

**THE SECRETARY OF STATE FOR TRANSPORT'S STATEMENT
OF POLICY ON THE EXERCISE OF HIS POWER UNDER
SECTION 26(1) OF THE RAILWAYS ACT 1993**

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Foreword

The railway is a public service, specified by the Government and delivered by the private sector via a process of rail franchising. Parliament has given the Secretary of State for Transport (the “Secretary of State”) the right to let passenger rail franchises through a competitive procurement process. However, there are some circumstances where a competitive procurement process may be inappropriate.

The Secretary of State is required under amendments to the Railways Act 1993, brought in by the Railways Act 2005, to publish a statement of policy about how he proposes to exercise that right. The statement of policy must in particular specify when a franchisee is and is not likely to be selected by means of an invitation to tender and the means by which the Secretary of State proposes to select a franchisee where no invitation to tender is issued.

I trust that this paper clarifies your understanding of these matters and I welcome any suggestions for further explanation if this is required.

Thank you in advance for taking the time to respond.

Mike Mitchell

Director General, Rail and National Networks, Department for Transport
May 2007

Executive Summary

1. This consultation relates to the statement of policy which the Secretary of State for Transport (the "Secretary of State") is required to publish under section 26(4A) of the Railways Act 1993 (as amended). The statement of policy must set out how the Secretary of State intends to exercise his power under section 26(1) of that Act to select the franchisee for a passenger rail franchise by means of an invitation to tender.

2. The statement of policy covers all passenger rail franchises which the Secretary of State is responsible for letting. As such it does not apply to the ScotRail franchise, for which Scottish Ministers are responsible. A separate Statement of Policy for Scottish Franchises will be issued by Scottish Ministers under Section 26 (4B) of the Act at an appropriate time.

3. The statement of policy must in particular specify when a franchisee is and is not likely to be selected by means of an invitation to tender and the means by which the Secretary of State proposes to select a franchisee where no invitation to tender is issued.

4. Comments are invited on whether the statement (a) complies with the statutory requirements and (b) makes clear the Secretary of State's policy with regard to the matters mentioned above.

How to Respond

5. The consultation period will run from 17 May 2007 to 16 August 2007. Those wishing to respond should ensure that their comments are received by the closing date.

6. If you would like further copies of this consultation document it can be found at www.dft.gov.uk or you can contact Paul Knight. Please send consultation responses, preferably by email, to:

Name: Paul Knight
Email: paul.knight@dft.gsi.gov.uk
Address: Procurement Directorate, Policy and Contracts Division, 3/27 Great Minster House, 76 Marsham Street, London, SW1P 4DR
Telephone: 020 7944 2573
Fax: 020 7944 2177

7. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation please make it clear whom the organisation represents, and, where applicable, how the views of members were assembled.

8. A list of those consulted can be found on page 9. If you have any suggestions of others who may wish to be involved in this process please contact us using the details above.

9. The information you send us may need to be passed to colleagues within the Department and / or published in a summary of responses received in response to this consultation. We will assume that you are content for us to do this, and that if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system, unless you specifically include a request to the contrary in the main text of your submission to us.

10. Please ensure that, if you want your name or response to be kept confidential, you state this clearly in your response.

11. The Freedom of Information Act 2000 requires public authorities to disclose information they hold, if it is requested. This includes information contained in responses to consultations. The Department will generally publish subsequently the information it discloses under FOI on its web site. If you ask for your response to be kept confidential this will only be possible if it is consistent with the Department's obligations under the Freedom of Information Act 2000.

Consultation Questions

12. Does the statement of policy:

- comply with the requirements of section 26 of the Railways Act 1993
- make clear the policy of the Secretary of State in relation to the matters which it is required to cover?

Statement of Policy on the Exercise of the Secretary of State's Power Under Section 26(1) of the Railways Act 1993

1. *This statement of policy is published by the Secretary of State for Transport (the "Secretary of State") pursuant to section 26(4A) of the Railways Act 1993 (as amended) (the "Act").*
2. *Terms defined in the Act have the same meanings when used in this statement unless the context requires otherwise.*
3. *Section 26(1) of the Act provides that the appropriate franchising authority may select the person who is to be the franchisee in relation to a franchise agreement from among those who submit tenders in response to an invitation to tender under section 26 of the Act for the right to provide, or to secure that a wholly owned subsidiary provides, services for the carriage of passengers by railway under that franchise agreement.*

4. *The Secretary of State is the appropriate franchising authority in relation to all franchise agreements except Scottish franchise agreements.*
5. *Section 26(4A) of the Act requires the Secretary of State to publish a statement of policy about how he proposes to exercise his power under section 26(1) (the "Franchising Power").*
6. *Section 26(4B) of the Act requires that statement to include the policy of the Secretary of State about:*
 - a) *when his selection of the person to be a franchisee under a franchise agreement is likely to be from among those submitting tenders in response to an invitation to do so;*
 - b) *when it is likely such an invitation will not be issued; and*
 - c) *the means by which he is proposing that the selection will be made in cases where there is no such invitation.*

General use of the Franchising Power

7. *The Secretary of State intends in accordance with his duties under section 4 of the Act to award franchises by means of a competitive process wherever possible. It is therefore likely that his selection of the person to be a franchisee under a franchise agreement will be from among those submitting tenders in response to an invitation to do so in all cases except those mentioned at paragraph 8 below.*
8. *Where a franchisee is selected from among those submitting tenders in response to an invitation to do so, that selection will be based on an analysis of those tenders in relation to criteria referred to in the invitation to tender and associated documents made available to the bidders. Such criteria are likely to include:*
 - a) *consistency with the Secretary of State's strategic objectives and those of the Welsh Assembly Government in the case of the Wales and Borders Franchise;*
 - b) *affordability*
 - c) *the ability of the bidder to deliver the specification set out in the invitation to tender;*
 - d) *value for money.*

Circumstances in which an invitation to tender will not be issued

9. *It is likely that an invitation to submit a tender for the right to provide, or to secure that a wholly owned subsidiary provides, passenger railway services under a franchise agreement will not be issued where:*
- a) it is necessary to re-let a franchise earlier than anticipated as a result of the early termination of that franchise;*
 - b) the Secretary of State's duty under section 30(1) of the Act arises;*
 - c) a short-term franchise agreement is required to facilitate franchise remapping; or*
 - d) the Secretary of State considers that, as a result of some temporary uncertainty or instability, best value would be secured by letting a franchise on a short-term basis;*

and in the Secretary of State's opinion:

- e) it would be impracticable to issue an invitation to tender because of the shortness of the interval between any circumstances falling within paragraphs a) to d) above arising and the date when services are required to begin under the new franchise agreement; or*
- f) if an invitation to tender were issued any bids received in response to that invitation would not represent value for money or would not be affordable as a result of the shortness of the term of the proposed new franchise agreement or any other circumstance.*

The circumstances listed at b) and c) above are described in more detail at paragraphs 10 and 11 below.

Section 30(1) duty

10. *The Secretary of State has a duty under section 30(1) of the Act to provide, or secure the provision of, services for the carriage of passengers by railway where a franchise agreement is terminated or otherwise comes to an end but no further franchise agreement has been entered into in respect of the services provided under such terminated or expired franchise agreement.*

Franchise remapping

11. *The Secretary of State is required by section 23(1) of the Act from time to time to designate such services for the carriage of passengers by railway as he considers ought to be provided under franchise agreements (except in relation to Scotland-only services). In exercising the Franchising Power he may from time to time require to revise the allocation of the services designated under section 23(1) to particular franchise agreements. This may require simultaneous changes to the scope of services provided under franchises with different expiry dates. He may therefore from time to time require a short-term franchise agreement to be put in place in order to secure the provision of services during the interval between the cessation of services under an existing franchise agreement and the commencement of a new 'remapped' service.*

Means by which selection will be made if no invitation to tender is issued

12. *If no invitation to tender is issued in circumstances where a short-term franchise agreement is required in relation to a franchise to facilitate franchise remapping, and if the existing franchisee agrees, the Secretary of State proposes to appoint the existing franchisee to be the franchisee under the short-term franchise agreement on terms substantially the same as those of the existing franchise agreement.*
13. *If no invitation to tender is issued in other circumstances where the Secretary of State's duty under section 30(1) of the Act arises in relation to a franchise agreement, then the Secretary of State proposes to select as franchisee or operator of the franchise to which that franchise agreement relates a company which is wholly owned by him and which has not previously traded.*

No adequate tender for franchise received

14. *Section 26ZA of the Act sets out courses of action available to the appropriate franchising authority where, in the case of an invitation to tender under section 26 of the Act for the provision of services:*
 - a) *the appropriate franchising authority receives no tender in response to the invitation; or*
 - b) *it receives a tender but considers that the services would be provided more economically and efficiently if they were provided otherwise than under a franchise agreement entered into in response to the tender.*

For the avoidance of doubt, the Secretary of State may also select the person to be a franchisee under a franchise agreement without issuing an invitation to tender in the circumstances described at paragraphs a) and b) above.

What will happen next

13. Thank you for taking the time to reply. We do not intend to acknowledge individual responses unless by request.

14. A summary of responses, including the next steps will be published by 14th September 2007 on the Department's website (www.dft.gov.uk); paper copies will be available on request.

Question and Answer Brief

15. If you have further questions after you have read this document please contact;

- Name: Paul Knight
- Address: Procurement Directorate, Policy and Contracts Division, 3/27 Great Minster House, 76 Marsham Street, London, SW1P 4DR
- Telephone: 020 7944 2573
- Fax: 020 7944 2177
- Email: paul.knight@dft.gsi.gov.uk

Regulatory Impact Assessment

16. A regulatory impact assessment (RIA) was deemed unnecessary because this consultation aims to clarify current policy and does not involve a change of policy.

The Code of Practice on Consultation

17. The consultation is being conducted in line with the Code of Practice on Consultation.

18. The code of practice sets out the following criteria:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked and the time-scale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your Department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.
19. A full version of the code of practice is available on the Cabinet Office web-site at:
<http://www.cabinet-office.gov.uk/regulation/consultation/code.asp>
20. If you consider that this consultation does not comply with the criteria or have comments about the consultation process please contact:
Andrew D Price
Consultation Co-ordinator
Department for Transport
Zone 9/9 Southside
105 Victoria Street
London, SW1E 6DT
email: consultation@dft.gsi.gov.uk

List of those consulted

<ul style="list-style-type: none"> ▪ Arriva Trains Wales ▪ Central ▪ Chiltern ▪ C2C ▪ First Capital Connect ▪ First Great Western ▪ Gatwick Express ▪ GNER ▪ Midland Mainline ▪ Northern ▪ 'One' ▪ Silverlink ▪ Southeastern ▪ Southern ▪ South West Trains ▪ TransPennine Express ▪ Virgin Crosscountry ▪ Virgin West Coast ▪ Centro - West Midlands PTE ▪ Merseytravel - Merseyside PTE ▪ Metro - West Yorkshire PTE ▪ GMPTE - Greater Manchester PTE ▪ South Yorkshire PTE ▪ Nexus - Tyne and Wear PTE ▪ PTEG 	<ul style="list-style-type: none"> ▪ Stagecoach Holdings Plc ▪ Virgin Trains ▪ Go-Ahead Group Plc ▪ National Express Group Plc ▪ FirstGroup plc ▪ SercoNed plc ▪ Sea Containers ▪ GNER Holdings ▪ M40 Trains Ltd ▪ Arriva Trains Ltd ▪ RMT ▪ ASLE&F ▪ TSSA ▪ AEEU (Amicus) ▪ London TravelWatch ▪ Passenger Focus ▪ Welsh Assembly Government ▪ Scottish Executive ▪ Transport Scotland ▪ ATOC ▪ Network Rail ▪ ORR ▪ TfL
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