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Western bidders set deadline for costs resolution

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The four bidders for the cancelled Great Western franchise contract have begun initial legal proceedings against the Department for Transport to recover the £40m "wasted" costs they incurred bidding for the contract.

The legal papers served extend the time available for Arriva, Stagecoach, National Express and First Group to discuss the issue with the DfT until 28 March, prior to deciding whether to challenge the DfT's use of a 'catch all clause' in its invitations to tender to prevent costs being reimbursed.

This clause states that bidders shall be responsible for all costs incurred "whether or not... the [tendering] process is subsequently varied in any way or terminated". However, it is understood that the bidders have received legal advice that the clause could be invalid if the procurement system itself was shown to be flawed.

The entire refranchising programme was halted last October after Virgin's successful challenge against the award of the West Coast contract to First Group uncovered errors in the DfT's procurement processes. Subsequently, the Great Western competition was cancelled in January, after the DfT concluded that the franchise should initially be let as a short management contract rather than on the original 15 year, net cost terms.

The bidders' case would argue both factors indicate that Great Western was let under a flawed process. It would also highlight that the DfT's decision to reimburse bid costs for West Coast could set a precedent for the Great Western costs to be repaid given that both competitions were cancelled at a late stage. The companies had spent around £10m each in bid costs.

The DfT has argued that the West Coast and Great Western situations are materially different because a preferred bidder had been announced when West Coast was cancelled. It has also pointed out that between 2001 and 2004 there were a number of precedents for costs not being reimbursed when competitions were cancelled or halted. However, none of these cases related to flaws in contract procurement.

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