

DIRECT AWARDS HIGH LEVEL PROCESS GUIDE

Context

Government's objective is to secure world class train services that drive economic growth and exceed passenger expectations.

The liberalised rail market in Great Britain allows Government to procure the very best expertise from domestic and overseas partners; this in turn provides the maximum benefit for passengers and taxpayers. Government continues to seek partnerships with organisations that can deliver innovative solutions to the continuing challenges faced, whilst maintaining a strong focus on safety.

The Rail Franchising Programme includes selecting, through Franchise Competitions, delivery partners who will support the Department's vision and secure the most cost effective and value for money operation of rail services from providers who will continuously seek to improve services for passengers.

The programme also includes a number of direct awards to incumbent rail operators. The direct awards help to manage and sustain a realistic and properly resourced programme of Franchise Competitions and a healthy bidding market for those competitions. In entering into such direct awards, the Department is conscious that the commercial terms have not been tested through a procurement competition. Domestic and European law helps in this by setting out a specific legal framework for "public service contracts" (which encompass rail passenger services) which is intended to ensure that the terms are economically efficient so that the taxpayer (and fare-payer) is not over-paying for services. Should appropriate terms not be achievable, the Department will call upon contingency measures rather than enter into a Direct Award.

The Guide

The attached document is a guide giving an indicative process used in agreeing a Direct Award. The key decision points are shown as diamonds and at these points, specific approval to proceed must be received from Departmental governance boards on examination of the updated Business Case and other supporting evidence for the Direct Award.

The DA guide is an internal Department for Transport document. It is an indicative and dynamic document which is subject to controlled change and must be read in that context. Any printed copy or any electronic copy downloaded and saved falls out of control at the time of printing or saving.

Whilst the guide defines the process that Departmental staff, and where necessary their advisers, will be expected to follow when delivering direct awards of franchise contracts, the Franchising Director retains the discretion to derogate from or change the process where he deems it to be necessary, or expedient in the context of the franchising programme as a whole. Such discretion will be exercised in compliance with applicable law and will not be used in any manner that undermines the effectiveness of the governance or assurance processes.

This guide describes a generic process for the direct award of a franchise contract. In the event of any apparent conflict between the formal documents issued in relation to any individual direct award and this DA guide, then the formal documents take precedence.

Legal framework

The award of interim contracts must comply with the relevant domestic and European legal requirements; in particular section 26 of the Railways Act 1993 and EU Regulation 1370/2007 on public passenger transport services by rail and road (“Regulation 1370”).

The Department has issued a Statement of policy on the exercise of the Secretary of State's power under section 26(1) of the Railways Act 1993 which was presented to Parliament in March 2013. This statement explains the means by which an operator will be selected if an invitation to tender is not issued. It also makes it clear that where the Secretary of State is unable to enter into or conclude negotiations with a private sector operator that he will need to act in accordance with his operator of last resort duties under Section 30 of the Railways Act 1993 and that this may include securing the services of a public services operator such as Directly Operated Railways Ltd, a wholly owned subsidiary company of the Secretary of State.

For public service contracts such as those to provide rail passenger services, Regulation 1370 makes express provision for direct awards in two circumstances: so-called “emergency” direct awards where there is disruption, or the risk of disruption, to rail services in which case the Department may make an emergency direct award of a rail franchise contract for a period of up to 24 months (Article 5(5)); and direct awards for a period up to 10 years provided that notice has been published in the Official Journal of the European Union (OJEU) at least one year before the direct award is entered into . (Articles 5(6) and 7(2)). This guide only applies to non-emergency direct awards.

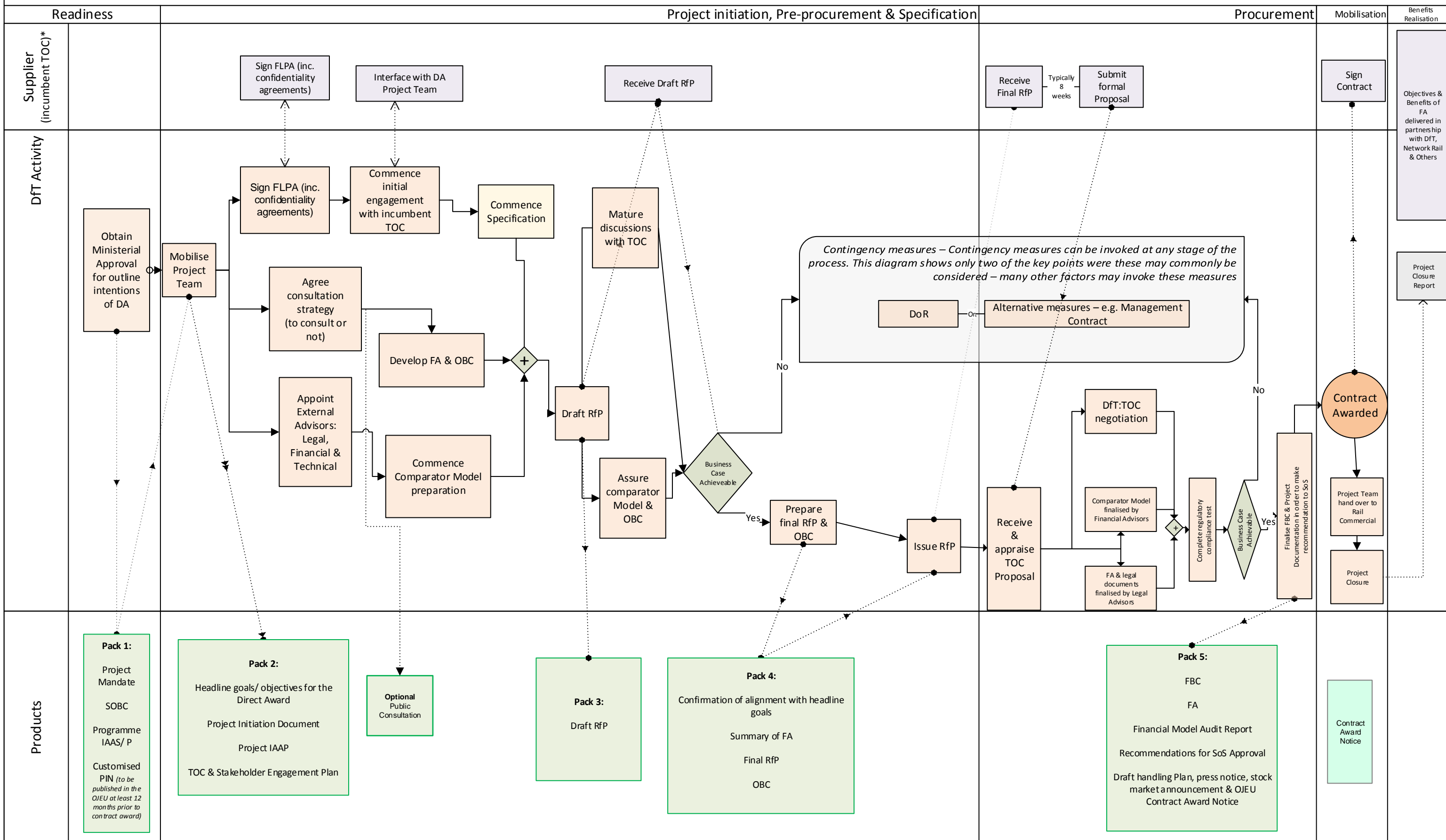
Regulation 1370 also sets out the mandatory content of public service contracts. This includes rules designed to prevent over-compensation of the operator. In particular, the Annex to the Regulation stipulates that the compensation may not exceed the “net financial effect” of complying with the public service obligation, calculated as follows:

- costs incurred in relation to the performance of the public service obligation as set out in the public service contract
- minus any positive financial effects generated within the network operated under the public service obligations in question
- minus receipts from / revenue generated while fulfilling the public service obligations
- plus a reasonable profit
- equals net financial effect.

The Annex defines “reasonable profit” as a rate of return on capital that is normal for the sector in a given member state and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention.

The direct agreement will therefore include some form of clawback/sharing mechanism and a cap on profits as part of the protections against overcompensation.

Rail Franchising – Direct Award* Project – High Level Process Guide *‘non-emergency’ direct awards as defined by Article 5(6) of Reg 1370/2007



Key	<p>Programme – refers to the Franchise Programme</p> <p>Project – refers to a single competition or Direct Award within the Programme</p>	<p>TOC – Train Operating Company</p> <p>FA – Franchise Agreement</p> <p>PIN – Prior Information Notice</p> <p>RfP – Request for Proposal</p> <p>OJEU – Official Journal of the European Union</p>	<p>SOBC – Strategic Outline Business Case</p> <p>OBC – Outline Business Case</p> <p>FBC – Full Business Case</p> <p>IAAS/ P – Integrated Assurance & Approval Strategy/ Plan</p> <p>FLPA – Franchise Letting Process Agreement</p>	<ul style="list-style-type: none"> The Direct Award process guide is an internal Department for Transport document. It is an indicative and dynamic document which is subject to controlled change and must be read in that context. Any printed copy or any electronic copy downloaded and saved falls out of control at the time of printing or saving. Whilst the guide depicts the process that Departmental staff, and where necessary their advisers, will be expected to follow when delivering direct awards of franchise contracts, the Franchising Director retains the discretion to derogate from or change the process where he deems it to be necessary, or expedient in the context of the franchising programme as a whole. Such discretion will be exercised in compliance with applicable law and will not be used in any manner that undermines the effectiveness of the governance or assurance processes. This guide depicts a generic process for the direct award of a franchise contract. In the event of any apparent conflict between the formal documents issued in relation to any individual direct award and this DA guide, then the formal documents take precedence.
	<p>Diamonds represent decision points. The addition of this '+' icon indicates that all preceding activities must complete before next stage occurs</p>			

The Department awards Franchise Agreements in accordance with relevant domestic and European legal requirements; in particular the Railways Act 1993 and 2005 and EC Regulation 1370/2007