

Exclusion of bidders – the 2019 Rail Franchising litigation

Fionnuala McCredie Q.C.

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Exclusion



How do you control - and overcome - the complexities of excluding a bidder from a procurement process on discretionary grounds or for non-compliance, following the rail franchising litigation?

Themes



- 2019 Rail Franchising Litigation – facts and law

- Lessons for future procurements:
 - Setting the competition rules and requirements
 - Non compliance with competition rules and the lawful exercise of discretion
 - The requirements of equal treatment

2019 Rail Franchising Litigation



The Challenge (1)



- In 2018 the **Department for Transport** (“DfT”) was running rail franchise competitions for the **West Coast** (“WC”), **East Midlands** (“EM”) and **South East** (“SE”)
- The **Railway Pension Scheme** (“RPS”) is a shared cost defined benefit private scheme, under investigation by **The Pensions Regulator** (“TPR”) over funding levels
- Rail franchisees are responsible for employer contributions to the RPS
- The RPS investigation caused uncertainty about the level of future pension contributions for individual rail franchises

The Challenge (2)



- The ITTs provided that a non-compliant bid could be rejected and the bidder disqualified at the sole discretion of the SoS
- The issue of pensions was the subject of specific re-bid instructions, issued after the ITTs were issued, in which the DfT offered a defined, limited, pensions risk sharing mechanism for those franchise competitions (“PRSM”).
- The specific bid instructions contained specific requirements that bidders accepted the PRSM offered by the SoS
- The Claimants refused to accept the DfT PRSM and offered to contract on different terms, with little or no pensions risk taken by the franchisee

DISQUALIFIED

The Challenge (3)



- On 9 April 2019 the Claimants were disqualified by the SoS for failing to accept the PRSM and bidding on terms that transferred pensions risk back to the SoS
- Arriva, Stagecoach and Virgin challenged their disqualifications
- 4 claimants:
 - West Coast Train Partnership (**Virgin and Stagecoach**)
 - **Stagecoach** South Eastern Trains
 - **Stagecoach** East Midlands Trains
 - **Arriva** Rail East Midlands (settled before trial)

The Challenge (4)



The Claimants began 8 sets of proceedings between April and June 2019 (4 Part 7 and 4 judicial review applications) alleging breaches of

- The Rail Regulation 1370/2004 (“Rail Regulation”)
 - Article 4 - requires definition of services and parameters for compensation to prevent over compensation
 - Article 5(3) - requires fair competitive tendering and observance of the principles of **transparency and non-discrimination**
- EU principles of **proportionality, equal treatment and transparency**

The Hearing



The Hearing



- Expedited trial ordered for November 19, later January 20
- The JR claims were stayed; Pt 7 claims case managed together but remained separate actions
- 3 week trial in January 20 on pensions issues, which in fact was determinative of all claims.
- Complex high value litigation; extensive standard disclosure; 6 interested parties; extensive and difficult confidentiality issues

The Result



On 17 June 2020 Mr Justice Stuart-Smith found for the DfT on all issues, holding that:

- The ITT, and its terms specifying what would or may be treated as non compliance, was clear, precise and unequivocal and admitted no misunderstanding by a RWIND tenderer
- Specifically, the ITT was clear that a contractual amendment that sought to transfer risk from the franchisee to the SoS would mean the bid was deemed non-compliant

Margin of appreciation for CA (1)



The Claimants argued that the SoS was not entitled to allocate pension risk to rail franchisees, because it was too large and/or uncertain and unpredictable and “*potentially enormous*”

Margin of appreciation for CA (2)



Held:

- Terms allocating contractual risk are subject to a wide margin of appreciation; they are a manifestation of policy decisions about allocation of public resources
- There was no principle of EU or UK law that limited the size of a risk that could be allocated to one contracting party or another in a public procurement
- Uncertainty of outcome was a risk that could be estimated and priced as any other
- The imposition of uncertain pensions risks on franchisees was lawful and not in breach of the Rail Regulation, transparency and fairness

Discretion (to disqualify)



The ITT had reserved a sole discretion to the Secretary of State to disqualify bidders for non –compliance

- The Judge held that
 - The discretion was lawful, provided that it was exercised rationally and in accordance with policy.
 - The exercise of discretion cannot be arbitrary, unlimited or capricious

Controlling and overcoming the complexities of excluding a bidder



Should only do so when confident that it is justifiable:

- Likely occurs when the bidder has invested significant time and money in the bid
- Carries negative publicity for bidder and CA alike
- Unless immediately and comprehensively justifiable, likely to result in legal challenge
- Legal challenge that absorbs significant time and money for both parties (and interested parties, such as successful bidders)

What do CAs need to do? What should bidders consider before bidding non-compliantly?

Clear competition rules



- The ITTs for these competitions contained clear provisions relating to non-compliant bids:
“the Department expects to receive Bids that contain no qualification. Bidders shall not propose amendments to the Franchise Signature documents... including by proposing their own [SoS] Risk Assumptions or any other contractual amendments that seek to transfer risk from the Franchisee to the [SoS]”

Judgment Para 106; ITT para 4.1.2

Clear competition rules



ITT

*“Where a Bid is found to be non-compliant ... and except where subsection 3.6 (Automatic elimination) applies, **the Department may at its sole discretion reject the Bid and disqualify the Bidder who has submitted that Bid from the competition**”*

Judgment Para 105; ITT 3.5.3

Clear Pensions re-bid rules (1)



- Instructions to bidders SE competition

“...3.1.1 Bidder’s proposals must be compliant with the Franchise Signature Documents. Bidders are not permitted to mark up these documents ... and must accept them in their entirety.”

Clear Pensions re-bid rules (2)



3.1.2 ... Where a bidder has not in fact marked up a Franchise Signature Documents but has made a proposal or statement in its Bid which, to be given effect, would necessarily mean a mark-up of a Franchise Signature Document would be required, the Department will deem such a proposal as a mark-up that will result in the bid being treated as non-compliant in accordance with sub-section 5.1.8 of the ITT”

Judgment para 232

ITTs for the competitions are available on the internet

The exercise of discretion (1)



- The ITT stated that the competition would be conducted *“in line with the applicable general principles of EU law and the requirements of English law”* (Judgment para 11)
- That meant that it had to be exercised
 - On a principled basis
 - Rationally and in accordance with the policy upon which it was based
- It could not be exercised on an unlimited, arbitrary or capricious basis (Judgment para 380)

The exercise of discretion (2)



- The Court took into account:
 - The ITT stated what the grounds for automatic disqualification were (which it had to)
 - The Judge considered that as a matter of fact a RWIND tender could predict with reasonable certainty which non-compliances did not give rise to a real risk of disqualification and those that did
 - The terms of the ITT had to be viewed in context and the pensions problems were well known to RWIND tenderers at the material times

The exercise of discretion (3)



- As a matter of fact a RWIND tenderer could and should have realised that material non-compliance on pensions gave rise to a serious risk of principled disqualification
- Other tenderers bid compliantly
- Neither the Claimants nor other bidders raised a clarification as to the exercise of the discretion
- As bidder who was considering bidding non-compliantly should, as Stagecoach did, have raised the possibility with the Department. Stagecoach received the unequivocal message that the DfT required compliance with the Franchise Signature Documents

Judgment 381-386

The requirements of equal treatment



- Where 5 bidders had accepted the pensions' risk, and bid compliantly, an acceptance by the DfT of a serious non-compliance (as established by the published ITT rules and the terms of the pensions' re-bids) would have led to legitimate complaints of unequal treatment by the compliant bidders
- Having established the rules of the competition, the DfT was obliged to require strict compliance; *Commission v Denmark* (ECLI:EU:C:1993:257) and judgment paras 26 - 28

Relevant factors in assessing robustness of a decision to disqualify (1)



- Did the ITT/procurement documents make mandatory requirements very clear to bidders
- Did the ITT set out clearly, precisely and unequivocally the circumstances for automatic disqualification
- In reserving a (sole) discretion to disqualify, did the ITT make it clear that discretion would be exercised in accordance with the applicable law
- Was the discretion exercised in accordance with relevant policy, rationally and on a principled basis?

Relevant factors in assessing robustness of a decision to disqualify (2)



Relevant factors

- Could a RWIND tender predict with reasonable certainty which non-compliances were likely to result in disqualification and which were not
- Were the circumstances of the CA requirements well known
- Had clarifications been raised about the exercise of the discretion and/or the CA requirement that led to disqualification?
- Did the bidder raise the possibility of bidding non-compliantly with the CA and what was the response?
- Did other bidders bid compliantly?

Thank you for listening

FIONNUALA MCCREDIE Q.C.
FMCCREDIE@KEATINGCHAMBERS.COM

Please contact the Practice Management Teams for further information

T +44 (0)20 7544 2600

E clerks@keatingchambers.com

www.keatingchambers.com