



Neutral Citation Number: [2024] EWHC 1042 (Admin)

Case No: AC-2023-CDF-000129

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BRISTOL DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2024

Before :

THE HONOURABLE MR JUSTICE LINDEN

THE KING

(on the application of CAMBRIAN OFFSHORE SOUTH WEST LIMITED)

Claimant

- and -

NORFOLK COUNTY COUNCIL

Defendant

- and -

OFFSHORE RENEWABLE ENERGY CATAPULT LIMITED

Interested Party

Michael Bowsher KC and Jonathan Lewis (instructed by Stephens Scown LLP) for the
Claimant

Jason Coppel KC and Aliya Al-Yassin (instructed by nplaw) for the Defendant

Hearing date: 30 April 2024

JUDGMENT

This judgment was handed down remotely at 10.30am on 7 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Linden:

Introduction

1. This is a claim for judicial review of a decision of the Defendant which was set out in a letter dated 3 August 2023 (“the Decision letter”). That decision was that the Claimant (“COSW”) was not entitled to be paid grant monies in the sum of £1,372,405 which it had claimed in a series of invoices pursuant to a grant agreement dated 13 March 2020 (the “Grant Offer Letter”). COSW says that it paid this sum to Keyvor Morlift Limited (“KML”) pursuant to a contract dated 7 January 2020 (“the Contract”) and a number of subsequent variations to the Contract.
2. The essential reasons for the Decision were that the Defendant considered that COSW had failed to comply with conditions for reimbursement stipulated by the Grant Offer Letter which were concerned with the conduct of transparent and fair procurement processes. These failures occurred when COSW awarded the Contract to KML, when it entered into the Contract, and when it subsequently agreed to vary the Contract in KML’s favour in a way which the Defendant characterises as highly uncommercial. COSW says that this view of the variations was reached by the Defendant with the benefit of hindsight.
3. On 26 January 2024, Freedman J directed a hearing of the Claimant’s application for permission. He considered that certain matters required to be explained more fully and/or countered orally, primarily by the COSW, and he directed that the parties submit skeleton arguments which addressed these matters.
4. A hearing was therefore held on 30 April 2024. Having considered the written and oral submissions of the parties, I granted permission in respect of Grounds 2, 3 and 5 (in part) and I said that would give brief written reasons for refusing permission in relation to the other Grounds. Those reasons are set out below.

Summary of the background

5. At all material times COSW was one of 18 Project Partners in the Tidal Energy Stream Industry Energiser Project (“the Project”). The Project was conducted under the auspices of the Interreg VA France (Channel) England Programme (“the Programme”), a European Territorial Cooperation programme supported by the European Regional Development Fund (“ERDF”). The ERDF is one of five European Structural and Investment Funds (“ESIFs”) which are governed by Regulation (EU) No 1303/2013 (“the Regulation”).
6. The Defendant was the Managing Authority for the Programme. Pursuant to Article 125 of the Regulation it was responsible for managing the operational programme “*in accordance with the principle of sound financial management*”: Article 125(1). This includes an obligation to “*verify that the co-financed products and services have been delivered and that expenditure declared by the beneficiaries has been paid and that it complies with the applicable law, the operational programme and the conditions for support of the operations*”: Article 125(4)(a).
7. The Interested Party was the Lead Partner for the Project. By the Grant Offer Letter, it contracted with the Defendant and, in turn, it entered into a Partnership Agreement

with the 17 other Project Partners, including the COSW, which became effective on 13 March 2020. By clause 5.3 of the Partnership Agreement, COSW was required to comply with the Grant Offer Letter and the Interreg Programme Manual. Expenditure claimed by Project Partners was subject to a multi-level system of audit and control, which was set out in Article 13 of the Grant Offer Letter and Guidance Note 6a of the Programme Manual with which COSW was required to comply in accordance with Article 5.5(e) of the Partnership Agreement.

8. COSW itself had a procurement policy at the material time which provided for a “*formal EU Procurement Process*” for Interreg contracts which exceeded the relevant EU thresholds of £181,302 for supplies and services contracts and £4,551,413 for works contracts. The Programme Manual required that COSW complied with those internal rules, unless there were stricter applicable national or EU rules, which there were not because COSW is not a “*contracting authority*” for the purposes of EU procurement law and the Public Contracts Regulations 2015 (“PCR”).
9. COSW’s role in the Project was to remove a non-operational tidal stream turbine (“the Turbine”) from the sea-bed of Ramsey Sound in South Wales, replace it with a new turbine which would provide a new and reliable source of data regarding tidal energy generation and commission an open access data centre for the dissemination of that data. It subcontracted the removal of the Turbine to KML pursuant to the Contract. The original contract price was £495,000 but COSW says that it has paid sums totalling £1,372,405 to KML as a result of variations which were subsequently agreed.
10. Mr Diccon Rogers is the sole statutory director of COSW and its Executive Chairman. He is also one of two statutory directors of KML and a 50% shareholder in KML’s parent company. A “Statement of Financial Capacity”, signed by Mr Rogers on 8 May 2019 as required by the Interested Party, also says that KML is one of two named investors in COSW, the other being Mr Rogers himself who represented KML. Accordingly, on 20 November 2019 Mr Rogers signed a declaration of conflict of interest and it is COSW’s case that he took no part in the procurement process which led to the Contract, leaving the matter to be dealt with by other personnel within the companies, including COSW’s Managing Director Ms Susan Barr, and a procurement consultant, Mr Craig Pullen on the COSW side. On the KML side the matter was dealt with by Ms Bobbie Stone, its Business Development Manager.
11. On 6 December 2019, Mr Pullen placed an advertisement for the Contract on the Contracts Finder website with a closing date for tenders 12 days later, which the Defendant contrasts with the minimum period of 35 days under and “open procedure” under the PCR (see regulation 27(2)). The Contract was not advertised on an EU wide basis either, as the PCR would require if they applied. Mr Pullen also drew up the Invitation to Tender. Although there were expressions of interest from 7 other potential bidders, KML submitted the only bid within the specified timescale.
12. Although COSW was under no obligation to enter into a contract with KML immediately, it did so on 9 January 2020 at a time when the Grant Offer Letter under which it was to receive funding had not yet been signed, and when COSW believed that there was uncertainty as to whether the work required under the Contract would go ahead. COSW says that it did this because the Interested Party had impressed on it that time was of the essence.

13. On 24 January 2020, two weeks after the Purchase Order was issued, COSW notified KML of a delay of 4-8 weeks to the Contract for reasons which included “*grant and project funding delays*”. KML was instructed to hold its vessels, staff and project team on standby. KML proposed to levy a standby charge of approximately £7,000 per week for 8 weeks, whilst reallocating vessels, crew, equipment and resources to other work for not fewer than 8 weeks. This was agreed by COSW as a variation to the Contract when, says the Defendant, there was no obligation or need to do so. Subsequently, further payments to KML were agreed by way of contractual variations to accommodate delays caused by the Covid-19 pandemic and consequent “lockdown” restrictions.
14. Three invoices submitted by COSW in January 2020, and totalling approximately £200,000, were reimbursed by the Interested Party on 30 April 2021. However, all subsequent invoices, starting with an invoice dated 2 June 2021, were rejected. In April 2022 the Interested Party brought its concerns about the KML procurement to the Defendant’s attention whereupon there was detailed correspondence about the matter, albeit with a number of delays, in the course of which the Defendant made a decision on 27 May 2022 and then withdrew it after it was challenged.
15. The Programme came to an end on 31 December 2023. Although COSW says that some preparatory steps were taken, the Contract has not in fact been performed. When issues arose as to whether COSW would be paid, it decided not to proceed with the work.

The Decision letter

16. The Decision letter set out 5 reasons for the Decision as follows:

“1. COSW breached its procurement obligations by failing to advertise the contract in the Official Journal of the European Union (“OJEU”), and instead only advertised it at a national level through the UK’s Contracts Finder platform. The contract in question was wrongly characterised as a below-threshold works contract when it should have been treated as an above-threshold services contract. The contract did not involve any “works” properly defined or, at the least, the works element was small and subsidiary to the services element. This warrants a 25% rate of correction in respect of all sums paid under the contract as per EU guidelines.

2. COSW awarded the contract to KML without having taken adequate steps to mitigate the conflict of interest caused by the status of Diccon Rogers (DR) as a director of both companies, and KML’s status as an investor in COSW. In particular, the appointment of Craig Pullen (CP), who also acted as a consultant to KML, was insufficient to mitigate the conflict of interest, and DR participated in the decision to accept CP’s recommendation and award the contract to KML at the conclusion of the procurement (at a time, when on COSW’s own account, there was material uncertainty as to when the project could go ahead). This warrants a 100% rate of correction of all sums paid under the contract as per EU guidelines, including for all contract variations.

3. The steps taken by COSW purportedly to mitigate DR’s conflict of interest in fact created a further conflict of interest as the person it appointed to manage the

procurement of the contract, CP, also provided a consultancy services to KML. This warrants a 100% rate of correction of all sums paid under the contract as per EU guidelines, including for all contract variations.

4. COSW then agreed variations to the contract without having taken adequate steps to mitigate the conflict of interest caused by DR's status as a director of both companies, and KML's status as an investor in COSW. Indeed, COSW has not notified the MA of any steps taken to mitigate these conflicts of interest when it was deciding whether or not to vary the contract and on what terms. This warrants a 100% rate of correction of all sums paid, as per EU guidelines, for all contract variations.

5. Variations were also in breach of a "national rule" insofar as they increased the value of the contract to more than 50% of its original value, requiring a correction of 25% of the initial contract value and 100% of the value of variations which increased the value of the contract to more than 50% above its original value.

As per the guidelines, where a number of irregularities are detected in the same procurement procedure, the rates of correction are not cumulated and the most serious irregularity should be taken as an indication to decide the rate of correction. As such, the 100% rate of correction in respect of conflicts of interest is the rate that applies in this instance."

17. I will refer to these reasons as Reasons 1-5. The Decision letter went on to explain the Defendant's assessment of the facts under two headings: "*Conflict of Interest*" and "*Other concerns*".
18. I note that each of the Reasons identified the rate of correction which was applied as a result of that particular Reason. The COSW's Statement of Facts and Grounds did not include any challenge to Reason 4 which disallowed 100% of the costs of the variations to the Contract. It did not appear to be disputed by Mr Bowsher KC that it followed from this that the Grounds were academic insofar as they challenged other Reasons which led to a 100% correction in relation to the costs of the variations. Even if all of those Grounds were well founded, Reason 4 would be unscathed. The Grounds of challenge were therefore only relevant to sums paid or to be paid under the original Contract i.e. the £495,000.

The Grounds of Challenge

19. There are 7 pleaded Grounds of challenge. These are:
 - i) The reasons given in the Decision letter were inadequate ("Ground 1");
 - ii) The Defendant erred in assuming that the ESIF National Procurement Requirements (ESIF-GN-1-001) ("the ESIF requirements") applied to the Contract ("Ground 2");
 - iii) The Defendant erred in its characterisation of the Contract as a "*public services contract*" rather than a "*public works contract*" ("Ground 3");

- iv) The Defendant took into account irrelevant considerations in its assessment of the conflict of interest issues (“Ground 4”);
 - v) Reason 5 was legally erroneous because the ESIF requirements did not apply (“Ground 5”);
 - vi) The Decision breached the Claimant’s substantive legitimate expectation that it would be reimbursed the sums in question (“Ground 6”);
 - vii) The Decision breached the Claimant’s rights under Article 1 of Protocol 1 to the European Convention on Human Rights (“A1P1 of the ECHR”)(“Ground 7”).
20. At the hearing, Mr Bowsher said that his submissions would concentrate on Grounds 2-4: he did not abandon the other Grounds but he did not propose to develop them further. In the event, the bulk of his submission were in relation to these Grounds but he touched on Grounds 6 and 7 as well in answer to questions from the Court.
21. As to the relationship between the Grounds and the Reasons for the Decision, Mr Coppel KC helpfully confirmed that he accepted that:
- i) Reason 1, failure to advertise EU wide, was founded on breach of COSW’s procurement policy which, as noted at [8] above, required an EU compliant process for public services contracts above a threshold value of £181,302. This Reason therefore depended on the Defendant being right that the Contract was not a public works contract, which is the issue under Ground 3;
 - ii) Reasons 2 and 3 also depended on the Contract being a services contract (Ground 3) or, if was a works contract, the ESIF requirements applying (the issue under Ground 2). By either route COSW was required to address and remedy conflicts of interest;
 - iii) Ground/Reason 5 depended on the ESIF requirements applying and they stand or fall with the outcome on Ground 2.

Ground 1: the reasons for the Decision were inadequate

22. The complaint under Ground 1 is that the Defendant failed to give adequate reasons for the Decision. Save for one point, it is accepted by COSW that the Decision letter set out reasons which were adequate. That point relates to the application of the ESIF requirements. COSW accepts that it was aware that the Defendant was taking the view that these requirements applied, and had been aware of this from April 2023. But it is said that the Defendant never explained why, in its view, they applied. Mr Bowsher accepted, in his skeleton argument, that there is no general duty to give reasons but he submitted that this is a case in which there was a duty to do so in order to enable COSW to review the Decision so as to determine whether it was flawed, and he relied on *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065C. He submitted that fairness required an explanation so as to enable COSW to challenge the Decision if it was made on a false basis.

23. There is nothing in this point. As Lord Brown stated in *South Buckinghamshire District Council and another v Porter* [2004] 1 WLR 1953 at [36]: “A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.” The Decision letter clearly and fully explains the Defendant’s decision. By its own admission COSW was aware, from April 2023, of the Defendant’s view that the ESIF requirements applied. The issue is one of construction (see, further, Ground 2 below) on which the COSW was able to take its own position even if it did not know why the Defendant took its view. In any event the reasons for the Defendant’s view on this point were explained in its Pre Action Protocol letter of 19 October 2023. COSW therefore was not prejudiced in terms of its ability to challenge this aspect of the Decision. Although Mr Bowsher suggested that the Court should guard against ex post facto rationalisation the rationale for that principle does not apply where, as here, the question is one of law on which the public body is either right or wrong.

Ground 2: the ESIF requirements did not apply

24. It was confirmed at the hearing that it is common ground that the issue under this heading is one of construction of the Interreg Programme Manual and, in particular, the requirement that “*All project Partners will need to ensure that they comply with these rules*” which appears on page 28 of the Manual under the heading “*National Rules*”. There is also a potential issue as to the construction of the document containing the ESIF requirements themselves.
- i) Mr Bowsher’s case is that the national rules referred to in the Programme Manual are the PCR. The ESIF requirements are not national rules for this purpose and, indeed, the ESIF requirements themselves are not intended to apply to the Interreg programme in any event for reasons which are set out in COSW’s Reply.
 - ii) Mr Coppel’s case is that national rules for these purposes are rules which implement the relevant EU Directives (i.e. the PCR) “*and also set national standards for Public Procurement*” as is stated under the same heading in the Manual (“*National Rules*”). The ESIF requirements fall within this category and they are applicable to the Interreg programme on the basis that they apply to the ERDF “*in England*” (per footnote 1 on page 2 of the ESIF requirements document) i.e. money from an English pot of the ERDF managed by an English Managing Authority (as here). Mr Coppel did not argue, however, that even on Mr Bowsher’s proposed interpretation of “national rules” there was therefore a contractual obligation to comply with the PCR, including regulation 24 which deals with conflicts of interest.
25. In the end I was persuaded by Mr Bowsher that Ground 2 is arguable. Although I was inclined to agree with Mr Coppel on the basis of the words of the Programme Manual and the ESIF requirements, it may be that the evidential material referred to in the Reply provides a relevant factual matrix which supports a different interpretation. It also appeared that the Interested Party had considered that the ESIF requirements were not applicable to the Interreg Programme. The fact that I was also minded to give permission on Ground 3 led me to err on the side of caution in relation to what will be a fairly short additional point.

Ground 3: Works contract or services contract.

26. Under COSW's procurement policy, if the Contract was a services contract rather than a works contract then COSW was obliged to conduct fully EU law compliant procurement process. Ground 3 turns on the interpretation and application of the definition of "*public works contract*" in regulation 2 of the PCR, read with Schedule 2 and regulation 4.
27. The Claimant advertised the Contract on the basis that it was a works contract and the Interested Party was aware that it had done so and did not challenge this approach, albeit there are issues as to what it knew about the proposed contract at the relevant time. Mr Bowsher advanced various arguments that the view of the COSW and the Interested Party was correct, albeit these arguments appeared to go beyond his pleaded case, and that the Defendant was therefore wrong to take the view that this was a public services contract.
28. Mr Coppel's central argument was that a public works contract is one whose main purpose is construction or demolition whereas the Contract was concerned with services i.e. removing the Turbine from the sea bed, raising it to the surface and transporting it to shore. The fact that any works which were involved were not the main feature of the Contract is illustrated by COSW's Purchase Order to KML, which stated that the total value of the Contract was £495,000 plus VAT and set out the invoices which were expected to be issued by KML for "Phase 0" and "Phase 1.1.", amounting to a total of £325,700. These phases, said Mr Coppel, were to be completed before any "works" were to be commenced and they accounted for the significant majority of the value of the Contract.
29. Again, I was inclined to agree with Mr Coppel but the language of the relevant provisions of the PCR is not easy to interpret and I was not shown any authority as to how it should be approached. Mr Bowsher persuaded me that the point was arguable and, in any event, I was reluctant to decide it without fuller argument.

Ground 4: irrelevant considerations in the assessment of the conflict of interest issues

30. COSW alleges that the Defendant took into account three irrelevant considerations. The first was that Defendant relied on Mr Pullen's statement in his Procurement Report dated 21 January 2020 that his "*.. recommendation [to appoint KML] was agreed by the Directors of Cambrian Offshore SW on 7th January 2020 and [KML] were duly appointed as the Marine Contractor for the required works*". COSW's case is that Mr Rogers did not in fact participate in the award of the Contract. Mr Pullen says in his evidence that he meant the director (singular rather than plural as in the Procurement Report) of COSW who was not conflicted i.e. Ms Barr (albeit she is not a statutory director).
31. Second, it is said that the Defendant also relied on a belief that KML had an ownership stake in COSW based on Mr Rogers' 8 May 2019 Statement of Financial Capacity which said that he and KML were the two named investors in COSW. Mr Rogers' evidence is that KML did not at the material time hold any shares in COSW.
32. Third, the Defendant relied on a belief that Mr Pullen also provided consultancy services to KML which was a regular client of Mr Pullen who "*would have had an*

interest in KML winning contracts to provide works or services, as such contracts could be expected to involve purchasing by KML". In this connection, COSW complains that the Defendant did not identify its specific concerns before the decision or interview, or otherwise approach Mr Pullen for evidence, contrary to its *Tameside* duty and/or its duty to act fairly. Had it done so, it would have learnt that Mr Pullen worked for KML "*in a completely different area and had no interest at all in the Contract being awarded to KML*". As there was no risk of a conflict of interest Mr Pullen did not sign a declaration at the time. He only did so subsequently in direct response to the Defendant's concerns.

33. Mr Pullen's evidence is that he advises KML on an occasional independent sub-contractor basis and on its purchasing only. He does not advise on any of its work projects. Prior to and during the procurement process he was engaged by KML to advise on some limited procurement activities in connection with KML contracting with third parties to carry out work on its premises in connection with its ESIF funded project, and not its day-to-day operational matters. As a precaution he had agreed that there would be an information barrier in place at KML between the advice work which he did for KML and the part of KML that deals with its sales contracts. This was agreed with Ms Bobbi Stone who has responsibility for all of KML's sales contracting.
34. Mr Pullen says that he therefore could not, and did not, have any knowledge or involvement in KML's tendering for works whether under the Project or any other project. He also owes a duty of confidentiality to COSW and would never disclose any information to KML or any other potential bidder which might prejudice a procurement exercise. And he says that KML is a comparatively minor client of his. He only has one project with them and he estimates that the income which he has received represents less than 5% of the total turnover of his consulting business. He has no financial interest in KML. KML being successful in the procurement would not have given him any financial advantage, or potentially generated work for him in connection with the Contract, or enhanced his standing within KML.
35. Mr Pullen also states that he had a very limited role in the COSW procurement process.
36. As Mr Coppel pointed out, the reality of the Defendant's arguments is not that the matters taken into consideration were irrelevant. It is that they were factually incorrect. However, they were not being put as material errors of fact, no doubt because COSW appreciated that it would not be able to satisfy the test applicable to this type of ground as set out in *E v Secretary of State for the Home Department* [2004] QB 1044. It is difficult to see how the matters complained of by COSW could not be relevant considerations.
37. As far as the first alleged irrelevant consideration is concerned, Mr Coppel argued that Mr Pullen's statement in his Procurement Report was plainly a relevant consideration. Mr Pullen claims that he meant something other than he wrote but he has not explained how he came to make such a significant error. In any event, the reality was that, even on COSW's case Ms Barr, who worked for a company of which Mr Rogers was sole director and Executive Chairman, and in which he had a financial interest, was dealing with Ms Stone who worked for a company of which Mr Rogers was one of two statutory directors, a 50% shareholder in the parent company and stated on 8

May 2019 to be its legal representative. Mr Coppel argued that there plainly was a conflict of interest problem even assuming (but expressly without accepting) that Mr Rogers had no personal involvement in the procurement process, the negotiation of the Contract or the agreement of the subsequent variations to the Contract. This was, in effect, recognised by COSW in its failure to challenge Reason 4 whilst maintaining that Mr Rogers had no role in the variations to the Contract. As COSW also recognised, there was therefore a need for someone independent to conduct the procurement process. The problem was that Mr Pullen was not independent.

38. As far as Mr Pullen's role is concerned, the findings in the Decision letter were actually as follows:

“On 6 December 2019, CP placed an advert on Contracts Finder for the contract... In addition, in the Invitation to Tender (“ITT”) which was provided to parties expressing an interest in the contract, the urgency of the works was emphasised.... The closing date for tenders was 18 December 2019.

KML was a regular client of CP, who is said to have advised it on purchasing matters, and CP would have had an interest in KML winning contracts to provide works or services, as such contracts could be expected to involve purchasing by KML. CP recognised the potential conflict of interest, but no immediate declaration was made by him and he instead purportedly took steps to ensure that his instructions from within KML on the matters on which he was advising came from persons other than Bobbie Storie, its Business Development Manager. That suggests that CP was working for KML at precisely the same time as KML was bidding for the contract. It is unclear how CP taking instructions from someone other than Bobbie Storie was supposed to remedy the conflict of interest inherent in CP having KML as a client at the same time as he was designing and managing a procurement process in which KML was intending to bid.”

39. Mr Coppel also pointed out that, in a letter dated 13 April 2022, Mr Pullen described himself as a “Procurement Consultant” and said “Specifically, my appointment was to remove any conflict of interest and to ensure an independent and transparent procurement process”. Mr Pullen went on to say that “The advert, ITT and tender assessment were managed by myself as an independent contractor to” COSW. He therefore had a role in the classification of the Contract as a works contract, the decision as to how widely the matter would be advertised and the setting of the short deadline for tenders. On his account in the letter of 13 April 2022, he also had a role in the assessment of the KML tender. And he prepared a Procurement Report which provided an account of the procurement process, including the approach to evaluation, and made a recommendation that KML be appointed for the required works in the tendered sum of £495,000. Even assuming that Mr Pullen's written evidence gives an entirely accurate account, the perception of a conflict of interest was inescapable given that both COSW and KML were his client at the same time. Mr Coppel also showed me correspondence between the parties which demonstrated that, contrary to Mr Bowsher's argument based on the Tameside duty and/or the duty to act fairly, the question of the nature and extent of Mr Pullen's role had been fully explored between the parties and considered before the Decision.
40. As far as the second alleged irrelevant consideration was concerned, Mr Coppel also pointed out that the Defendant did not in fact proceed on the basis that KML had “an

ownership stake in the Claimant". The Decision letter states that KML was one of the investors in COSW, as was stated in Mr Rogers' financial declaration of 8 May 2019 and the Defendant was fully entitled to take this into account.

41. I accept Mr Coppel's submission that, for the reasons given above, Ground 4 is not reasonably arguable. The matters taken into account by the Defendant were plainly relevant considerations and the Defendant made reasonable inquiries in relation to them. The view taken by the decision-maker on the conflict of interest issues was unsurprising. Moreover, as Mr Coppel pointed out, that view was that not only had there been a failure to manage the conflict of interest effectively (Reason 2); the method of management of that conflict had created a further conflict of interest (Reason 3). Both Reasons 2 and 3 resulted in a 100% rate of correction. It therefore would not be sufficient for COSW to establish an arguable case that one of the first two matters relied on by COSW was irrelevant: it would have to establish that both were, and that both of Reasons 2 and 3 were therefore flawed.

Ground 5 error of law in respect of value of modifications to the contract

42. It is agreed that this Ground stands or falls with Ground 2. Mr Coppel accepted that, contrary to his position in writing, Ground 5 is not totally academic in the light of there being no challenge to Reason 4. Although Ground 5 was primarily concerned with contractual variations, Reason 5 also led to a correction of 25% of the original contract value to which Ground 5 continues to have relevance.

Ground 6: substantive legitimate expectation that payments would continue.

43. Although Mr Bowsheer appeared to be seeking to widen the scope of this Ground when he addressed Ground 3, COSW's pleaded case (at [80]-[84] of the Statement of Facts and Grounds [41]-[44] of its Skeleton Argument) was that a substantive legitimate expectation that the Defendant would pay the invoices at issue in this case arose when the Defendant authorised the payment of the invoices which were presented in January 2020. The Defendant and the Interested Party were aware of Mr Rogers' conflict of interest, they carried out appropriate checks and the fact that the payments were made entitled COSW to proceed on the basis that the Defendant would not subsequently take the points as to the flaws in the procurement and contracting process which it has taken in the Decision: "*through its conduct the Defendant made a clear and unambiguous promise that it would treat the initial procurement of the KML (sic) as complying with procurement law, such a promise being devoid of relevant qualification*".
44. Mr Bowsheer's skeleton argument said that COSW was not "*for a moment suggesting*" that the Defendant ought to have departed from its duties under the governing regulations, nor that the Defendant somehow fettered any future discretion in respect of payment of future claims. COSW's case was that the Defendant had carried out auditing and verification checks in respect of the first claim for reimbursement of sums paid to KML and, in so doing, had assessed or ought to have assessed the lawfulness of the procurement of KML including the impact of any conflict of interest. Having authorised payment, the Defendant could not simply change its assessment of those issues absent new information coming to light, which it had not. Moreover, if a new assessment had been prompted by new information, the Defendant was required to articulate its new reasons (*R (Bibi) v Newham London*

Borough Council) [2002] 1 WLR 237 at [59]). Further, the Defendant could not resile from its position in circumstances which would cause substantial unfairness to the COSW, especially given the procurement context in which there are strict time limits applicable to challenges to a procurement process (see e.g. regulation 92 of the PCR which applies a 30 day limit within which to challenge the decision of a contracting authority and *Jobsin Co UK plc v Department of Health*, [2002] 1 CMLR 44.

45. As Mr Coppel pointed out, there are various fundamental flaws with this argument. First, as noted above, Article 5.5(e) of the Partnership Agreement required COSW to comply with the Grant Offer Letter and Guidance Note 6a. The former provides that the Managing Authority is entitled to withhold payments or claw back funds which have been approved and paid to a Project Partner if the Audit Authority (in this case Norfolk Audit Services which is part of the Defendant) determines that the payment was not eligible expenditure: Article 13(9). Guidance Note 6a also states that “Partners should be aware that if errors are discovered in claims in later audits [i.e. after consideration by First Level Controls] financial corrections will be made, which may include recovering expenditure already paid to the partner”. COSW’s case therefore seeks to derive an implied promise which is inconsistent with the express terms of the arrangements which it entered into and/or the payment of the first three invoices was equivocal at best and therefore did not give rise to an expectation which was in principle enforceable in public law.
46. Second, even if such a promise had been made, it is difficult to see how there could be a “legitimate” expectation that the Defendant would be bound to continue to approve payments, regardless of the outcome of subsequent auditing and/or which it considered to be unlawful and/or insistent with the funding arrangements which had been entered into. As noted above, COSW’s position was that it was not suggesting that such a promise was or could be made but that is precisely the nature of the promise on which Ground 6 is based.
47. Third, there is no factual foundation for COSW’s case including its case on unfairness/abuse of power. Contrary to COSW’s assertion that it relied heavily upon the Defendant’s initial approval of payment in that it modified the Contract so as to keep KML involved, the Interested Party initially reimbursed COSW in respect of the first three invoices on 30 April 2021. No money was paid to COSW before it first varied the Contract, on 24 January 2020. The first of the questionable invoices by KML, for its standby fees, was not submitted until June 2021 and it was not paid.
48. Moreover, the Defendant was not consulted about the procurement of the Contract, the entry into the Contract or the contractual variations at the time that they occurred. The circumstances of the COSW’s award of the Contract to KML were not brought to the Defendant’s attention by the Interested Party until April 2022, when, in response to the delayed submission of invoices by COSW, the Interested Party raised concerns about the procurement process. I agree with Mr Coppel that, having been made aware of those concerns, the Defendant could not then lawfully undertake, or regard itself as bound, not to comply with its legal obligations as the Managing Authority under Article 125 of the Regulation, including to question expenditure which had initially been approved and reimbursed and to decline to authorise further expenditure.
49. Finally, the Defendant clearly did explain, in the correspondence between the parties and in the Decision letter, the reasons for the position which it took.

50. There is nothing in Ground 6.

Ground 7: breach of A1 P1

51. The position of the parties in writing was that they agreed that this Ground would only be arguable if the Decision was unlawful for at least one of the reasons advanced in Ground 1-6.
52. No authority was cited by Mr Bowsher for his assertion that there was an interference with COSW's right to peaceful enjoyment of its "*possessions*", nor as to how its claim to be entitled to the relevant sums was a possession. Mr Coppel disputed that there was any "*possession*" and he relied on *Kurban v Turkey*, no. 75414/10, 24 November 2020 at [63] for the proposition that a legal claim may constitute a possession: "*only where it has a sufficient basis in domestic law...or where the applicants had 'a claim which was sufficiently established to be enforceable'...or where the persons concerned were entitled to rely on the fact that a specific legal act would not be retrospectively invalidated to their detriment...*". He submitted that COSW's claim met none of these criteria. Not only had there been a failure to comply with applicable procurement rules, COSW/KML had failed to deliver the essential element of the services for which it is claiming payment, namely the retrieval and storage of the Turbine. It had therefore failed to satisfy a key condition for it to be entitled to payment.
53. In his oral submissions Mr Coppel accepted that the sums which were paid to COSW were arguably its possessions, so that any attempt to claw them back might engage A1P1, but he maintained the position that a claim for further sums was not. His principal submission was, however, that Ground 7 was premature. If COSW succeeded the Decision would be quashed and the Defendant would need to consider the matter afresh. Mr Bowsher appeared to agree or at least did not make submissions to the contrary.
54. I agree with Mr Coppel's submissions. Mr Bowsher did not advance any clear argument as to how A1P1 is engaged as matters stand, nor argue that it was necessary for Ground 7 to be determined even if he succeeded on one of the Grounds in respect of which I have given permission. I therefore refused permission in relation to Ground 7.

Directions

55. In the skeleton arguments the parties addressed issues as to the disclosure of an Audit Report which was prepared by the Defendant prior to the Decision and a potential damages claim. Mr Bowsher did not, however, pursue these matters. This was presumably because he accepted that they did not arise in the light of Mr Coppel's point that in the event that the Claim succeeded it was likely that the Decision would be quashed and a further decision would need to be made by the Defendant which might or might not be the same decision.
56. All other directions were agreed and will be reflected in the Order.