



**IRG-Rail 15 (5)**

**Independent Regulators' Group – Rail**

**IRG–Rail**

**Position Paper on the proposal for performance-based direct  
award of public service contracts**

***03 July 2015***

## I. IRG Rail's position

1. IRG-Rail has already voiced its endorsement of the European Commission's original proposal for the 4th railway package arguing that, as a general rule, there should be mandatory competitive tendering for rail public service contracts. Any exceptions from this general rule should be limited to clearly defined and substantiated specific circumstances<sup>1</sup>. In this paper IRG-Rail outlines its views on the Dutch proposal of 6 May 2015 about performance based direct award of public service contracts<sup>2</sup>.
2. With regard to this issue, IRG-Rail has also expressed serious concerns about the amendments made in the European Parliament's (EP) first reading of the package. These amendments introduce a very broad range of options for continuing with direct award, thus impeding market opening. IRG-Rail believes that the proposed broad exceptions from competitive tendering will negatively impact on the railway undertakings' possibilities to compete on an open European market. At the same time, Member States and railway undertakings will have to contribute and invest in the technical harmonisation of rail to create a harmonised European railway system, e.g. ERTMS.
3. The current proposal put forward by the Dutch government is another variation of an exception-based approach introduced by the proposal of the EP. In IRG-Rail's opinion the Dutch approach similarly endangers the original objectives of market opening; of improving transparency, allowing fair competition and eliminating the potential for discrimination. As outlined in its previous position paper, IRG-Rail strongly believes that competitive tendering is the best approach to award public service contracts. If any exception to this rule was considered, at the very least a number of additional safeguards would be required to prevent the proposed approach from being misused, and a minimum improvement in efficiency. The following safeguards should be considered:
4. **TRANSPARENCY:** IRG-Rail believes ex-ante and ex-post transparency must be essential features of not only open tendering procedures but also of the procedure to award a contract directly. Ex-ante transparency involves publishing the requirements of the competent authority. All relevant information must be made available to potential bidders or candidates for direct awards as part of any process where public authorities envisage awarding a public service contract – be it in an open

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<sup>1</sup> Such as e.g. emergency measures.

<sup>2</sup> Brussels, 6 May 2015, W. Doc. 2015/76

tender, or with a single candidate that they have chosen for direct awarding. This includes publication of this information. In the case of a direct award, the supervisory body<sup>3</sup> should be able to review the relevant information at this early stage of the procedure as a basis for any necessary intervention. Ex-post transparency involves publishing the requirements and the results of the contract winner's performance.

5. The Dutch proposal does not contain any transparency requirements during the award procedure, allowing instead direct award to be handled in an opaque manner. Transparency is crucial to address the potential adverse effects of discretionary power. Asymmetric access to information acts as a barrier for new candidates/competitors seeking to apply for and win a public service contract.
6. **FOCUS ON EFFICIENCY IMPROVEMENT:** The justification for any exception from competitive tendering should be a potential efficiency improvement. In its assessment, the competent authority should, first and foremost, test the efficiency of the transport service provision. This includes an assessment of both the total costs and total output. An assessment based only on performance criteria – as suggested by the Dutch proposal - focuses only on output and fails to investigate the total costs. An efficiency analysis should measure the performance compared to input, i.e. the contractor's productivity. Performance criteria as defined in the Dutch proposal imply that only absolute performance will be considered, which is not sufficient to assess efficiency of a contractor who did not go through a competitive tendering procedure. In any case, IRG-Rail is concerned that it would be impossible to carry out an accurate assessment.
7. **YARDSTICK COMPETITION:** For any criteria to be set, the competent authority would need to define challenging but achievable targets and obtain data for the purpose of comparison. One approach which could be considered, as underlined in the previous IRG-Rail's position paper, is the use of yardstick competition. Yardstick competition in the form of a comparison of the performances of various national or sub-national monopolies would allow the identification of best practices and could be seen as a tool to collect performance data and provide incentives.
8. **APPROPRIATE SUPERVISION:** Since the current proposal envisages a broad range of options for direct award at the discretion of competent authorities, appropriate supervision by an independent body is required. Although the EP proposal had included a certain level of regulatory oversight through the regulatory body, IRG-Rail had identified a number of

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<sup>3</sup> For its necessary role please see below point 8

open questions with regard to the details such as: how to gather a sufficient level of expertise and additional resources to ensure a robust level of regulatory assessment and supervision; or the consequences if the regulatory body finds against the direct award<sup>4</sup>. This includes the consequences both for the contract and the competitors (ex. whether the contract is void, whether and how rail services are to be provided, the position/evaluation of would-be competitors). These questions have not been answered in the new proposal. Moreover, the introduction of “independent validation” is not entirely clear and thus raises doubts on ensuring adequate supervision. IRG-Rail believes that a competent, powerful, independent supervisory authority with appropriate resources – whether it is the regulatory body, or another competent authority – needs to be involved in the procedure at an early stage. This body would need appropriate instruments to challenge any decisions, and consequences should be clear if the supervisory authority finds against a decision.

9. **CORRECTIVE MECHANISM:** With regard to the details of the procedure, IRG-Rail believes that a mechanism to challenge the decision of the competent authority awarding the public service contract needs to form part of the procedure. For example, competitors should be able to complain and appeal to the supervisory body, which could also initiate an ex-officio procedure to investigate the direct award. The supervisory body should also be able to redefine or ask for the performance obligations set to be redefined by the competent authority, if the selected railway undertaking needs further incentives to improve its efficiency. This mechanism would be necessary to avoid interested undertakings/competitors being excluded at too early a stage, and to ensure that the exception clause for direct award is not used to perpetuate exclusive rights for one railway undertaking.
10. **SANCTION MECHANISM:** In IRG-Rail’s opinion, proportionate sanctions and penalties for the competent authorities and operators under direct award are necessary, in case the criteria to award a public service contract directly have not been complied with or where a railway undertaking has failed to achieve the efficiency targets. This could result, for example, in a fine, or an obligation to stop the direct award and require the competent authority to award the contract through competitive tendering.
11. With regard to the duration of directly awarded public service contracts, IRG-Rail questions why public service contracts which have been directly awarded should be allowed to have a maximum duration of 10 years.

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<sup>4</sup> <http://www.irk-rail.eu/app/download/5802961388/IRG-Rail+%2814%29+5+-+Position+Paper+4RP+EP+First+Reading+2014.pdf>

IRG-Rail would be in favour of reducing this period to five or six years. It would be counter-productive to shield operators from the pressures of competition, and deny passengers and taxpayers the benefits that competitive tendering can bring, for extended periods.

## **II. Conclusion**

12. IRG-Rail stresses once more its support for a mandatory implementation of competitive tendering for rail public service contracts, with a very limited scope of exemptions. If the negotiations based on the Dutch proposal continue, the safeguards described above should be added as a minimum requirement to continue market opening and increase the value for money for customers and public transport authorities.