Case No: CO/7925/2013

Neutral Citation Number: [2014] EWHC 2167 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM CIVIL JUSTICE CENTRE

Birmingham Civil Justice Centre
Priory Courts
BIRMINGHAM

Date: 02/07/2014

Before :

MR JUSTICE FOSKETT

- -

Between :

MANSFIELD DISTRICT COUNCIL **Claimant**

- and –

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

- -
- -

Andrew Hogan (instructed by **Ashfield District Council Legal Department**) for the **Claimant**
Deok Joo Rhee (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing date: 20 May 2014

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Judgment

MR JUSTICE FOSKETT:

Introduction

1. By a letter dated 19 March 2013 the Defendant (acting through the East Midlands Growth Delivery Team) communicated his decision to the Claimant to claw back from the Claimant grant payments made previously from the European Regional Development Fund ('ERDF') towards the funding of a town centre improvement plan. The amounts sought to be clawed back were £138,317.74 and £20,262.52 in respect of two contracts awarded by the Claimant to A & S Enterprises in connection with the town centre improvement plan.

2. The Defendant's justification for the claw-back is (i) that the Claimant had, it was suggested, breached EU law in the award of the two contracts (by failing to advertise publicly the proposed contracts), (ii) that it was, accordingly, also in breach of contract with the Defendant and (iii) that the amount of the claw-back (25% of the total sums made available by way of grant) was proportionate.

3. The Claimant refutes the basis of the Defendant's case and his entitlement to act in the manner indicated.

The contracts and the essential legal parameters

4. The two projects the subject of the two contracts were the Mansfield Station Gateway Office Accommodation Project ("the GOA Project") – which would create 434 m² of office accommodation - and the Mansfield Woodhouse Station Gateway Public Realm Improvement Works ("the PRIW Project"). Those latter works were in the nature of landscaping. The purpose of the two projects was said to be "to provide a positive, safe and attractive gateway to Mansfield Woodhouse for passengers arriving by train." They provided office accommodation and associated minor public works in the curtilage of Mansfield Woodhouse station.

5. In the scale of things, they were not substantial projects and indeed they fell below the threshold of the Public Contracts Regulations 2006, but nonetheless the contracts relating to them were subject to "EU Procurement Requirements" in the manner to which I will refer below. The overall value of the two contracts awarded was a little over £900,000 whereas the threshold for works contracts under those regulations was just over £3.9 million.

6. Prior to 1 November 2011 the ERDF was administered by the East Midlands Development Agency (the 'EMDA'), one of the Regional Development Agencies then in existence. Accordingly, it was the EMDA that was engaged in the process of agreeing the grants for the two contracts. That engagement provides much of the bedrock to the Claimant's case and it will be necessary to refer to it in a little detail. However, in the first instance, the rules in operation at the time need to be identified.

7. The agreement between the EMDA and the Claimant was that each grant was made on the basis that the Claimant would comply with the terms of the "Deeds of Grant". The GOA project was subject to a Deed of Grant dated 16 December 2010 and the PRIW Project subject to one dated 11 February 2011. The terms of each Deed of Grant included requirements pursuant to the Standard Conditions that the "Grant

Recipient" (the Claimant) (i) "shall comply with current EU Procurement Requirements at all times in relation to the Project" (Clause 14.2(b)) and (ii) "must comply and secure compliance with … EU Procurement Requirements and State Aid Rules" (Clause 10.1). Clause 14.3(a) also provided that "the Agency's tendering procedure requirements are available on the Agency website and the Grant Recipient shall at all times comply with those tendering requirements in relation to the Project."

8. The EMDA also issued a guidance note in August 2010 concerning EU procurement requirements known as Guidance Note 9. This was on the EMDA's website. Under a heading entitled "Minimum standards for low value contracts which fall below the EC thresholds" the following appears:

> "Larger organisations may already have their own procurement policies and procedures in place and provided these meet the minimum standards below they should be used. If your organisation does not have processes in place or they are less strict than the requirements below then the guidelines below must be followed:
>
> - Contract award procedures which do exceed the EC threshold must be in line with end of procurement rules. The EC principles of equality of treatment, non-discrimination, transparency free movement and competition must be respected throughout the entire process.
>
> - The following table summarises the key requirements for supplies and services contracts which fall below the EC threshold (currently £156,442) …
>
> [Table appears]
>
> - Where contracts fall below the EC thresholds an adequate level of advertising of the contract must be made in order to ensure that the general EC principles of equal treatment and transparency are respected.
>
> - An appropriate level of advertising equates to publication of the contract in the national or local press and on the website of the contracting authority
>
> …"

9. This part of the guidance is followed by a paragraph saying that "European procurement rules are complex" and that that which follows is "only a very brief summary". It is suggested that if there is any doubt, "applicants should take legal advice" and "where doubt remains … about the application of the procurement rules, it may be better to err on the side of caution."

10. The ERDF National Procurement Requirements (published in April 2012 by the Department for Communities and Local Government) gives guidance in relation to

sub-threshold contracts. Both Counsel referred to it, but as guidance it was not in force at the material time. However, as will appear (see paragraph 13), it is argued that it reflects European Community law. The relevant part of the guidance is as follows:

> **"14. Sub OJEU procurement**
>
> A procurement may not have reached the relevant value threshold for the Regulations to apply in full but there are still rules to be followed. The EU principles of equality and of treatment, non-discrimination, transparency, free movement and competition must be respected throughout the entire process regardless of the value of the contract. Grant Recipients will need to be able to demonstrate the legitimacy of the procurement route followed and any supporting evidence behind this in the event of an audit.
>
> […]
>
> … it is the responsibility of the Grant recipient to decide whether an intended contract might potentially be of interest to suppliers located in other Member States. This decision has to be based on an evaluation of the individual circumstances of the case, such as the subject matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance. If it can be demonstrated that this analysis has been carried out and the result is that no/limited advertising is required then this may be sufficient.
>
> In all instances a full audit trail of documents, including evidence of advertising where necessary and all decisions taken relating to procurements carried out should be retained for audit purposes. This needs to be retained for up to 3 years after the final payment made on the programme and at present this is likely to be until at least 2025.
>
> …
>
> <u>Internet</u>
>
> The wide availability and ease of use of the World Wide Web makes contract advertisements on websites far more accessible, especially for undertakings from other Member States and for small and medium enterprises (SMEs) looking for smaller contracts. The Internet offers a large choice of possibilities for advertising of public contracts.
>
> Advertisements on **the contracting entity's own website** are flexible and cost-effective. They should be presented in a way that potential bidders can easily become aware of the

> information. Contracting entities might also consider publishing information on forthcoming contracts not covered by the Regulations as part of their buyer profile on the Internet.
>
> **Portal websites** specifically created for contract advertisements have a higher visibility and can offer increased search options. In this respect, the setting-up of a specific platform for low value contracts with a directory for contract notices with subscription for e-mail constitutes a best practice, making full use of the Internet's possibilities in order to increase transparency and efficiency."

11. Mr Andrew Hogan, for the Claimant, submitted that there is a tension between the local EMDA guidance (which contemplates advertising in <u>all</u> cases falling below the threshold) and the national guidance (which contemplates cases where <u>no or limited</u> advertising will be appropriate). He submits that the local guidance goes beyond the requirements of EU law, but accepts that it is still relevant because it sets in place "an additional or more onerous, contractual requirement to advertise". I will return to this in due course.

12. In *R (Chandler) v Secretary of State for Children Schools and Families and others* [2009] EWCA Civ 1011, the Court of Appeal reflected on the "jurisprudence of the Court of Justice on cross-border interest in procurement contracts outside the regulations" in the following way:

> "27. Even where the tendering procedure in the Directive and the regulations does not apply, the Court of Justice has held that a contracting authority must apply the principles of non-discrimination and transparency in the Treaty before awarding a public services contract: *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG,* Case C-324/98 [2000] ECR I-10745. In these circumstances, the contracting authority must undertake a "degree of advertising sufficient to enable the market to be opened up to competition". This apparently activist approach of Court Justice is grounded in the fundamental freedoms guaranteed by the Treaty, including the freedom to provide services contained in article 49.
>
> 28. However, the jurisprudence only applies if there is shown to be the requisite degree of cross-border interest in tendering for the contract: see *Commission v Ireland* C-507/03, where the Court of Justice so held in relation to a contract not subject to the tendering requirements of the Directive:
>
> > "29 It follows that the advertising arrangement, introduced by the Community legislature for contracts relating to services coming within the ambit of Annex IB, cannot be interpreted as precluding application of the principles resulting from Articles 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest.

> 30 Also, in so far as a contract relating to services falling under Annex IB is of such interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 and 61, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17).
>
> 31 Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (*Coname*, paragraph 19 and case-law cited).
>
> 32 In those circumstances, it is for the Commission to establish that, notwithstanding the fact that the contract in question relates to services coming within the scope of Annex IB to Directive 92/50, that contract was of certain interest to an undertaking located in a different Member State to that of the relevant contracting authority, and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded.
>
> 33 According to settled case-law, it is the Commission's responsibility to provide the Court with the evidence necessary to enable it to establish that an obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see, to that effect, inter alia, Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21; Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paragraph 80; and Case C-135/05 *Commission* v *Italy* [2007] ECR I-0000, paragraph 26), in this case a presumption that a contract relating to services coming within the scope of Annex IB to Directive 92/50 and subject to the rules described in paragraph 24 of this judgment necessarily is of certain cross-border interest."

29. It is not wholly clear whether these principles also apply where a contract would be outside the Directive because the definitions of "service provider", or "public contracts" are not fulfilled. We have proceeded, without deciding the point, on the basis that the principles derived from the Treaty would apply in that situation.

30. The Court of Justice uses the words "of certain cross-border interest". We doubt whether the Court of Justice

> intended to hold that cross-border interest had been shown beyond reasonable doubt. No argument has been addressed to the relevant test. In relation to the type of contract with which we are concerned, it is clear from *Commission v Ireland* that there is no presumption that cross-border interest exists. Clearly there must be a realistic prospect of cross-border interest. It may be that, in the interests of protecting contracting authorities, a higher test than reasonable prospect applies so that the contracting authority would only be bound to follow the general principles in the Treaty if it was likely that there was cross-border interest. But a higher test would work to the disadvantage of potential tenderers in other member states and would be applied on the basis of imperfect information since *ex hypothesi* there would have been no publicity for the proposal. It is not necessary for us to resolve this question on this appeal. We will proceed on the basis most favourable to the appellant that if there is a realistic prospect of cross-border interest, the principles of the Treaty are engaged. The question of whether there has been cross-border interest shown in this case forms the basis of an alternative argument on this appeal, which we consider below (paragraphs 65 to 69). The Secretary of State does not suggest that, if the principles in the Treaty are engaged, there has been compliance with the advertising obligation that flows therefrom."

13. Mr Hogan suggests that the national guidance is consistent with that analysis of European Community law. I do not think Ms Deok Joo Rhee, for the Secretary of State, disagrees with that as a proposition, but her case is that, whether the national or local guidance is applied, advertising of the contracts <u>was</u> required and none occurred in this case. To the extent that European Community law is different from the local guidance (and she does not, as I understood her argument, accept that it is), the issue is whether the Claimant addressed (or could show that it had addressed) the question of whether there might be any "cross-border" interest in the contracts and/or, irrespective of whether the Claimant addressed the issue, whether as matter of fact there was any "realistic prospect of cross-border interest" (see *Chandler* at [30] above). What she asserts is an impermissible approach on the part of a grant recipient is to seek to justify *ex post facto* a failure to advertise a proposed contract by reference to the proposition that, if the issue had been addressed prior to letting the contract, the conclusion would have been that there was no realistic prospect of cross-border interest. Mr Hogan, on the other hand, submits that whether a proposed contract engages the Treaty principles and thus the requirement to advertise is an objective one, reviewable by the court as to the substance of the decision, not simply to that of reviewing the decision of the decision-maker on that issue. His submission is that in this case there was no cross-border element at all and no realistic prospect that the contracts would have been of interest to other EU contractors. The essence of his case is set out clearly in paragraph 10 of his Skeleton Argument which reads as follows:

> "It should be noted in the context of this case, the Claimant is an English local authority. The land in question is in Nottinghamshire. The contractors undertaking the works were

> English. The value of the works was modest. The European Commission has shown no interest in this case and neither has any extra-territorial contractor made any complaint about the award of the contracts. The Defendant moreover, has adduced no evidence to suggest that there is anything about the works within the curtilage of a remote branch station in Nottinghamshire, that would have attracted foreign companies to bid for the contracts."

14. I will return to the implications of the foregoing analysis and the competing submissions after reviewing (a) what was actually done in connection with the letting of the two contracts and (b) what are said to be the consequences of the pre-letting involvement of the EMDA in discussions with the Claimant's representatives. The two issues are related.

How the contracts were let

15. In common with other organisations that need to procure contractors for construction projects, the Claimant uses the Construction Line website, though not in the way that some others do. Construction Line is described on its website as "a Public-Private Partnership between Capita and the Department for Business Innovation & Skills" and it claims the following:

> "At the heart of what we do is our national online database, the UK's largest register for pre-qualified contractors and consultants. In terms of efficiency, time and cost saving and best practice, Constructionline is proven to deliver for public and private sector organisations alike.
>
> …
>
> For suppliers to the construction industry, Constructionline means that you no longer need to repeatedly fill in standard pre-qualification forms for every construction tender. What's more, with 8,000 buyers already using the Constructionline database to source contractors and consultants, Constructionline is a great tool to market your organisation.
>
> …
>
> By providing an up-to-date register of pre-qualified suppliers for construction contracts, Constructionline is a common sense solution that 8,000 buyers from over 2,000 organisations are already making the most of. We pre-qualify all of our suppliers to government standards, and maintain relationships with a range of industry, ePurchasing and Government partners to ensure that we remain relevant to procurement professionals within the construction industry."

16. In his witness statement, Mr Nicholas Hibberd, the Claimant's Regeneration Theme Lead (Property) with responsibility for property-based regeneration projects, sets out

how the Claimant uses the website. He explains that there are two main ways the site can be used which he describes in more detail as follows:

> "a. Firstly, Contructionline provide an opportunity for organisations to advertise procurement opportunities on their website. This ability to advertise was available from 04 November 2009.
>
> b. The general procedure is for organisations to log onto the noticeboard on the Constructionline website and insert the details of the procurement opportunity. Specific questions include: type of opportunity and location. The details are then posted on the notice board which contractors are able to view when they log onto the website to look at the opportunities posted by other organisations.
>
> c. When a company registers with Construction Line they are required to categorise their registration to specify the type of work they supply. References are also required to ensure they have the required workforce to undertake the works along with a specifying a geographical area which indicates which area of the country they are willing to work in and the value of the contracts which they are willing to take in these areas.
>
> d. Once a procurement opportunity is registered, Constructionline will match the opportunity to the companies which have registered under that specific category of work and said they are willing to work in that area and an e-mail promoting the opportunity will be sent to them.
>
> e. Companies also have the option of checking the Constructionline notice board themselves on a regular basis to find out about any newly listed opportunities.
>
> f. Secondly, Constructionline can be used to select pools of Contractors/business who comply with the relevant framework/work spec.
>
> g. There is not a requirement to advertise all procurement opportunities on the Constructionline website but the Council does direct all Contractors who enquire about Construction related contracts to be registered with Constructionline."

17. He explained further that the Claimant did <u>not</u> use the first option (namely, to use the Constructionline website to advertise the contractual opportunity), "but rather the second and selected a pool of businesses from the Constructionline site that complied with the framework required." This accords with what is said on the Claimant's own website which, under a heading entitled "Selling to the Council", says, *inter alia*, that "for all construction-related projects we use Construction Line as <u>our method of pre-qualification</u>" (emphasis added).

18. Whilst some parts of the various exchanges by e-mail and other correspondence after the Defendant expressed concerns about the procurement process in fact adopted appeared to suggest that the precise contractual opportunities in connection with these two projects were advertised on the Claimant's website, in fact it is common ground that no such advertisement appeared. What is relied upon for this purpose is (a) the sentence from the website referred to in paragraph 17 above and (b) the process adopted whereby the Claimant and its architects for the project identified an initial "long list" of contractors from the Construction Line list of contractors who (based upon past experience of their work) were assessed as "well equipped and able to deliver projects of this nature" each of whom was then approached by the architects to check availability and willingness to tender for the project. Based upon that exercise, a final tender list was compiled made up of 8 contractors. In the event, 6 tendered and A & S Enterprises was chosen. That that is what happened is confirmed by appropriate internal documentation from the Claimant.

19. However, no evidence of any assessment by the Claimant of potential cross-border interest in the project has been proffered at any stage and none exists.

20. Leaving aside for present purposes the issues raised below (see paragraphs 20-38), there can be little doubt that the "level of advertising" required by the local guidance (namely, "publication of the contract in the national or local press and on the website of the contracting authority": see paragraph 8 above) was not met. That does not appear to be in dispute. Ms Rhee would say that EU law was also breached; Mr Hogan would disagree.

The communications between the Claimant and the Defendant prior to the grants being made

21. The first face-to-face engagement between representatives of the Claimant and of the then EMDA took place on 4 March 2011. This was a Project Engagement Visit ('PEV') relating to the GOA Project. (A PEV in respect of the PRIW Project took place on 19 April 2011.) The purpose of such a visit is recorded on the formal record of such a visit in the following terms:

> "This Project Engagement Visit is to:
>
> - Provide advice and guidance about successfully managing an ERDF project.
>
> - Develop a successful working relationship between *emda* and the project.
>
> - Review the adequacy of systems and procedures set up by projects to ensure successful delivery.
>
> - Ensure reporting structures are in place to record accurate financial information and output data to *emda*.
>
> - Ensure that the project is able to operate in accordance with the ERDF Funding Agreement.

> This visit is not a guarantee that issues will not be raised at future monitoring visits and audits. This project could be subject to an audit or monitoring visit by:
>
> - *emda's* ERDF Appraisal and Monitoring Team
> - CLG Internal Audit Services (IAS)
> - European Commission Internal Audit Service
> - European Court of Auditors"

22. Each of those matters had been drawn to the Claimant's attention in a letter from Vikki Hamer, an A13 Assurance Manager on the ERDF, to Gemma Denton, a Regeneration Project Officer with the Claimant, dated 19 January 2011. Ms Hamer had sent to the Claimant a copy of the PEV Record prior to the first PEV itself.

23. Ms Hanne Hoeck, the Technical Assurance Manager for the Midlands ERDF programme, described a PEV as follows:

> "… the purpose of a PEV is to ensure that a successful applicant for ERDF monies understands the terms of the funding agreement, and to assist them in setting up systems which are compliant with the requirements of the funding agreement. It is not intended to be an audit, and as such, the procedure does not normally entail a detailed examination of the applicant's documentation associated with the ERDF grant."

24. Mr Hogan accepts that what was said and discussed at the PEV did not amount to a sanction of all aspects of the project or to a waiver of the Defendant's right to rely upon a default in the appropriate procedures in all circumstances. In general terms, his case is that the Claimant's representatives explained the way that Construction Line had been used and the way tenders were invited and were told that the procedure adopted was appropriate. As he put it in his Skeleton Argument, the "single, discrete issue" of the "methodology of awarding the contract … had been closed off" by what was discussed at that meeting. I will return to this below.

25. The PEV on 4 March was attended by Ms Hamer and Martin Holland (an ERDF Contract Officer) on the EMDA's side and Mr Hibberd, Ms Denton and someone called Perry Sykes on the Claimant's side. Ms Denton's witness statement indicates that it took place <u>after</u> the Claimant had "advertised and procured" for the contracts, but <u>before</u> any contracts had been offered. It is not disputed by anyone present that Construction Line was referred to. The issue is the basis upon which it was discussed. Ms Denton, supported by Mr Hibberd, says that she told Ms Hamer at this meeting (and, at a later stage, Mr David Gibb) of the process the Claimant adopted, namely, that Constructionline would be used to <u>select a pool of contractors to invite to tender</u>. Mr Hibberd says that "at no point did we confirm that an advertisement would be placed on Constructionline's website" and that "[all] parties were fully aware that the advertisement had been placed on the Council's website." As I have already indicated

(see paragraph 18), it is not accurate to say that an advertisement for the specific contracts had been put on the Claimant's website.

26. Ms Hamer indicates in her witness statement that she was unaware that the Constructionline website was used in this way. She was aware only of the first of the two ways it can be used referred to by Mr Hibberd (see paragraph 16 above). She says this:

> "In relation to Construction Online, where it is used in ERDF projects, the standard practice is that an invitation to tender is published in full on the website. Interested companies are then able to request a tender brief, before deciding whether to pursue the opportunity. I know this is the standard practice because, in my experience as an ERDF officer, this is the way it has always been used. Construction Online is a tendering portal, and I would say that around 15% of the applicants I deal with use this system. I did not realise that Construction Online could be used in any other way until around the time that the issue arose with this project (there was another project that had done something similar which was discovered around the time the issue arose with this project)."

27. Her position is that at no point during the PEV was she informed that there had been a variance from her perception of the standard practice relating to the use of the Constructionline website and there was no reason for her to suspect that it had been used differently. She does say that when she came to consider the witness statements of Ms Denton and Mr Hibberd in November 2013 she could not remember the details of everything discussed during the PEV because it had taken place over two years prior to the issues being raised and that she had done 54 PEVs since then, but she felt that she would have recorded something different on the PEV Record if she had been told of the way the procurement exercise had been undertaken.

28. What does the PEV Record say? The relevant entries and answers are as follows:

> "5.2 Does the Applicant have a procurement policy in place? How will the procurement policy be implemented in the project?
>
> Yes.
>
> The major procurement within this project is the procurement of the main contractor. This process has been initiated through the Construction Line system and the Tender brief was submitted to 8 companies; two of these declined the opportunity to tender but the remaining six will be submitting tenders later this month for assessment.
>
> There may be other small procurement exercises undertaken in relation to the marketing; however details of the quotes received will be retained.

> 5.3 Do these arrangements meet the European Commission guidance as per the emda/ERDF Funding Agreement?
>
> Yes.
>
> From the information provided the procurement appears to be in line with the ERDF Funding Agreement and is therefore acceptable."

29. Mr Hogan submits that this record (which was signed subsequently as accurate on behalf of the Claimant) is an "accurate description" of the use actually made by the Claimant of the Constructionline website. He also says that the record makes no mention of advertising in the national or local press or advertising on the Claimant's website (see paragraph 8 above) and that there is no criticism of that "deficiency" in the record.

30. Ms Rhee, on the other hand, submits that this absence of information about advertising in the record indicates that no-one on behalf of the Claimant informed Ms Hamer that the contracts had not been advertised as required.

31. I am bound to say, pausing at this point and making no reference to the PEV Record for the PEV on 19 April 2011 (see paragraph 21 above and paragraph 32 below), that the record of the process adopted neither confirms nor disaffirms which version of the Constructionline approach was in fact adopted. The process would have been "initiated through the Construction Line system" and as a result "the Tender brief … submitted to 8 companies" whichever of the two versions was implemented. The phraseology is not one that, even on a balance, supports one version or the other.

32. Ms Rhee draws attention to what was recorded in relation to the PEV on 19 April 2011 in respect of the PRIW Project. Ms Hamer met with Marc Hollingworth and Ms Denton on that day. The equivalent notes made in relation to the issues identified in paragraph 28 above were as follows:

> "5.2 Does the Applicant have a procurement policy in place? How will the procurement policy be implemented in this project?
>
> Yes
>
> The main contractor has been procured through an open tendering process as the value of the public realm works is below QJEU levels. The contractor will undertake sub contracting as necessary and Mansfield District Council do not intend to undertake any further procurement in relation to this project.
>
> 5.3 Do these arrangements meet the European Commission guidance as per the emda/ERDF Funding Agreement?
>
> Yes

> From the discussions undertaken it is clear that an open tender process has been undertaken which is acceptable for the value of works procured."

33. As Ms Rhee says correctly, the record that "the main contractor has been procured through an open tendering process" is contrary to what in fact had taken place. If what had occurred had been described fully by Ms Denton, then Ms Hamer would not have been correct in making this record.

34. There is a clear issue of fact in this case about what was or was not said about the procurement process. Without oral evidence and cross-examination, it would be impossible to come to a final view on that issue. Such a course is very rare in this jurisdiction and no invitation to consider that approach was made by either Counsel. However, I have to say that even with oral evidence and cross-examination, in the absence of some compelling contemporaneous written clue, the resolution of the issue could well have proved very difficult. It does seem to me on the available material that this has all the hallmarks of the two sides to the relevant conversations being at cross-purposes, the Claimant's side intending to refer to one version of the Construction Line approach and the Defendant's side believing the reference was the other version. Simply to illustrate, if Ms Denton had said something like "We get our contractors through Construction Line", Ms Hamer could easily have assumed that her understanding of the way Construction Line worked was what Ms Denton was talking about whereas Ms Denton was simply suggesting that potential contractors were identified from the Construction Line list of screened contractors. At all events, I see no alternative but to approach this issue on that basis and to conclude that there was no true meeting of minds on what truly represented the methodology of the procurement exercise undertaken by the Claimant.

35. Basing himself on cases such as *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 and *R v Secretary of State for Education ex p Luton Borough Council and Others* [2011] EWHC 217 (with its recitation of propositions from cases such as *Paponette v The AG of Trinidad and Tobago* [2010] UKPC 32), Mr Hogan sought to construct an argument that there has been an abuse of power in this case and/or failure to perform a substantive legitimate expectation, possibly on the back of a private law right to relief based upon estoppel or waiver. He suggests that the Claimant's employees were keen to establish that their methodology of awarding the contract met the Defendant's requirements, that they received an assurance that it did, that it was so recorded and that they acted on the assurance until two years later when the Defendant's position changed sought to change his mind, the procedures having been changed in the interim. The issue concerning the procurement process was not identified by the Defendant until the PAV (see paragraph 36 below) in relation to the PRIW project on 6 September 2012 and the subsequent inquiries undertaken by Mr Gibb and his colleagues.

36. The reference to a change in procedures is a reference to the standardisation process relating to Project and Verification Visits ("PAV") which was completed in April 2012. After then the process was that if any procurement had been undertaken prior to the start of the application for EDRF monies, then a detailed documentation check would take place at a paper-based "appraisal" at the Department for Communities and Local Government before the signing of the funding agreement.

37. I do not, for my part, see the relevance of this arguably stricter approach, but in any event any argument of the sort identified by Mr Hogan would require an unambiguous representation on the part of the Claimant about what was proposed (or about what had been done) in relation to procurement about which unambiguous approval was given by the Defendant. That factual scenario is not, in my judgment, demonstrated whether looked at subjectively from the point of view of the participants in the relevant discussions or on an objective analysis of the relevant material.

38. That being so, it seems to me that the two issues that remain for consideration are (a) whether there was a breach of the Deeds of Grant and/or of EU law and, if so, (b) whether the claw back was proportionate.

Breach of the Deeds of Grant and/or EU law?

39. Given that there was no open advertising of the proposed contracts in the way contemplated by the local guidance (see paragraph 8 above), I do not think it is argued that there was no breach of the Deeds of Grant. At all events, I so find.

40. Unless there has been a waiver of that requirement (which has not, in my view, been established), the right to claw back monies advanced arises. On that basis, it is probably immaterial as to whether, on a strict analysis, there has been a breach of EU law also save that it would, on all standard principles, not be possible to "waive" a requirement imposed by EU law. However, I will address that question out of an abundance of caution.

41. If the ERDF National Procurement Requirements (see paragraph 10 above) reflect EU law, then, in my judgment, a breach would be established because there is no evidence that the Claimant (as the Grant recipient) took any steps to decide whether the proposed contracts "might potentially be of interest to suppliers located in other Member States". Because the contracts were relatively small in the overall scale of things (and were to be executed "in a remote part of North Nottinghamshire", according to the Claimant), it is possible to see why such a conclusion might have been reached, but the guidance given requires a conscious process to have been adopted conscientiously at the material time with an appropriate audit trail.

42. I have not been taken to EU law beyond the analysis in *R (Chandler) v Secretary of State for Children Schools and Families and others* (see paragraph 12 above) and on one view this leaves open the possibility of the court deciding the issue as a matter of fact in a particular case. Since I do not consider that the issue does arise in this case (despite Mr Hogan's strong assertion that it is open to the court to review "the substance of the decision" not to advertise) because no consideration was given to the potential of cross-border interest, I venture no further view on the issue of the role the court may take in this context. All I would observe in the present case is that there is no evidence upon which I would have been able to evaluate whether there was any realistic prospect of cross-border interest in the two projects involved. Simple assertions, one way or the other, are of no assistance to the court in such a situation.

43. In my judgment, the failure to <u>consider</u> whether there was any realistic prospect of cross-border interest (with the need for appropriate advertising if it exists) does itself represent a breach of the EU procurement requirements and that an *ex post facto* justification is not sufficient to remedy that omission. This conclusion is supported by the view of the

Commission about what needs to be done as set out in its *Interpretative Communication on Community law applicable to the provisions of the Public Procurement Directive* (OJEU C-179, 01/08/2006). This provides as follows at paragraph 2.1.1:

> "The Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of 'passive' publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congress for information would likewise not constitute adequate advertising.
>
> Therefore, the only way that the requirements laid down by the ECJ can be met is by publication of a sufficiently accessible advertisement prior to the award of a contract. This advertisement should be published by the contracting entity in order to open the contract award to competition."

44. That conclusion, therefore, represents a further reason for invoking the claw back entitlement. The next issue is whether the decision to claw back 25% of the grant is sustainable.

The 25% claw back

45. The letter of 19 March 2013 (see paragraph 1 above) said this:

> "The projects did not comply with the advertising requirements set out in the funding agreement and therefore you have not complied with the terms of the funding agreement, and a 25% financial irregularity will be imposed for the value of the contract awarded to A & S Enterprises. This will be reduced by the ERDF Intervention rate for the relevant project, and assessed on a claim by claim basis."

46. The letter then quoted the ERDF National Procurement Requirements ERDF-GN-1-004 incorrectly by referring to the guidance given in respect of a contract above the OJEU threshold (which was not the case). In relation to such a contract awarded without complying with the advertising requirements laid down in the EC Public Procurement Directives, but which "was advertised to some extent allowing economic operators located in another Member State access to the contract", the penalty is "25% of the value of the contract involved". The same penalty arises in relation a "Below OJEU threshold" contract where the contract was "awarded without adequate competitive tendering, involving non compliance with the principle of transparency" which is what the breach amounted to in the present case.

47. Whilst the mistake does not give total confidence in the Defendant's internal processes, it is not really suggested that it made any difference to the decision. According to Ms Hoeck, the Defendant treated the guideline as "a recommended correction" and thus presumably as one from which the Defendant could depart. Indeed in her witness statement she says that "consideration was given to whether a lower penalty could be applied". There is in the papers an internal e-mail from Mr Gibbs suggesting that a lower penalty (say, 5-10%) might be imposed because the Claimant "partly advertised" the contracts. However, whilst that may have been his understanding at the time, it did not reflect the reality, namely, that there was no advertising.

48. Ms Hoeck says that a reduced penalty "was not felt to be appropriate given the statements in the guidance, and the specific nature of non-advertising breach." Further, she said that "the breach did not appear to be capable of falling into any of the other categories of breach." When looking at the guidance it does appear that no deviation from the 25% in this situation was contemplated because, for example, in an "Above OJEU threshold" contract where there has been "insufficient or discriminatory definition of the subject-matter of the contract" the recommended penalty is said to be "25% of the value of the contract [which] may be reduced to 10% or 5% depending on seriousness." That latitude is not expressly provided for in the situation obtaining in the present case.

49. Mr Hogan, however, contended that a note within the document entitled 'GUIDELINES FOR DETERMINING FINANCIAL CORRECTIONS TO BE MADE TO EXPENDITURE CO-FINANCED BY THE STRUCTURAL FUNDS OR THE COHESION FUND FOR NON-COMPLIANCE WITH THE RULES ON PUBLIC PROCUREMENT' issued by the European Commission (COCOF 07/0037/03-EN), which "sets out guidelines for the financial corrections to be applied for irregularities in the application of the Community regulations on public procurement to contracts", ought to have led to greater flexibility and a result that no penalty should have been prescribed. The note to which he referred relates specifically to the kind of breach that occurred in this case and is in the following terms:

> "The concept of "sufficient degree of advertising" must be interpreted in the light of Commission interpretative communication No 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, and in particular:
>
> a) The principles of equal treatment and non-discrimination imply an **obligation of transparency** which consists in ensuring, for the benefit of any potential bidder, **a degree of advertising sufficient to enable the contract to be subject to competition**. The obligation of transparency requires that an **undertaking located in another Member State can have access to appropriate information regarding the contract before it is awarded**, so that, if it so wishes, it would be **in a position to express its interest** in obtaining the contract.

> b) For individual cases where, because of particular circumstances such as a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case the effects on the fundamental freedoms are to be regarded as too uncertain and indirect to warrant the application of standards derived from primary Community law and consequently there is no ground for application of financial corrections.
>
> It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance." (Emphasis as in original.)

50. Basing himself on sub-paragraph (b) of that document, he submits that the contracts here had very modest economic interests at stake which would be of "no interest to economic operators located in other Member States" and that, accordingly, there was no ground for the application of financial corrections.

51. There is no evidence to suggest that the Defendant considered this approach, presumably because those taking the decision considered that there had been a breach of EU law. For the reasons I have given in paragraph 43 above, in my judgment, that assessment would have been correct. To that extent the approach adumbrated in the note did not (and does not) arise for consideration.

52. The justification for not departing from the 25% was developed further by Ms Hoeck when she said this:

> "However, I would emphasise that the DCLG as the Managing Authority has very little room for manoeuvre in matters such as these. Our work is over seen by the European Commission. Where the Commission consider that the Member State is not systemically carrying out verifications to the required standard, it has the ability to impose a penalty on the member state which is a percentage of the entire €3.6 billion programme."

53. She went on to describe how the Commission may, if systematic mistakes are made, impose an 'interruption' on the programme of payments from the Commission to the Managing Authority (preventing the Managing Authority from being repaid what it has paid to successful applicants) until systems have been put in place to correct the issue. She says that if the Member State fails to correct the issue identified by the Commission, it has the right to suspend the entire programme. She describes the three interruptions to the English programme during the period 2007-2013 and says that since 2010 the Commission has "been very tough on Member States in respect of

procurement issues for below OJEU public contracts" and, accordingly, whilst "the value of the contract may seem relatively small compared with other procurement contracts, the issue has much wider impact and the Managing Authority is not able to overlook it."

54. On this aspect of the case, Mr Hogan has not advanced any argument that this reasoning is flawed and, accordingly, I express no view about it other than to observe that the stronger justification for maintaining the penalty at 25% would seem to me to be that the guidance does not suggest any scope for departure from that figure in the situation that arose in this case.

55. I do not consider that there are any grounds upon which the court can interfere with the amount of the claw back.

Conclusion

56. It follows, therefore, that the Claimant's overall challenge to the Defendant's claw back decision must fail.

57. It is unfortunate that the claw back should have become necessary since this is not a situation in which there was ever any intention on the part of the Claimant to evade its responsibilities under the procurement processes and there is no doubt that there was a good and open working relationship between the Claimant's team and the team from EMDA, as it then was. However, the EU requirements are demanding and the onus is on the Grant recipient to get its own processes right. The help given by the Defendant is, of course, always important, but the ultimate responsibility for complying with the procurement obligations lies on the Grant recipient.

58. I am grateful to both Counsel for their assistance.