

June 2020

2019 Rail Franchising Litigation Judgment – Key Points



Introduction

The High Court judgment in the 2019 Rail Franchising Litigation determined claims brought by Stagecoach East Midlands Trains Ltd; West Coast Trains Partnership Limited; and Stagecoach South Eastern Trains Limited (together, "**Stagecoach and WCTP**"), whose respective franchise tender submissions had been disqualified by the Secretary of State for Transport ("**SoS**") for non-compliance with the pension requirements for the relevant franchise competition.

The judgment dismissed the claims and ruled that the SoS's exercise of his discretion in the Invitation to Tender ("**ITT**") in disqualifying Stagecoach and WCTP was lawful.

Key Points

Key points from the judgment include:

1. The discretion retained by the SoS regarding non-compliances and/or disqualification was not a breach of the requirements of transparency or fairness. The non-compliance criteria and consequences were sufficiently clear to a reasonably well informed and diligent ("**RWIND**") tenderer (and no bidder, including Stagecoach and WCTP had sought clarification during the bidding process). The ITT discretion should only be exercised on a principled and proportionate basis in accordance with the overarching EU and UK legal principles, and so it was not necessary for the ITT to set out the consequences for specific non-compliances.
2. The allocation of pensions risk in the rebid instructions was not unlawful. That the pensions liabilities were uncertain and potentially very large did not make the allocation unfair. The Court held that it is for a tenderer to review and price risks into their bid; if the relevant ITT requirements imposed a burden of risk beyond what was acceptable to Stagecoach and WCTP, the proper course was not to submit a bid (rather than to seek to change the risk allocation in the ITT with a non-compliant bid).
3. Use by the SoS of a non-compliance log that graded non-compliance on a scale of 1 to 5 was not evidence of an undisclosed evaluation criteria. The use of such a log was within the SoS's discretion in carrying out its evaluation on the basis that it did not change the award criteria established by the ITT. It did not impact on the decision to disqualify Stagecoach or WCTP.
4. The decision to disqualify Stagecoach and WCTP was not manifestly inappropriate. The SoS's evidence was accepted that it was not possible to reprice the relevant bids by reference to the ITT criteria to reach a position that genuinely compared Stagecoach and WCTP's bids against compliant bidders. The Court noted the very serious risk of challenge by compliant bidders in the event the SoS did in fact adjust or reprice the bids, or otherwise compared the compliant bids based on Stagecoach and WCTP's proposals. Furthermore, the Court noted that the relevant scores absent pensions considerations were so far behind those of the leading bidders that adjustment was not likely to be of any practical benefit to Stagecoach or WCTP.
5. The disqualification letters provided clear and sufficient reasons to enable Stagecoach and WCTP to understand and challenge their disqualification. On the facts, the explanation was beyond that necessary for a RWIND tenderer to understand the basis of the decision.

6. As the ITT contained a financial robustness test, the SoS was required to adhere to the criteria of that test. The Court determined however that it was not necessary for the financial robustness test to eliminate all risk or adjust for every eventuality. In setting the terms of the ITT, the SoS was entitled to determine the extent of any robustness testing. On the facts, the testing in the ITT was held not to be unfair or erroneous.
7. The SoS had determined a “most credible financial outcome” for the purposes of completing financial robustness testing. This was not unreasonable, as the financial outcome was based on the Pensions Regulator’s parameters for an industry solution as to pensions deficits at the time. Whilst the underpinning analysis to reach the outcome had been shared by SoS with Stagecoach and WCTP during the bid process, it was not necessary for the SoS to disclose in advance of receiving bids that this analysis would form the basis of the financial robustness testing for the evaluation of the bids.
8. PriceWaterhouseCoopers’ (“PWC”) analysis that modelled the impacts of five pensions downside scenarios on the leading bids in each franchise competition was not unlawful or a departure from the ITT criteria. On the evidence, it was held that it was not intended for PWC’s report to influence the outcome of the ITT evaluation process or any decision to disqualify; the purpose of the report was to provide assurance and inform a decision to proceed with the competitions (or cancel one or more of them).

Conclusion

The judgment is likely to have significant impacts on future public procurements, both for contracting authorities and for potential tenderers. The decision confirms that a discretion afforded to a contracting authority in the ITT must be exercised in a principled and proportionate manner. However, the mere fact that the discretion is expressed in wide terms does not make it inherently unlawful.

For tenderers, the judgment reinforces the expectation that risk should be priced into a tender submission; if the risk is unacceptable to the tenderer, it should decline to bid, rather than seek to shift risk with a non-compliant submission. Furthermore, if there is any doubt as to the consequence of non-compliance with the ITT criteria, the tenderer should exercise the opportunity to seek clarification during the bidding process; the consequences of failing to do so could be disqualification.

Key contacts



Suzanne Tarplee

Partner

T: +44 20 7809 2389

E: suzanne.tarplee@shlegal.com



Paul Thwaite

Partner

T: +44 20 7809 2341

E: paul.thwaite@shlegal.com



Michael Barron

Associate

T: +44 20 7809 2428

E: michael.barron@shlegal.com



David Stephens

Associate

T: +44 20 7809 2268

E: david.stephens@shlegal.com