

February 2021

Rail – Utilities procurement

Railways - Procurement regulation for train operators post Brexit

Procurement in the Great British railways industry has for many years been governed by laws, procedures and regulations that have their origins in European Union (EU) law. For the railways industry, this has primarily manifested in the Utilities Contracts Regulations 2016 – which is becoming more frequently used "in-life" (UCR) and Regulation 1370/2007 – which is used for franchise procurement (Regulation 1370). So now that the UK is no longer in the EU, what is the current position and what happens next?

Following from our recent article [here](#) looking at public procurement regulation post Brexit, this article considers the change in the procurement landscape from the perspective of a train operator and its owning group. We broadly consider two aspects of the post-Brexit landscape:

- first procurement of railway franchises and direct awards by authorities – be that the Department for Transport or one of the devolved authorities; and
- second what changes there may be to the UCR and the implications for train operators.

Regulation 1370 – EU Retained Law

Like many areas of UK regulation post Brexit, the current position in relation to Regulation 1370 is basically staying the same until the UK decides to change it. Regulation 1370 has been incorporated into law as "EU Retained Law" by a statutory instrument that preserves the regulation and makes only necessary changes to remove references to the EU and related concepts. The statutory instrument also makes it clear that previously awarded contracts – or extensions – remain valid.

For the purposes of the current emergency measures arrangements and upcoming direct awards, an

awarding authority – such as the Department for Transport – still needs to comply with the provisions of Regulation 1370. This includes, for example, the time limits, lengths of contracts and publication requirements for direct awards and any provisions relating to how much the public authority can pay for the services being provided.

It seems to us that Regulation 1370 is ripe for change or, at the very least, adaptation to reflect the rail market. Many of the provisions were designed with a view to the EU market which until relatively recently has been closed and are sometimes unduly prescriptive. In what has traditionally been a dynamic and competitive environment of franchise bidding, some of the provisions of Regulation 1370 are perhaps too restrictive and need to be looked at again. At the same time, reform should not be seen as an excuse to close the market to that competition which has made the industry so dynamic.

Utilities Contracts Regulations – EU Retained Law

As with Regulation 1370, there is currently no change – the UCR has substantially been incorporated into law with some minor changes.

Prior to the UCR being issued in 2016, there was a question mark over whether the utilities procurement rules applied to train operators when they award supply contracts. This debate was seemingly settled as part of the UCR 2016 which provided a carve out for contracts for the provision of public transport by rail which have been awarded on the basis of a competitive tendering procedure in accordance with certain parts of Regulation 1370. This meant that a train operator who had a franchise or other contract let in accordance with that regulation need not comply with the UCR.

However, the provisions of the UCR do need to be considered carefully by train operators – not least because direct awards need to be considered

carefully under the UCR rules. We do not seek to cover the detail of this here, but do please contact us if you require advice on this important issue. It is also worth noting that under the recently published Emergency Recovery Measures Agreements entered into in autumn 2020, train operators specifically agree to have a procurement policy that complies with the UCR.

Given the inherent uncertainty in the current UCR and the position taken in the ERMA, train operators should look out for how the new National Rail Contracts or, in due course, Passenger Service Concession agreements seek to cover procurement. It will also be important to think about how the new procurement regulations that are being considered – see below – are adapted. If, as is widely speculated, the Government takes more revenue and cost risk as part of new contracts, it may also wish for train operators to show value for money in procurements. We might expect to see a requirement in the new contracts or as part of new regulations that train operators follow a more formalised way of procurement.

What else do I need to be aware of?

GPA and TCA

As set out in our previous mailing [here](#), the UK is now an independent party to the World Trade Organisation's Government Procurement Agreement (GPA). This means that UK companies can continue to bid for contracts in GPA jurisdictions and vice versa, in the same way as before 1 January 2021. Companies are bound in international law to follow rules, for example, on non-discrimination, transparency and advertisement. It is also worth noting that the GPA rules are less stringent than the UCR and EU procurement law in coverage, detail and remedies. For example, there are no requirements in the GPA for 'standstill', 'automatic suspension', 'declaration of ineffectiveness' or compensation beyond tender/challenge costs.

The EU-UK Trade and Cooperation Agreement (TCA), amongst many other things, defines the procurement relationship between the EU and the UK, and the TCA represents the only real change following 1 January 2021. Broadly, it covers the provisions of the GPA with some additions. Helpfully, the TCA rules do not really go any further than the UCR and so as long as utilities continue to comply with these, they should be okay for now save for a few exceptions. See our earlier mailing [here](#) for more information.

It is worth noting that both the GPA and TCA will apply to procurements under the UCR and also Regulation 1370/2007.

Green paper

The UK government is currently consulting on a Green Paper regarding changes to its public procurement regime, which is due to end on 10 March 2021. This Green Paper focuses on a number of areas including:

- permitting contracting authorities to move away from "most economically advantageous tenders" to tenders aligned to social or strategic benefits, such as improving diversity and local employment, or promoting environmental solutions;
- procedural reform; and
- restricting the ability of failed bidders to challenge award decisions.

The Green Paper was issued before the TCA was agreed and some of the proposals – most notably the ability to challenge award decisions – look incompatible with the principles agreed within the TCA. One thing to look out for is the merger of the Public Contracts Regulations and the Utilities Contracts Regulations and the removal of any differences between the regimes. We will issue further mailings on the Green Paper including more detail in relation to procedural changes and challenges – and how they relate to railways.

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