above it is averred that there was a legal requirement to put the Second Contract out to tender under the PCR 2015 (these being the applicable Regulations as the Second Contract was entered into in February 2016²).

² This follows from Pressetext, and is reflected in UK Government Guidance.
Timing issues and extent of material change

13. By disclosure on 20 December 2018 of previously redacted material, including disclosure for the first time of the changes that had taken place between the First Contract and the Second Contract it became apparent that there were material changes (including to ‘gate fees’ or payment levels and an increase in up-front payment by the Defendant) such that the total value of the contracts were assessed by the Claimant as being in the order of a change from c£455m (First Contract/contract signed in February 2013) to c£600m (Second Contract/contract as materially amended and signed in February 2016). In contrast, the Council had publicly consistently cited a revised value/cost of £500m.

14. Whilst the contracts are lengthy and complex, and the full scope of the changes will require detailed evidence, it is averred that there was a change in the order of 30% of the value of the contract, to the benefit of the Contractor, and hence a material change that required a new tender process. Again, Regulation 72 of the CPR 2015 contains the only exceptions and none apply.

15. There was no procurement process carried out at all in respect of the “Second Contract”, which was negotiated completely outside the rules, outside competitive pressure, and apparently not within any precise revision clause. It is averred that the entering into (the award of a materially different contract in February 2016) by the Defendant was in breach of the PCR 2015 (and generally applicable principles of EU law) and the Claimant suffered loss as a result.

16. The extent of the changes to the Second Contract were deliberately concealed by the Defendant, including by stating in open Council meetings that the changes were not substantial, and subsequently by redacting information in the contract documents (requested under FOI the responses to which were delayed), by contesting further disclosure (which ultimately led to a ruling by the ICO against the Defendant in severe terms in June 2018, which ruling was itself appealed by the Defendant, leading to further delay). Again, in public (and apparently even to some Councillors within GCC) the Second Contract was said to be worth £500m.
17. 20 December 2018, the Defendants dropped their ICO appeal and disclosed for the first time elements of the Second Contract (including via an Ernst & Young report “Residual Waste PPP Project – Value for Money and Affordability Analysis”) that revealed the extent of the changes to the contract post-award.

18. Under Regulation 92(1)-(2) of the PCR 2015, proceedings must be started within 30 days beginning with the date (the “relevant date”) when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. It is averred that the relevant date in this case was 20 December 2018.

19. Specifically, whilst the Claimant, its members and related parties had previously had a wide range of concerns with the solution reflected in the contracts with the Contractor, including that it did not represent value for money, that there were cheaper and greener alternatives, that the Council had not itself been fully informed of relevant issues, it neither knew nor could have known that such material changes had occurred.

20. 20 December 2018 was the earliest point in time that the Claimant (indeed, apparently even some of the members of GCC itself that were opposed to the contract) knew or could with reasonable diligence have known (or had anything more than a mere suspicion at most) of the breach of procurement law.

21. Despite every attempt by the Claimant, through its members and other supporters to seek clarity, including FOI requests and a successful case before the ICO, and including via Grant Thornton which had been conducting an investigation in which context requests for disclosure were likewise delayed, that there had or might have been more than a minor change could only have been purely speculative and entirely unevidenced.

22. The Claimant will in this regard evidence and rely on the extensive failures to disclose relevant details, the misrepresentations of the Council as to the scope of the amendments or the consequences to the value/cost, and the fact that it was only after the disclosure on 20 December 2018 that (i) a local MP has called for a public inquiry into the award of the contract in Parliament and (ii) an open letter dated 7 January 2019 and calling for a public
inquiry on the basis of the now apparent increase in costs, was issued and signed, inter alia, by Councillors within the Defendant (GCC). In short, it is averred that the Claimant could no more know or determine there had been such an extensive, material change: even some of the Councillors had until that point been misled as to the extent of the changes in value (/cost to the GCC) of the Second Contract and this new information, when disclosed caused significant and widespread shock and dismay.

**Damages**

23. PCR 2015 Regulation 93(2)(b) requires that any if a declaration of ineffectiveness is sought this must be “in any event” within 6 months of the day on which the contract was started. As such this remedy is not available and is not sought.

24. The only claim available under the PCR 2015 is damages. The Claimant avers that:

   a) (To the extent applicable\(^3\)) there has been a sufficiently serious breach of the procurement rules to entitle the Claimant to damages (at issue is a failure to even conduct a procurement exercise when required by PCR 2015 and by directly applicable principles of EU law); and

   b) The Claimant has at the minimum lost a significant chance of being awarded a contract due to the failure to put the Second Contract out to tender. It claims for its losses of profit as a member (in fact it would have been the coordinating member) of a consortium.

25. In the circumstances, the issue of quantum should be determined after the substantive claim: it will require consideration of detailed evidence on the intended solution that the Claimant had been developing in 2015-16, the anticipated level of profit, and the prospects of success of the bid.

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\(^3\) There is a degree of conflict between decisions (of the UK Supreme Court and subsequently of the EEA Court).
26. The Claimants describe their purpose as follows (this is on their website and consistent with
the aims of C4RC as established):

"Community R4C is a registered Community Benefit Society with long-term charitable
objectives as follows:

The Protection and the Preservation of the environment for the public benefit by:

(a) The promotion of waste reduction, re-use, reclamation, recycling, the use of recycled
products, and the use of surplus.

(b) Advancing the education of the public about all aspects of waste generation, waste
management, waste recycling and the circular economy

(c) The promotion of such other activities and initiatives that contribute to and stimulate
the development of a local circular resource economy.

Once the recycling plant is running, a percentage of its profit will create an ongoing income
stream to Community R4C to fulfil these objects in the community."

27. It is averred that the Claimant (i) would have formed a consortium to bid had the Defendant
tendered the Second Contract (indeed, it had raised finance and taken other steps to prepare
to do so) (ii) the Defendant had a good prospect of success (in particular, it had a solution that
would be both cheaper and be a better fit with legal obligations including in relation to the
"waste hierarchy" than the contract with the Contractor) and (iii) The Defendant anticipated
making a profit itself.

28. For the purposes of this claim, and subject to further consideration, evidence and if necessary
consequential amendment, it is averred that the Claimants would have bid and won a contract
which would have led to a profit (and contribution to its fixed costs) that it estimates
conservatively at £350,000 (NPV) and this claim is made on that basis.
Breach of the Public Contracts Regulations 2015 and (parallel) breach of fundamental principles of EU law

29. In the premises it is averred that:

1) The **material amendments** between the First Contract the agreement signed in February 2016 led to a new contract (the Second Contract) on **Pressetext** principles;

2) PCR 2015 applied to the Second Contract (a contract for services) and required a new procurement process to be followed, including advertisement and a process that ensured economic operators are treated equally and without discrimination and that was carried out in a transparent and proportionate manner (see Regulation 18);

3) The award/signing of the Second Contract in February 2016 was unlawful as it had not been awarded following such a procurement process;

4) This amounted to a serious breach by the Defendant in respect of which damages will in principle be available;

5) The Defendant is an economic operator as defined in PCR 2015 regulation 19;

6) The Defendant would have bid had the Second Contract been properly put out for tender as required by law;

7) The Defendant would have won (alternatively was deprived of a substantial chance of winning) a contract due to the breach of PCR 2015 by the Claimant.

8) In the alternative generally applicable principles of EU law (generally reflected in EU legislation and UK legislation as amended from time to time but applicable in parallel) required a separate tender process, and the breach of these principles and the EU remedies directive leads to the same result as breach of the 2015 Regulations above. For the avoidance of doubt this is pleaded on a protective basis should the Defendant, which has not responded to pre-action
correspondence, claim the PCRs 2015 do not apply; if it is accepted the PCRs 2015 apply, this does not remain as a separate issue.

RELIEF

27. The Claimant seeks:
   1. Damages in the sum of £350,000;
   2. Interest; and
   3. Costs.

I believe that the facts stated in this Particulars of Claim are true.

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Kenneth McEwan
Solicitor for the Claimant

Duncan Sinclair

18 January 2019

39 Essex Chambers, London