



Department
for Transport

Statement of policy on the exercise of the Secretary of State's power under section 26(1) of the Railways Act 1993

Presented to Parliament pursuant to
section 26(4F)(a) of the Railways Act 1993

March 2013

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Introduction

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, for the time being, 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”). (Please note that the Franchising Power is separate and distinct from the Secretary of State’s duties under section 30 of the Act.)
6. Section 26(4B) of the Act requires that statement to include the policy of the Secretary of State about:
 - a. when it is likely that an invitation to tender will be issued;
 - 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.

Circumstances in which it is likely that an invitation to tender will be issued

7. In accordance with his obligations under EU Treaty principles of equal treatment, non-discrimination and transparency, the Secretary of State intends to select the person who is to be the franchisee in relation to a franchise agreement by issuing an invitation to tender, except where:
 - a. the circumstances set out in paragraphs 10 or 11 apply; or
 - b. the Secretary of State uses his powers under section 26ZA(2) of the Act (where either no tenders or no adequate tenders are received in response to an invitation to tender).
8. Where a franchisee is selected on the basis of tenders received in response to an invitation to tender, that selection will be based on an analysis of those tenders in relation to criteria set out in the invitation to tender and associated documents made available to the bidders.

Circumstances in which it is likely that an invitation to tender will not be issued

9. As an exception to the principle outlined in paragraph 7, domestic and European law prescribe certain circumstances in which the Secretary of State may select a person to be the franchisee in relation to a franchise agreement without issuing an invitation to tender (in other words, by making a direct award of the agreement to that person). Accordingly, the Secretary of State will only consider the making of a direct award where he considers that this is permitted under the applicable legal framework(s) (including any restrictions which prohibit the overcompensation of the direct award recipient), and that the award can be made in accordance with the procedures prescribed by law.
10. Within the parameters described in paragraph 9, the Secretary of State will not issue an invitation to tender (and will make a direct award) where, in his reasonable opinion, the disruption of rail services, or the immediate risk of such disruption, means that it is not practicable to do so.
11. In addition (but subject always to the parameters described in paragraph 9), it is likely that the Secretary of State will not issue an invitation to tender (and will make a direct award) where, in his reasonable opinion, doing so would not be conducive to:
 - a. the effective administration of a sustainable and well-resourced programme of franchise competitions; or
 - b. the fulfilment of government objectives in relation to rail transport (including as to the remapping of franchises),and the Secretary of State is able to comply with any applicable requirements regarding the publication of information in relation to the direct award.
12. Where a direct award is made, the Secretary of State will look to issue an invitation to tender in relation to the services subject to that direct award as soon as appropriate, in accordance with the Secretary of State's obligations under the EU Treaty principles, as set out in paragraph 7.

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

13. Where one or other of the circumstances indicated in paragraphs 10 or 11 arises, and the Secretary of State considers it appropriate to select the person who is to be the franchisee in relation to a franchise agreement without publishing an invitation to tender, the Secretary of State proposes (subject to paragraph 15) to secure the continued operation of those passenger rail services by direct award of the agreement to the incumbent operator, or if required by the factors set out in paragraph 14, another operator.
14. In choosing whether to make a direct award to the incumbent operator, the Secretary of State will consider all relevant factors, including his obligations under the EU Treaty principles of non-discrimination, transparency and equal treatment. Relevant factors will include the following:

- a. business and service continuity, outcomes for passengers, value for money, affordability, delivery risk and the continued quality of the franchise proposition;
- b. broader market or programme considerations, the delivery of major projects and investment, franchise remapping, impacts on the wider UK rail network and impacts that extend beyond or arise after the term of the franchise agreement in question; and
- c. the wider government objective of enabling the continued provision of passenger rail services by private sector operators.

Section 30 of the Act

15. If the Secretary of State is unable to enter into or conclude negotiations with any private sector operator, because he considers that the direct award of the agreement to a private sector operator would not be appropriate in light of the factors set out in paragraph 14, he will act in accordance with his operator of last resort duties under section 30 of the Act, which may include securing the services of a public sector operator.



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