

Consultation Response Document: Railways Act Section 26

March 2013

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1. Introduction

On 31 January 2013 the Department launched a targeted consultation on a revised version of the Railways Act 1993, Section 26 policy statement in order to take account of the recommendations of the Brown Review into Rail Franchising and current franchising policy. The consultation is available at the following link:

<https://www.gov.uk/government/consultations/railways-act-1993-section-26-policy-statement>

The previous Section 26 policy statement (published March 2008) is available at the following link:

<http://webarchive.nationalarchives.gov.uk/20110503151558/http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-0792.doc>

The consultation closed on 1 March and responses were received from the following organisations:

1. Abellio
2. ATOC
3. Eversholt Rail
4. Go-Ahead Group
5. Greater Anglia
6. LGA Public Transport Consortium
7. London Travelwatch
8. Network Rail
9. Northern Rail
10. Passenger Focus
11. Rail Delivery Group
12. Rail Future
13. RMT
14. Stagecoach
15. Transport for London
16. TUC
17. Welsh Government

The Department has endeavoured, in good faith, to produce a summary of the responses received. The following section provides this summary, the third section summarises and comments on the changes made to the statement in response to the consultation responses, and the revised Section 26 policy statement is appended to this document.

The Department found many of the consultation responses constructive and helpful, and is very grateful to all the organisations who took the time to respond to this consultation.

2. Summary of responses

Section 26 of the Railways Act 1993 requires the Secretary of State to publish a statement of policy describing how he proposes to exercise his franchising power. This was a consultation specific to the proposed statement rather than a wider consultation on franchising policy.

The statement covers three areas:

- a) when selection of the person to be a franchisee under a franchise agreement is likely to be from 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 it is proposed that the selection will be made in cases where there is no such invitation.

The key questions for consultation were:

- Does the policy statement provide sufficient explanation of the Department's intended approach in the three areas referred to above?
- Is the approach set out by the Department appropriate, given the variety of circumstances in which the Secretary of State could exercise his franchising power?

Taking each in turn:

Does the policy statement provide sufficient explanation of the Department's intended approach in the three areas referred to above?

Several respondents felt the statement provided sufficient explanation of the Government's intended approach. Others, however, requested clarification on a number of areas. Two respondents argued for a 'plain English' version of the statement and a further document setting out the way in which the Department approaches franchising.

Overall respondents were content with the statement as a means of ensuring the continued operation of passenger rail services by private sector companies, subject to a number of requests for clarification, though several were content with the statement as drafted. Two respondents argued that the public sector provided better value for money than the private sector for the operation of rail franchises and the franchising policy statement should not favour the private sector.

The importance of clarity and transparency was underlined in several responses, as was certainty for the market. Some respondents argued that the perceived lack of clarity in the statement would affect market confidence.

Specific comments and requests for clarification were received on a number of paragraphs. Respondents were most concerned with the circumstances in which the Secretary of State would select a franchise operator who was not among those submitting tenders in response to an invitation to do so. Concern was expressed by several consultees about how and why the Secretary of State would select an operator who had not bid for a franchise. An explanation of the circumstances in which such a selection would be made was requested.

Is the approach set out by the Department appropriate, given the variety of circumstances in which the Secretary of State could exercise his franchising power?

Respondents were content with the statement as a means of ensuring the continued operation of passenger rail services by private sector companies. Two respondents, however, argued for a move away from private sector operation of rail franchising as they argued the public sector was better placed to operate passenger rail services.

Overall respondents felt the approach set out by the Department was appropriate, subject to the clarification requests set out above. There was some concern about the effect of a series of single tender actions on competition, bidders and the supply chain.

Some respondents argued for a more prescriptive and explicit statement on the circumstances under which invitations to tender will be issued, and direct awards will be made, to avoid market uncertainty.

A significant comment on the references to “the incumbent operator, or another operator” in paragraphs 13 and 14 of the draft statement was made by several respondents. Those respondents were concerned by the perceived lack of clarity in the statement regarding the circumstances in which a direct award might be made to an operator other than the incumbent. More specifically, where an award to a non-incumbent is contemplated, it was suggested that this should be done by way of open competition.

3. Changes to the Statement

In responding to the consultation we have sought to balance the need to have a statement that meets our legal, commercial and policy requirements and the responses of consultees.

We have noted the requests for clarification from several respondents. We will be offering follow up meetings to consultees if they wish to understand the final statement further. There were a number of points made which were relevant to franchising policy rather than comments on the statement itself. We will follow these up bilaterally with respondents.

Changes to the Statement

The following are the main changes proposed in light of the consultation:

Textual Change	Comment
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; when it is likely that an invitation to tender will be issued;	We have changed this to make it consistent with the clarification in paragraph 7 and to simplify the language used in the statement, both in response to consultees' comments.
<u>General use of the Franchising Power</u> <u>Circumstances in which it is likely that an invitation to tender will be issued</u>	We have changed this heading to make it more reader friendly, descriptive, and consistent with later headings.
7 In accordance with his obligations under EU Treaty principles of equal treatment, non-discrimination	Concerns were raised about the words "wherever possible" in particular, and the last two sentences of this

<p>and transparency, the Secretary of State intends to select the person who is to be the franchisee in relation to a franchise agreement wherever possible by way of open, competitive tender. 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 by issuing an invitation to tender, except where:</p> <ul style="list-style-type: none"> a. <i>the circumstances set out in paragraphs 10 or 11 apply; or</i> b. <i>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).</i> 	<p>paragraph more generally. The language has been rephrased and made clearer.</p>
<p>8. Where a franchisee is selected in this way 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.</p>	<p>Text made clearer following changes to previous paragraph.</p>
<p><i>Circumstances in which it is likely that an invitation to tender will not be issued</i></p>	<p>This heading has been moved to make the statement easier to understand.</p>
<p>11. In addition (but subject always to the parameters described in paragraph 9), it is also 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</p>	<p>We have removed “also” as this has the potential to confuse the reader.</p>

conducive to:	
<p>12. Where a direct award is made, the Secretary of State will look to issue an invitation to tender in relation to the relevant 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.</p>	<p>In response to points made by consultees a change of wording from "relevant", which was felt to be too vague, to "subject to that direct award" has been made to add clarity. This makes the intention explicit.</p>
<p>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 another operator or if required by the factors set out in paragraph 14, another operator.</p> <p>14. In choosing whether to make a direct award to the incumbent operator or another 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 may include the following:</p>	<p>We have carefully considered the policy intention when selecting an operator if no invitation to tender has been issued, in response in particular to comments from the industry. Taking account of these comments, and our own policy position, we have changed the wording of these two paragraphs to indicate a rebuttable presumption in favour of the incumbent operator.</p>

We note the request from two respondents for a 'plain English' version of the statement. Whilst we don't propose to issue a 'plain English' version of the statement we are in the process of drafting an overview of UK Franchising which will address these requests as well as other requests for clarification made as part of the consultation.

Appendix: Section 26 Statement

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

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.