



Department  
for Transport

Rail Executive

## Rail Franchising

### West Midlands Franchise

### Franchise Pre-Qualification Process Document

December  
2015



## Department for Transport

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# Important Notice

This Document is issued by the Authority pursuant to its functions and duties under the Railways Act. It forms part of a competitive procurement conducted in accordance with relevant legal requirements including Regulation 1370/2007 and is being issued to all Passport Holders and Temporary Visa Holders who satisfied the first part of the pre-qualification stage, as described in the Passport PQQ Pack.

This Document is not a recommendation by the Authority, or any other person, to enter into any agreement or to make any investment decision. In considering any investment in a franchise, recipients of this Document should make their own independent assessment and seek their own professional financial and legal advice.

This Document does not purport to contain all of the information that a prospective franchisee or shareholder may require. Neither the Authority, nor any of his employees, agents or advisers, makes any representation or warranty (express or implied), and no such representatives have any authority to make such representations and warranties, as to the accuracy or completeness of the information contained in this Document.

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The only information which will have any legal effect and/or upon which any person may rely will be such information (if any) as has been specifically and expressly represented and/or warranted in writing to a successful franchisee in the relevant franchise agreement or in any other relevant agreement entered into at the same time as the franchise agreement is entered into or becomes unconditional.

Legal, technical and financial advisers will be acting for the Authority in relation to the letting of this Franchise and will not regard any other person as their client or be responsible to anyone other than the Authority for providing the protections afforded to their client or for advising any other person on the contents of this Document or any matter referred to in it.

The Authority is not and shall not be liable for any expenses, costs or liabilities incurred by a Franchise Applicant making a Franchise Application or negotiating or bidding for a franchise agreement or any other agreement entered into in connection with such franchise agreement, or any such costs incurred by their Affiliates or any other person.

The Authority reserves the right not to award a franchise agreement, or any contract, to make whatever changes it sees fit to the structure and timing of this Franchise Letting Process (including issuing updates and amendments to this Franchise PPD), to cancel this Franchise Letting Process in its entirety at any stage

and, where it considers it appropriate to do so, to make a direct award pursuant to Regulation 1370/2007.

# Terms and Definitions used in the Franchise Eol and Franchise PPD

**“Affiliate”** means in respect of any Franchise Applicant, its Controllers, any entity or person Controlled by the Franchise Applicant, and any entity or person other than the Franchise Applicant which is Controlled by any of the Controllers of the Franchise Applicant, from time to time.

**“Appendix”** means additional information submitted as part of a Franchise Application using the template provided in Annex A of the Franchise Eol.

**“Application Date”** means 30 October 2015

**“AQ”** means a clarification question asked of a Franchise Applicant by the Authority to clarify any element of a Franchise Application.

**“Authority”** means the Secretary of State for Transport who is seeking to award a contract.

**“Bidder”** means a party or parties invited to respond to the ITT.

**“CJEU”** means the Court of Justice of the European Union.

**“Control”** means the power of a person or other entity (“C”) to secure that the affairs of a person or other entity are conducted in accordance with C's wishes. In relation to a body corporate Control may be secured by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate. Control shall include Control held indirectly as well as directly, negative Control (exercised by veto rights), and joint Control (where there is one or more other persons or entities in addition to C which also exercise Control, or C together with any other person or entity exercises Control), and **“Controlled by”** shall be construed accordingly.

**“Controller”** means any person or entity who has Control.

**“CQ”** means a clarification question asked of the Authority by a Franchise Applicant.

**“Document”** means this Franchise PPD together with the Franchise Eol that it supports.

**“DOTAS”** or **“Disclosure of Tax Avoidance Schemes”** means the rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as in force from time to time, as currently contained in Part 7 of the Finance Act 2004 and in secondary legislation made under powers contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868

made under s.132A Social Security Administration Act 1992, as each of these may change from time to time.

“**EIR**” means the Environmental Information Regulations 2004 (SI 2004/3391).

“**Fixed Guarantee**” means either: (a) at this Franchise EoI stage £20 million or (b) such higher amount as the Authority may specify in the ITT.

“**FLPA**” means the Franchise Letting Process Agreement, being the deed to be entered into by a Franchise Applicant in order to gain access to the Franchise section of the franchising procurement e-sourcing portal including, among other obligations, confidentiality and non-collusion undertakings.

“**FOIA**” means the Freedom of Information Act 2000.

“**Franchise**” means the rail franchise described in the Prospectus.

“**Franchise Agreement**” means the operating franchise contract and ancillary documents to be entered into between the Authority and the Franchisee.

“**Franchise Applicant**” means a Passport Holder (or combination of 2 or more Passport Holders) or Temporary Visa Holder, or wholly owned subsidiary of a Passport Holder or Temporary Visa Holder, which has submitted, intends to submit, or is considering submitting a Franchise Application.

“**Franchise Application**” means the response to the Franchise EoI submitted by the Franchise Applicant.

“**Franchise Application Deadline**” means the time and date specified in section 3.3 below.

“**Franchise EoI**” means the Franchise specific pre-qualification questionnaire for which this Franchise PPD provides supporting information.

“**Franchise EoI Pack**” means this Document and all accompanying documents including the Prospectus.

“**Franchise Letting Process**” means the competitive procurement process for the letting of the Franchise, as described in the Franchise EoI Pack and to be described further in the ITT.

“**Franchise PPD**” means this pre-qualification process document that contains the supporting information for use with the Franchise EoI.

“**Franchisee**” means the person or entity appointed by the Authority to enter into the Franchise Agreement with the Authority to provide, by the operation of associated rolling stock and stations, the franchise services that will comprise the Franchise.

“**Funding Deed**” means a deed to be entered into between a Guarantor, the Franchisee and the Authority whereby the Guarantor provides, among other things, a loan facility to the Franchisee in the amount of the Guarantee. Under the terms of

the Funding Deed, the Authority, as a party to the deed, will have legal rights to require the Franchisee to draw down under the loan facility to ensure the financial robustness of the Franchisee.

**“Funding Requirement”** means the total funding required to support the Franchise, including the Guarantee, season ticket bond and performance bond.

**“Further Technical Questions”** means the questions in respect of franchise specific capability and technical ability described in section 2.4 below.

**“General Anti-Abuse Rule”** or **“GAAR”** means (a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions.

**“Guarantee”** means either: (a) at this Franchise EoI stage, the Fixed Guarantee; or (b) after receipt of bids the Fixed Guarantee and the Variable Guarantee.

**“Guarantor”** means a Controller of the Franchise Applicant (or of the single purpose entity to be formed by the Franchise Applicant to undertake the operation of the Franchise) which will provide financial security to the bond provider(s) for the performance and season ticket bonds, and which will sign the Funding Deed.

**“Halifax abuse principle”** means the principle explained in the CJEU Case C-255/02 Halifax and others.

**“ITT”** means the invitation to tender to be issued by the Authority to Bidders to start the bid phase of this Franchise Letting Process.

**“OJEU”** means the Official Journal of the European Union.

**“OONC”** or **“Occasion of Tax Non-Compliance”** means:

- (a) any tax return submitted to a Relevant Tax Authority on or after 1 October 2012 by the Franchise Applicant (including, where the Franchise Applicant is a joint venture or consortium, any member of that joint venture or consortium) is found to be incorrect as a result of:
  - (i) a Relevant Tax Authority successfully challenging it under the General Anti-Abuse Rule or the Halifax abuse principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax abuse principle;
  - (ii) the failure of an avoidance scheme which the Franchise Applicant (including, where the Franchise Applicant is a joint venture or consortium, any member of that joint venture or consortium) was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or
- (b) the tax affairs of the Franchise Applicant (including, where the Franchise

Applicant is a joint venture or consortium, any member of that joint venture or consortium) give rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Franchise Application Deadline or to a civil penalty for fraud or evasion.

**“ORR”** means the Office of Rail and Road.

**“Passport”** means the confirmation awarded by the Authority to each Passport Holder that their Passport Application met the requirements set down by the evaluation process set out in the Passport PPD.

**“Passport Application”** means the response to the Passport PQQ that was submitted by the Passport Holder.

**“Passport Holder”** means, during the validity period of the relevant Passport, a person or entity (or persons or entities) that submitted a Passport Application on or before the Application Date and to whom a Passport has been awarded.

**“Passport PPD”** means the pre-qualification process document that contains the supporting information for use with the Passport PQQ.

**“Passport PQQ”** means the pre-qualification questionnaire for which the Passport PPD provides supporting information.

**“Passport PQQ Pack”** means the Passport PPD, the Passport PQQ and all accompanying documents.

**“Passport System”** means the pre-qualification passport system described in the Passport PPD, the Passport PQQ, the Passport System Notice and this Document.

**“Passport System Notice”** means the qualification system notice published in the OJEU (number 2015/S 189-343640, as updated by number 2015/S 226-412254) for the purpose of advertising the Passport System, including any updates to the qualification system notice published in the OJEU from time to time.

**“PIN”** means a prior information notice published in the OJEU.

**“Prospectus”** means the document providing background and details of the Franchise, issued as part of the Franchise EoI Pack.

**“Railways Act”** means the Railways Act 1993.

**“Regulation 1370/2007”** means Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

**“Relevant Tax Authority”** means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which the Franchise Applicant (including, where the Franchise Applicant is a joint venture or consortium, any member of that joint venture or consortium) is established.



**“Temporary Visa”** means a temporary permission granted by the Authority to a Passport Holder that enables that Passport Holder to participate in this Franchise Letting Process as part of a specific group of economic operators that is different to the single economic operator or group to whom the underlying Passport was awarded, including where the respective contributions of the economic operators in that group have changed since the underlying Passport was awarded.

**“Temporary Visa Holder”** means the persons or entities to whom a Temporary Visa has been awarded for this Franchise Letting Process, including the Passport Holder that submitted the Temporary Visa Information.

**“Temporary Visa Information”** means the application for the Temporary Visa that was submitted by the Temporary Visa Holder in accordance with the requirements set down in the Passport PPD.

**“Ultimate Controller”** means a Controller of the Franchise Applicant (and, where the Franchise Applicant is a joint venture or consortium, any member of that joint venture or consortium) which is not itself Controlled by any other person or entity.

**“Variable Guarantee”** means an amount calculated as a percentage of the excess of franchise payments bid over a defined profile of payments set out in the ITT.

In this Document, the words **“other”**, **“includes”**, **“including”**, **“for example”** and **“in particular”** do not limit the generality of any preceding words and are to be construed without limitation.

In this Document, **“working day”** means any day other than Saturday, Sunday, Christmas Day, Good Friday or a statutory bank holiday in England.

If and to the extent of any inconsistency or conflict between any of the documents in the Franchise EoI Pack, the order of priority for the purposes of construction is, in descending order:

- the FLPA;
- the Franchise EoI;
- this Franchise PPD;
- any other information provided or made available on the Franchise section of the franchising e-sourcing portal (including the Prospectus).

# 1. Introduction

This Document is issued to Passport Holders and Temporary Visa Holders. From within that pool of potential Franchise Applicants, the Authority is seeking Franchise Applications from organisations that can demonstrate the necessary managerial capability and experience and financial strength to be considered for the award of a Franchise Agreement for the effective delivery of passenger services and management of train operations for the Franchise.

Please refer to the Prospectus for the background and details of the Franchise.

This Franchise PPD:

- (i) outlines this Franchise Letting Process;
- (ii) describes the process for selection and shortlisting of Bidders to receive the ITT; and
- (iii) sets out the evaluation criteria for this EoI stage.

The powers and duties of the Authority in relation to franchising and the letting of franchises can be found in the Railways Act and the Transport Act 2000, which can be accessed via [www.legislation.gov.uk](http://www.legislation.gov.uk)

The Authority has published a Rail Franchising PIN. This includes the full rail franchising schedule, details of Direct Awards, and additional information regarding the aims of the rail franchising programme.

The Rail Franchising PIN is updated annually and published in the OJEU. The updates will include additional information relating to the aims of the rail franchising programme. The Rail Franchising PIN will also be available on the Authority's website:

<https://www.gov.uk/government/organisations/department-for-transport/series/rail-franchising>

## 2. This Franchise Letting Process

### 2.1 Introduction

This Franchise Letting Process consists of a pre-qualification process followed by a bid phase.

Section 26(3) of the Railways Act stipulates that the Authority may not issue an ITT to any person unless it considers that such person has the appropriate financial position and managerial competence, and is otherwise suitable to be the franchisee for the relevant rail franchise.

The Authority will make that determination as regards this Franchise through the pre-qualification process, which comprises:

- (i) the Passport PQQ; and
- (ii) the Franchise Eol.

### 2.2 Pre-qualification process

The pre-qualification process (comprised of the Passport PQQ and Franchise Eol stages) enables the Authority to assess each Franchise Applicant's ability to deliver (or secure the delivery of) passenger services and management of train operations for the Franchise. This includes assessing:

- (i) whether any of the specified grounds for mandatory or discretionary rejection applies;
- (ii) the economic and financial standing of the Guarantor or Guarantors;
- (iii) the Franchise Applicant's capability, competence and experience; and
- (iv) the Franchise Applicant's safety management and culture.

### 2.3 Franchise Applicants

Subject to section 5.5 below, Franchise Applications may only be made by Passport Holders or Temporary Visa Holders.

### 2.4 Franchise Eol

The Franchise Eol requires Franchise Applicants to respond to the following;

- (i) Organisation and Contact Details (please refer to Part A of the Franchise Eol);
- (ii) Certain Franchise Specific Grounds for Discretionary Rejection (including past performance) (please refer to Part B of the Franchise Eol); and
- (iii) Economic and Financial Standing (please refer to Part C of the Franchise

Eol).

Franchise Applicants are required to declare, in the form set out in the Franchise Applicant's Declaration in the Franchise Eol, that the information that has already been provided in respect of Parts B and C of the Passport Application and/or Temporary Visa Information (as applicable) is up to date and that the information provided in respect of Parts D and E remains accurate.

Questions in respect of franchise specific capability and technical ability have been made available by the Authority on the Franchise section of the franchising e-sourcing portal (the **Further Technical Questions**), along with the weightings applicable to those questions.

Responses to the Further Technical Questions should not be submitted as part of the Franchise Application. The Further Technical Questions will only be activated where Franchise Applicants are to be ranked for the purposes of shortlisting, as set out in section 4.4 below. Responses to the Further Technical Questions will **not** be required unless the Authority expressly confirms to Franchise Applicants that the Further Technical Questions have been activated and that it requires responses to them.

## **2.5 Evaluation and shortlisting**

Franchise Applications will be evaluated in accordance with the evaluation process set out in section 4 below.

The maximum number of Franchise Applicants that will be shortlisted and invited to bid is 4. Details of the shortlisting process are set out in section 4.4 below.

## **2.6 Franchise Eol debrief**

Franchise Applicants will be notified of the outcome of their Franchise Application in writing, together with the reasons if they are not invited to bid.

If the Further Technical Questions were activated, Franchise Applicants that are invited to bid will be offered a face-to-face debrief with the Authority, in addition to the written notification referred to above, to cover the reasons why they were successful.

If the Further Technical Questions were activated, Franchise Applicants that are not invited to bid will be offered a face-to-face debrief with the Authority, in addition to the written notification referred to above, to cover the reasons why they were unsuccessful.

Where a Franchise Applicant is not invited to bid where the Authority has activated the Further Technical Questions and ranked Franchise Applicants to create a shortlist, the written reasons provided to the Franchise Applicant will include the scores awarded to that Franchise Applicant for the Further Technical Questions, along with the scores and rankings of all Franchise Applicants shortlisted to receive

an ITT on an anonymised basis.

## **2.7 ITT**

The ITT will be issued to the successful Franchise Applicants inviting them to bid (the Bidders).

Draft requirements (including draft requirements for bilateral meetings between the Authority and Bidders) may be provided to Bidders for comment. The ITT will be available via the franchising e-sourcing portal and the Authority's web site. It is currently the intention to give Bidders approximately 120 calendar days to submit their bids in response to the ITT.

## **2.8 Access to data site**

The Authority will provide the Bidders with secure access to a Franchise data site in accordance with the data site authorisation process set out in the FLPA. The data site will be populated with relevant information provided by the Authority in relation to this Franchise Letting Process, and by the current operator, Network Rail and any other relevant parties in relation to the current operation of the railway as far as it relates to the Franchise.

## **2.9 Award of the Franchise**

The Franchise will be awarded to the Bidder which presents the most economically advantageous tender by reference to the award criteria to be specified in the ITT.

There will be a number of conditions precedent to the commencement of services pursuant to the Franchise Agreement. The ITT and related documentation will contain further information. Franchise Applicants' attention however is drawn at this stage to the following, which will be included as conditions precedent:

- the obtaining of the appropriate licences from the ORR; and
- the obtaining of a safety certificate and safety authorisation from the ORR.

Further details will be given in the ITT but information can also be found by accessing the ORR website at <http://orr.gov.uk/>

The Authority may, at any time during this Franchise Letting Process, require Franchise Applicants or Bidders (as applicable) to demonstrate that they will be in a position to obtain the necessary licences, safety certificate and safety authorisation from the ORR. The Authority may, at any time, during the Franchise Letting Process require Franchise Applicants or Bidders (as applicable) to apply for the necessary licences, safety certificate and safety authorisation from the ORR in order to ensure that each is obtained prior to the Franchise start date.

## **2.10 Timescales**

The proposed timetable for this Franchise Letting Process is given below. This is intended as a guide and, whilst the Authority does not intend to depart from the timetable, it reserves the right to do so at any time, including omitting one or more

stages, or adding one or more additional stages.

Franchise Applicants are required to notify the Authority immediately upon becoming aware that they will not be able to comply with the timescales set out below, for example as a result of the need to obtain approval from any governmental or regulatory authority. The Authority reserves the right to eliminate a Franchise Applicant from this Franchise Letting Process if so notified.

<b>Stage</b>	<b>Description</b>	<b>Date</b>
Public consultation	Public consultation	15 December 2015
Franchise EoI	Issue of Franchise EoI Pack	15 December 2015
	Return of Franchise Application	4 March 2016
	Further Technical Questions activated (if required)	11 March 2015
	Return of responses to Further Technical Questions (if required)	8 April 2016
	Confirm Bidder shortlist	6 May 2016 (if Further Technical Questions activated)  8 April 2016 (if Further Technical Questions not activated)
Bid Preparation and Negotiation of Bids	ITT pack issued to Bidders	July 2016

	Receipt of ITT submissions	November 2016
	Announcement of winning Bidder	June 2017
Mobilisation	Contract Start	October 2017

## 2.11 Competition Matters

Depending on the identity of the Bidder, the award of the Franchise may constitute a relevant merger under the Enterprise Act 2002 (**EA02**) (i.e. one over which the Competition and Markets Authority (**CMA**) would have jurisdiction), or a concentration with a European Community dimension under Council Regulation (EC) No.139/2004 (**EUMR**), which would be required to be notified to the European Commission (**EC**).

If the award of the Franchise to a particular Bidder would give rise to a realistic prospect of a substantial lessening of competition (under EA02), or of a significant impediment to effective competition (under the EUMR), such as would give the CMA (or EC, as appropriate) cause to subject the award of the Franchise to an in-depth "phase 2" investigation, this might prejudice the timing of this Franchise Letting Process and/or the ability of the Bidder to operate the Franchise as bid. Generally, a concentration with a European Community dimension may not be completed until clearance has been obtained under the EUMR. In the context of a relevant merger under EA02 that has been completed, the CMA may make an interim order to prevent or unwind any integration pending conclusion of any investigation. It is therefore important for the Authority to be able to assess the impact of any potential intervention by the CMA or EC in scrutinising the bids of each Bidder under merger control rules.

In the ITT to be issued to shortlisted Bidders, the Authority expects that each Bidder will therefore be required to provide in its bid information relating to merger control issues which may include:

- confirmation of whether or not an award of the Franchise to it would require notification to the EC under the EUMR, and if so whether the Bidder would propose to request pursuant to Article 4(4) of the EUMR that the transaction is referred back to the CMA for consideration, and how it views the prospects of such a request being accepted;
- an explanation of its assessment of whether or not the transaction would be cleared by either the CMA or EC without the need to refer it for an in-depth phase 2 investigation;
- confirmation that it will comply with any requests by the Authority for the

Bidder's advisers to hold a dialogue with the Authority's advisers, to the extent that (in the view of the Authority) the explanation provided by the Bidder requires clarification;

- confirmation of the strategy it will adopt to minimise any delay caused by the need to obtain clearance from the CMA or EC before being able to operate the Franchise. This should include, but is not limited to, how the Bidder proposes to deal with the CMA or the EC, throughout the pre-notification and notification processes, as well any discussions around undertakings or commitments for the purposes of avoiding an in-depth phase 2 investigation;
- confirmation that it will co-operate fully with the EC and CMA during their investigations, in particular by responding promptly to any requests for information;
- the form of any derogations the Bidder would seek to the CMA's standard form of initial enforcement ('hold separate') orders in the event that these are required in the context of a completed merger;
- confirmation:
  - of whether it considers it would need to offer undertakings to the CMA or, as the case may be, commitments to the EC in order to avoid a referral to an in-depth phase 2 investigation, as well as what those are likely to be;
  - that it will offer such undertakings or commitments to the CMA or the EC as may be required by the CMA or the EC to enable it to operate the Franchise as bid, unless and to the extent that any such undertakings or commitments given would impact on the ability of the Bidder and/or any of its Affiliates to operate any other UK rail franchise of which it is the franchisee; and
  - that it is prepared to comply with the undertakings or commitments which it has identified in its own analysis and that it is willing to take the steps needed to comply.

Following bid submission, the Authority will require the Bidder to keep the Authority informed of the progress of its notifications to the EC and/or CMA, including notifying the Authority as soon as possible if it becomes aware of the possibility that a phase 2 investigation or undertakings or commitments in lieu of such an investigation may be required.

Following bid submission, the Authority will require Bidders to advise the Authority as soon as possible if there is any change in the circumstances from the position as outlined in their bid which may affect the competition clearance process (for example, if the Bidder acquires or divests another transport operation which is relevant to the competition assessment of the Franchise award). If a Bidder fails to do so, that Bidder's bid may be deemed to be noncompliant in which case the Authority reserves the right to eliminate the Bidder from further participation in this Franchise Letting Process.



If, in the view of the Authority, following its evaluation of the bid information referred to above and/or any updated information provided by a Bidder subsequently, the impact of any intervention (including, but not limited to referral to an in-depth phase 2 investigation) by the CMA (or EC, as appropriate) would prejudice the timing of this Franchise Letting Process or the ability of the Bidder to operate the Franchise as bid, or would otherwise prejudice the Franchise or any other franchise, the Authority reserves the right to seek further information and/or to eliminate the Bidder from further participation in this Franchise Letting Process.

Bidders should be aware that the above considerations apply to joint venture and consortium members in the same way as to sole Bidders. Even if two Bidders are not identical the existence of a common joint venture partner or consortium member could raise merger control issues. In particular, Bidders should note that the EA02 and the EUMR are capable of applying to joint venture and consortium members where they exercise a form of control known as "material influence" (under the EA02) or "decisive influence" (under the EUMR), both of which are capable of existing well below a 50% interest.

Franchise Applicants should note that the Authority has particular concerns regarding the merger control implications of the same operating group winning both the Franchise and the InterCity West Coast rail operations. The Authority is concerned that the nature of these two rail operations on the West Coast Mainline may increase the risk that intervention by a competition authority could prejudice the timing of this Franchise Letting Process and/or the process for the future InterCity West Coast rail operator and/or the ability of the winning Bidder to operate one or both of these operations.

At this point in time, a similar approach to that described above is anticipated in relation to any InterCity West Coast competition. However, the Authority reserves the right to consider further or alternative measures to address potential merger control issues at or before any InterCity West Coast Expression of Interest stage.

It should be noted that the InterCity West Coast project team is currently considering all proposition options, including a number of operating models over a variety of lengths from short term through to longer term.

The Authority strongly recommends that Franchise Applicants consider potential merger control issues when determining whether to participate in both this Franchise Letting Process and any competition for InterCity West Coast. Franchise Applicants are strongly encouraged to contact the Authority to discuss any merger control concerns as early as possible.

# 3. Submitting Franchise Applications

## 3.1 FLPA

To obtain the FLPA for this Franchise, Franchise Applicants must first email: [westmidlands@railexecutive.gsi.gov.uk](mailto:westmidlands@railexecutive.gsi.gov.uk)

Franchise Applicants are required to sign and return the FLPA. The FLPA signed must be identical to the draft deed provided by the Authority, subject only to amendments permitted by the Notes to Franchise Applicants shown in that draft deed.

Upon receipt of the signed FLPA by the Authority, Franchise Applicants will gain access to the Franchise section of the franchising e-sourcing portal.

The franchising e-sourcing portal enables access to editable Word templates for each of the sections of the Franchise EoI, plus a pdf Declarations and Authorisation document. Instructions for uploading the completed documents are at section 3.3 below.

## 3.2 Response Instructions

The following conditions shall apply to the submission of Franchise Applications:

- (a) Franchise Applicants must answer every question and ensure that they complete the Franchise EoI as requested. Failure to do so may result in their Franchise Application being deemed non-compliant and rejected.
- (b) Where a question cannot be answered fully, Franchise Applicants should provide a relevant explanation with reasons. If the question does not apply, a Franchise Applicant should write 'Not Applicable'.
- (c) Where a Franchise Applicant has submitted supporting information in response to a question in the Franchise EoI, the relevant response must refer to the supporting information and reference any relevant Appendices. Similarly any supporting information must indicate the Part and question number in the Franchise EoI to which it refers. Supporting information submitted in response to the Further Technical Questions (if activated) will count towards the page limit set out in paragraph (f) below.
- (d) The responses to specific questions in the Franchise EoI must not include cross references to responses to other questions. Any information which is cross-referenced in a manner which is contrary to this paragraph (d) will not be taken into account in the evaluation of the response to the question that contains the cross-reference.
- (e) All responses must be in English. This requirement does not apply to any requested information which has not been created for the Franchise Application, but a translation into English must be provided for any requested information submitted in a language other than English.
- (f) If activated, the responses to the Further Technical Questions, including supporting information, must not exceed 20 sides of A4, with the exception of any policy statement requested, which will not be counted towards the

page limit. Parts A, B and C (including, for the avoidance of doubt, any Appendices provided in response to these Parts) and any CQs and AQs and responses shall not count towards this page limit. Any material included in the submission beyond the applicable page limit will not be taken into account in the evaluation.

- (g) The Authority expects the information supplied in Franchise Applications to be concise and unambiguous.
- (h) All financial information supplied as part of the Franchise Application must be clearly denominated in Pounds Sterling. This requirement does not apply to any requested information which has not been created for the Franchise Application (e.g. company financial reports), which should use the original currency. Where financial information is supplied as part of the Franchise Application in a currency other than Pounds Sterling, and the Authority wishes to convert the relevant information into Pounds Sterling, it shall use the applicable exchange rate published in the Financial Times on 1 February 2016.

If specific project financial information cannot be provided for reasons of confidentiality, Franchise Applicants should state this.

- (i) The font size must be 11 pt minimum, font type must be Arial standard (i.e. not 'narrow') and the line spacing must be 13pt minimum. Pages must be bordered on all sides by 2cm margins. Minimum font size for any text in tables must be 10 pt. It will not be acceptable to place large sections of text into tabulated format as a means of meeting the page limit requirements.
- (j) The Authority reserves the right to clarify elements of a Franchise Application with the Franchise Applicant by means of an AQ. The Franchise Applicant will be required to respond to any AQ within 3 working days, which may be extended by the Authority where the Authority considers it appropriate and reasonable to do so.
- (k) Failure to comply with any of the conditions or requirements set out in this Document may, at the Authority's discretion, result in the Franchise Application being rejected.
- (l) The Authority expressly reserves the right to require a Franchise Applicant to provide additional information supplementing or clarifying any of the information provided in its Franchise Application, but is under no obligation to do so.
- (m) Where the Authority considers either that certain information has, by mistake, not been provided by a Franchise Applicant or that there are potentially unintentional errors in information that has been provided, then the Authority reserves the right to clarify these issues with the Franchise Applicant by means of an AQ and to allow such Franchise Applicant to correct such errors or amplify their response before evaluating their Franchise Application, but is under no obligation to do so.

### **3.3 Uploading responses via the e-portal**

The Franchise Applicant must download the electronic Word version of the Franchise EoI from the franchising e-sourcing portal for completion.

Preparation for uploading and submission must be carried out as follows:

- Parts A, B and C must be completed as separate documents and converted to individual searchable pdfs, each of which must then be uploaded via the portal. Instructions will be given on-screen for the uploading of other information requested by the Franchise EoI, for example audited accounts.
- In respect of the Franchise Applicant's Declaration, which requires authorising signatures, each person required to give it must sign the document by hand (not electronically) and the signed document(s) must be scanned to JPEG or pdf format, which must then be uploaded via the portal.
- In respect of the Guarantor's Declaration, which requires authorising signatures, the Guarantor (or each Guarantor if more than one) must sign the document by hand (not electronically) and the signed document(s) must be scanned to JPEG or pdf format, which must then be uploaded via the portal.
- Annex B (Economic and Financial Standing Spreadsheet) of the Franchise EoI must be completed in accordance with the instructions tab. The completed spreadsheet must be presented in Microsoft Excel 'xlsx' or 'xlsm' format, with workings and formulae intact (i.e. non input cells should not be 'hard-coded' with values). The completed spreadsheet must then be uploaded via the portal.
- In respect of Annex C (Bond Template Letter) of the Franchise EoI, the bond provider(s) must sign the document by hand (not electronically) and the signed document(s) must be scanned to JPEG or pdf format, which must then be uploaded via the portal.

For documents requiring a signature, the Franchise Applicant must provide the signed original to the Authority on demand at any time during this Franchise Letting Process.

Franchise Applicants must upload a fully completed response together with the required supporting information using the Authority's franchising e-sourcing portal, before 1700 (UK time) on 4 March 2016 (the **Franchise Application Deadline**). No documents or information other than the Franchise Application and the required supporting information should be submitted.

Franchise Applicants who have considered the opportunity and opted not to submit a Franchise Application are requested to provide an acknowledgement and optionally provide reasons for deciding not to respond, to: [westmidlands@railexecutive.gsi.gov.uk](mailto:westmidlands@railexecutive.gsi.gov.uk)

### **3.4 Clarification Questions**

The following CQ process will be in place, allowing Franchise Applicants to clarify what is required at each stage:

- (a) Each Franchise Applicant should select one person for co-ordination of its CQ process.

- (b) CQs must only be submitted via the secure messaging feature in the Authority's franchising e-sourcing portal using the subject heading provided and where possible referencing the specific Part and question number of the Franchise EoI to which the CQ relates. Only one question may be submitted per CQ. The Authority reserves the right to reject a CQ containing multiple questions.
- (c) In general CQs, and the responses to CQs, will be shared with all other Franchise Applicants. However, where a Franchise Applicant indicates that a CQ, or its response, should not be shared with all other Franchise Applicants (with supporting reasoning) and the Authority agrees in its absolute discretion, the Authority will treat the CQ as confidential and will respond only to the Franchise Applicant who submitted the CQ. Conversely if the Authority considers that the CQ, and the response to the CQ, can be shared with all other Franchise Applicants, it will notify the relevant Franchise Applicant that the CQ will not be progressed and will be closed. If the Franchise Applicant agrees with the Authority that the question is not confidential, the question and response will be shared with all other Franchise Applicants. If the Franchise Applicant does not agree, the Franchise Applicant may (i) revise the question and its reasoning as to why the CQ and the response to the CQ should not be shared with all other Franchise Applicants which the Authority will consider; (ii) revise the CQ and submit it as a CQ which can, along with the response, be shared with all other Franchise Applicants; or (iii) decide not to pursue a CQ on the topic and notify the Authority accordingly. Any CQ that the Authority receives and subsequently issues to other Franchise Applicants will not identify the originator of the CQ.
- (d) The Authority will use reasonable endeavours to respond to CQs on a timely basis. Franchise Applicants should note that the Authority may take up to 5 working days to respond to CQs and Franchise Applicants should take this into account to ensure they receive responses in time to submit a Franchise Application before the Franchise Application Deadline. Franchise Applicants should also note that the Authority may decline to respond to CQs received after 1700 (UK time) on 26 February 2016.
- (e) The Authority reserves the right to reject a CQ where to respond to the CQ would involve prejudging the Authority's evaluation of any Franchise Applicant's Franchise Application.
- (f) A bulletin of CQs, and the Authority's responses, will be published on the Authority's franchising e-sourcing portal.

### **3.5 Transparency and Freedom of Information**

The information provided by a Franchise Applicant in response to the Franchise EoI will be used for this exercise and for the purpose of cross-Government reporting. All Central Government Departments and their Executive Agencies and Non-Departmental Public Bodies are subject to control and reporting within Government. In particular, they report to the Cabinet Office and HM Treasury for all expenditure. Further, the Cabinet Office has a cross-Government role delivering overall Government policy on public procurement including ensuring value for money and related aspects of good procurement practice.

For these purposes, the Authority may disclose within Government any of the Franchise Applicants' documentation/information (including any that a Franchise Applicant considers to be confidential and/or commercially sensitive such as specific bid information) submitted by a Franchise Applicant to the Authority in a Franchise Application and/or during this Franchise Letting Process. Franchise Applicants submitting a Franchise Application consent to these terms as part of the competition process.

The information will not be shared with any other party, subject to the requirements of the FOIA and other applicable law, including environmental information covered by the EIR.

In submitting a Franchise Application, Franchise Applicants are invited to identify which parts, if any, of their response are provided to the Authority in confidence or are commercially sensitive, such that they may be exempt from disclosure under FOIA and/or EIR. Franchise Applicants should provide reasons why such information should not be disclosed in response to any request and an estimate of the period of time during which the Franchise Applicant believes that such information will remain exempt from disclosure.

Franchise Applicants should note that, even where information is identified as commercially sensitive or confidential, the Authority may be required to disclose such information in accordance with the FOIA and/or EIR. The Authority is required to form an independent judgment concerning whether the information is exempt from disclosure under the FOIA and/or EIR at the time of request. In particular Franchise Applicants should be aware of the Code of Practice issued by the then Secretary of State for Constitutional Affairs under section 45 of the FOIA which limits the circumstances under which a public authority should agree to hold information in confidence. It could be the case, therefore, notwithstanding notification by Franchise Applicants that parts of a response have been provided in confidence or are commercially sensitive, that the Authority will be obliged to disclose those parts.

The Authority will place a copy of the Franchise EoI Pack in the public domain at the same time as it is supplied to Passport Holders and Temporary Visa Holders.

Franchise Applicants' attention is drawn to the relevant provisions of the FLPA, which permits in certain circumstances disclosure of information by the Authority, as well as the provisions of section 145(2) of the Railways Act.

The Authority complies with the central government transparency agenda programme, details of which can be found at <http://www.dft.gov.uk/publications/dft-transport-sector-transparency-board> and Cabinet Office guidance on this in relation to procurement and contracts which can be found at <https://www.gov.uk/government/publications/procurement-andcontracting-transparency-requirements-guidance>

### **3.6 Guidance on specific Parts of the Franchise EoI**

#### ***Part A – Organisation and Contact Details***

- If the Franchise Applicant is a wholly owned subsidiary of the Passport

Holder/Temporary Visa Holder, confirmation should be provided that the conditions in section 5.5 of the Franchise PPD are met, by including the required wording in the signed Franchise Applicant's Declaration (or, where applicable, each of the signed Franchise Applicant's Declarations).

### ***Part B – Franchise Specific Grounds for Discretionary Rejection***

No further guidance.

### ***Part C – Economic and Financial Standing***

No further guidance.

### ***Part D – Further Technical Questions***

The following will apply if the Further Technical Questions are activated:

- The Franchise Applicant should provide all of the information requested for each question including the information requested in the sub-text of each question.
- Marks will be allocated to the Franchise Applicant's response to each question as a whole, rather than by reference to each element of a question's sub-text.
- In providing examples of capability, competence and past experience, Franchise Applicants should state whether the work was undertaken by the Franchise Applicant or another person whom the Franchise Applicant relied on as part of their Passport Application (and/or Temporary Visa Information, as applicable).
- If the Franchise Applicant is a group of economic operators (i.e. a joint venture or consortium), the Franchise Applicant should indicate which member of the joint venture or consortium undertook the work, and if any of the work was undertaken jointly by the members of the joint venture or consortium.
- In all cases the Franchise Applicant should make clear, when providing examples of capability, competence and past experience, the identity of the person on whom the Franchise Applicant is relying, the role of the relevant person(s) in undertaking the work, whether they had management control over the work, and, where possible, which specific elements of the work they undertook.
- The source of the example used in response to each Further Technical Question must be the person that the Franchise Applicant proposes will perform the relevant element of the Franchise operations.
- The Franchise Applicant's responses to the Further Technical Questions

must be consistent with the responses to Part D (Capability and Technical Ability) of the Passport PQQ (in the Passport Application and/or Temporary Visa Information as applicable), subject to any changes that have previously been notified to the Authority in accordance with section 5.4 of the Passport PPD, in terms of (where relevant) the allocation of elements of the Franchise operations across members of the joint venture or consortium, and/or reliance on the capability, competence and past experience of any other person.



# 4. Franchise Application Evaluation Process

## 4.1 Objectives

The objectives of the Franchise Application evaluation process are:

- to evaluate Franchise Applications in accordance with the criteria set out in this Franchise PPD;
- to provide a robust and objective means for ranking Franchise Applications (where applicable); and
- to enable selection of the desired number of Bidders to proceed to the ITT stage.

## 4.2 Evaluation process

The table below provides an overview of the evaluation process that the Authority will apply to each section of the Franchise Application. Further detail is set out in section 4.3 below.

**Table 1 – overview**

Evaluation Criteria			
Evaluation Section		Scored Pass/Fail	or Evaluation method
Part A	Organisation and Contact Details	Not Assessed	Information provided will be reviewed but will not be scored.  However, changes to information previously provided in the Franchise Applicant's Passport Application and/or Temporary Visa Information may result in the Franchise Application being rejected and the Franchise Applicant being eliminated from this Franchise Letting Process.
Part B	Franchise Specific Grounds for Discretionary	Discretionary Pass/Fail	Information provided will be reviewed and assessed and the Authority will use its discretion to determine whether the

	Rejection		response is a “Pass” or a “Fail” . A “Fail” will result in the Franchise Application being rejected and the Franchise Applicant being eliminated from this Franchise Letting Process.
Part C	Economic and Financial Standing	Pass/Fail	Information provided will be reviewed and assessed and a “Fail” will result in the Franchise Application being rejected and the Franchise Applicant being eliminated from this Franchise Letting Process.
Part D	Further Technical Questions	Scored  Scores are 100% weighted (i.e. there are no other scored questions)	If the Further Technical Questions are activated, the response to each question will be reviewed and evaluated against the ratings in Table 2 below and assigned one of the corresponding scores as shown below (i.e. exact scores of 0, 20, 40, 60, 80 or 100 only can be assigned – intermediate scores are not permitted). Scores will be weighted using the question weightings made available by the Authority on the Franchise section of the franchising e-sourcing portal to give the total score for the Further Technical Questions.

Franchise Applicant's Declaration	Pass/Fail	<p>If the signed Franchise Applicant's Declaration (or, where applicable, each of the signed Franchise Applicant's Declarations) is submitted and is in the form, and includes all of the wording, specified in the Franchise EoI, this will be marked as a "Pass".</p> <p>If not, this will be marked as a "Fail", the Franchise Application will be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.</p>
Guarantor's Declaration	Pass/Fail	<p>If the signed Guarantor's Declaration (or, where applicable, each of the signed Guarantor's Declarations) is submitted and is in the form, and includes all of the wording, specified in the Franchise EoI, this will be marked as a "Pass".</p> <p>If not, this will be marked as a "Fail", the Franchise Application will be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.</p>

**Table 2 – Further Technical Questions marking scheme**

If the Further Technical Questions are activated, the responses to each question will be scored against the assessment criteria below. The marking characteristic will be used to assess the response to the question in full including the sub-text of the question.

<b>Marks</b>	<b>Characteristics</b>
100	Evidence submitted shows the ability to deliver, very strongly supported by relevant and transferable past experience and achievements.
80	Evidence submitted shows the ability to deliver, supported by relevant and transferable past experience and achievements.
60	Evidence submitted shows the ability to deliver in most areas, but the Authority has concerns in a few areas, about the relevance and transferability of past experience and achievements and/or about the approach described.
40	Evidence submitted shows the ability to deliver in some areas, but the Authority has concerns in some areas, about the relevance and transferability of past experience and achievements and/or about the approach described.
20	Evidence submitted shows the ability to deliver in a few areas, but the Authority has concerns in most areas, about the relevance and transferability of past experience and achievements and/or about the approach described.
0	Evidence submitted does not show the ability to deliver.

### 4.3 Evaluation Methodology

The Authority may reject a Franchise Application, and eliminate the Franchise Applicant from this Franchise Letting Process in the event that a Franchise Applicant provides inaccurate information in the Franchise Application, or in response to any other request for information by the Authority, or a Franchise Applicant fails to provide any such information.

#### **General Compliance Check**

The Authority will check whether the Franchise Applicant has submitted all responses, information and documentation required by the Franchise EoI, as set out in the return checklist included in the Declarations and Authorisation section in the Franchise EoI, by the Franchise Application Deadline.

#### **Part A – Organisation and Contact Details**

Information provided will be reviewed. The Authority may request additional information from the Franchise Applicant, by means of an AQ, to its satisfaction.

If the information in the responses has changed from the information provided in the Passport Application (and/or Temporary Visa Information, as applicable), and the change has not previously been notified to the Authority in compliance with the Passport PPD, the Franchise Application may be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.

Where the Franchise Applicant is a wholly owned subsidiary of the Passport Holder or Temporary Visa Holder (as applicable), the Authority may check that the conditions set out in section 5.5 below are met and may request additional information and/or proof from the Franchise Applicant.

The Authority will also check the continuing validity of the Passport and (where applicable) Temporary Visa as referred to in response to A0.1 of the Franchise EoI. If the Passport (and/or Temporary Visa, as applicable) is no longer valid, the Franchise Application may be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.

## **Part B – Grounds for Discretionary Rejection**

Part B is a pass/fail section and is not scored.

If a Franchise Applicant has provided an unequivocal "No" to all of the questions in B1 then, subject to the following, this will be marked as a "Pass".

If a Franchise Applicant has:

- answered "Yes" to any question contained in B1 ; or
- irrespective of the Franchise Applicant's response:
  - in respect of question B1.1, there is a conflict of interest in respect of this Franchise Letting Process; or
  - in respect of question B1.2, there has been a distortion of competition in respect of this Franchise Letting Process,

then the Franchise Applicant may fail, their Franchise Application may be rejected and the Franchise Applicant may be eliminated from this Franchise Letting Process. In exercising its discretion to reject a Franchise Applicant's Franchise Application, the Authority shall apply the following principles:

- in respect of questions B1.1 and B1.2, the Franchise Applicant's Franchise Application shall only be rejected if there are no other means to ensure the Authority's compliance with its duty to treat all economic operators equally and to act fairly and transparently;
- in respect of questions B1.3 to B1.5, a Franchise Applicant may provide evidence (in a separate Appendix as requested in the Franchise EoI) to the effect that measures taken by the Franchise Applicant (or relevant joint venture or consortium member, as applicable) are sufficient to demonstrate its reliability despite the existence of a relevant ground for discretionary rejection. If the Authority considers such evidence to be sufficient, the Franchise Applicant's Franchise Application shall not be rejected. The measures taken by the Franchise Applicant (or relevant joint venture or consortium member, as applicable) shall be evaluated by the Authority taking into account the gravity and particular circumstances of the criminal offence, misconduct or other relevant situation. Where the Authority considers such measures to be insufficient and that the Franchise Applicant's Franchise Application should be rejected, the Authority shall give the Franchise Applicant a statement of the reasons for that decision.

## **Part C – Economic and Financial Standing**

Part C checks that Franchise Applicants have an appropriate financial and economic standing. The Authority will evaluate the financial standing of the Guarantor(s), by undertaking a number of tests as described below.

A response will be marked "Pass" provided that the following criteria are met:

- the Guarantor is (if more than one, each of the Guarantors is) clearly identified;
- an appropriately authorised representative of the Guarantor (if more than one, of each of the Guarantors) has signed the Guarantor's Declaration in the Franchise EoI;
- the Guarantor passes (if more than one, each of the Guarantors must pass) at least 3 out of the 4 financial tests set out below (to pass test 2, a Guarantor must pass both parts (a) and (b)) for the most recent year in the audited financial statements; and
- the Guarantor's (if more than one, each of the Guarantor's) audited financial statements are not subject to any qualification which, in the sole discretion of the Authority, is material.

If the Guarantor (if more than one, any of the Guarantors) does not meet these criteria, and the Franchise Applicant is unable to, or does not, arrange the 100% bonding required (see below), it will be marked "Fail", the Franchise Application will be rejected and the Franchise Applicant will be eliminated from this Franchise Letting Process.

Each Franchise Applicant should satisfy itself that the Guarantor meets (if more than one, each of the Guarantors meet) at least 3 out of the 4 financial tests set out below. The Guarantor(s)' tests will be based on the audited consolidated financial statements of the relevant Guarantor's group.

### **Financial tests**

#### **1. Credit rating**

The credit rating must be investment grade or higher (equal to BBB- or above for Fitch and Standard & Poor or equal to Baa3 or above for Moody's).

#### **2. EBITDA ratios**

(a) Earnings Before Interest, Tax, Depreciation and Amortisation divided by Interest Cost: this ratio must exceed 3.0

(b) Net Debt divided by Earnings Before Interest, Tax, Depreciation and Amortisation: this ratio must be less than 4.0

#### **3. Total Net Assets divided by the Guarantee**

Total Net Assets divided by the Guarantee: this ratio must exceed 2.0

#### 4. EBITDA divided by the Guarantee

Earnings Before Interest, Tax, Depreciation and Amortisation divided by the Guarantee: this ratio must exceed 1.0

The application of the Guarantor(s) financial tests is solely for ensuring a consistent approach is taken in determining the financial standing of all Franchise Applicants. It is not the Authority's intention that the calculations provided by the Franchise Applicant nor the Authority's calculations of the financial tests would be published unless the Authority is subsequently required to do so as a result of any FOIA or EIR request.

#### **Definitions to be used in the financial tests**

The ratios should be based on numbers included in the audited financial statements prepared following IAS, IFRS, UK Generally Accepted Accounting Practices or other Generally Accepted Accounting Practices.

**“Earnings Before Interest, Tax, Depreciation and Amortisation”** means accounting profit before taxation for the relevant 12 months adding back net interest and depreciation of tangible assets and amortisation of intangible assets charged in the 12 months and excluding the profit or loss relating to joint ventures, dividends received from joint ventures and associates and gains or losses in relation to disposal of fixed assets, investments and/or businesses in the relevant 12 months.

**“Interest Cost”** means gross interest expense paid or payable in the relevant 12 months as a result of borrowings of the business for whatever reason. This amount should not be offset by interest income.

**“Net Debt”** means the total of financial liabilities including leasing liabilities less cash or cash equivalents.

**“Total Assets”** means the total of non-current and current assets recognised in the balance sheet of the accounts.

**“Total Net Assets”** means Total Assets minus Total Liabilities.

**“Total Liabilities”** means all amounts which the entity is obliged to settle at some point after the balance sheet date plus any provisions and other amounts identified and set aside to meet contingencies, recognised in the balance sheet of the accounts.

A template spreadsheet has been provided for Franchise Applicants to populate (see Annex B to the Franchise EoI).

#### **Guarantor(s)**

A Franchise Applicant may seek to use one or more Guarantor(s) in order to provide the Guarantee, provided that the Franchise Applicant must not use two or more Guarantors which have the same Ultimate Controller. If a Franchise Applicant wishes to proceed with multiple Guarantors, it will need to specify what proportion of the Guarantee each Guarantor is providing, so that the



Authority can apply the ratio tests to each Guarantor accordingly.

Each Guarantor will be severally liable only for that proportion of the Guarantee it is providing, and will not be jointly liable for the whole value of the Guarantee with any other Guarantor(s).

### **Application of the financial tests**

The Authority will work with its financial advisers to separately calculate the results of the financial tests for the Guarantor(s), using the definitions above and the information provided in the Guarantor(s)' audited financial statements. Where the Authority is not satisfied with the information provided by the Guarantor(s), further clarification may be sought.

When the Authority conducts the financial ratio tests it will exclude exceptional items, as defined in Financial Reporting Standard 3: Reporting Financial Performance ("**FRS3**"), recorded in the audited financial statements of the Guarantor(s). Where a Guarantor(s)' audited financial statements are prepared under accounting standards which do not require or permit the reporting of exceptional items, the Guarantor(s) should declare any items (revenue or cost) which would be disclosed as exceptional items, should FRS3 have been applicable. The Authority will work with its financial advisers to determine whether each such item declared falls to be treated as an exceptional item under FRS3. Each item which the Authority and its financial advisers consider should properly be treated as an exceptional item will be excluded from the financial ratio tests.

The Authority will explain to the Franchise Applicant the manner in which it has calculated the results of the financial tests for the Guarantor(s) (whether or not the relevant test has been passed), and will give the Franchise Applicant 2 working days to comment on the Authority's calculations before the Authority announces the Franchise Applicants which have been shortlisted to receive the ITT. As a result of comments received from Applicants, the Authority may revise its calculations of the results of the financial tests for the Guarantor(s), but is under no obligation to do so. The Authority will be the final arbiter in all matters pertaining to the calculations.

Please see the "Timetable of Bonding Requirements" below for further information on this process.

The Authority reserves the right to take into account the following and re-calculate financial tests for a Guarantor, applying the same rules as stated above, when:

- the Guarantor issues updated financial information following the Franchise Application and prior to contract award. The Franchise Applicant should identify, consistent with the instructions above, any exceptional items included in such updated information;
- a material event of the type defined in C1.3 of the Franchise EoI occurs subsequent to the issue of the most recent audited financial statements; or
- audited financial statements or credit rating updates are issued during

this Franchise Letting Process,

and the consequences of such re-calculation, in terms of the bonding required, will be as described further below, as applicable to the relevant stage of this Franchise Letting Process at which the tests are re-calculated.

## **Bonding**

As an alternative to a Guarantor passing at least 3 out of the 4 financial tests, the Franchise Applicant can secure a letter of intent to provide bonding for 100% of the Fixed Guarantee, as set out in C1.5 of the Franchise EoI.

Where the Authority indicates to a Franchise Applicant that it has calculated that its Guarantor, or one or more of its Guarantors, has not passed at least 3 out of the 4 financial tests, the Franchise Applicant will be given 7 working days to secure 100% bonding under C1.5 of the Franchise EoI, so that it may nevertheless be eligible to be shortlisted to receive the ITT. Where the Franchise Applicant is seeking to proceed with a single Guarantor, and that Guarantor has not passed at least 3 out of the 4 financial tests, the 100% bonding must accordingly cover the whole value of the Fixed Guarantee. Where a Franchise Applicant is seeking to proceed with multiple Guarantors, the 100% bonding must cover the portion of the Fixed Guarantee which was to be met by the Guarantor(s) unable to pass at least 3 out of the 4 financial tests.

Where a Guarantor has not passed at least 3 out of the 4 financial tests, the Franchise Applicant is not permitted to propose a substitute Guarantor as an alternative to securing 100% bonding.

Where the Franchise Applicant is shortlisted to receive the ITT on the basis of securing 100% bonding as described above, it may subsequently opt, at any time prior to contract award, to demonstrate to the Authority that its Guarantor (or if more than one, one or more of the Guarantors) is able to pass at least 3 out of the 4 financial tests at the relevant time. Where the Authority agrees that the relevant Guarantor is able to do so, the Franchise Applicant will no longer be required to secure 100% bonding (where applicable, in respect of that Guarantor's portion of the Guarantee).

Franchise Applicants should note that, where the Guarantor(s) can meet 3 or 4 out of the 4 financial tests (and the Franchise Applicant does not propose to secure 100% bonding in accordance with C1.5 of the Franchise EoI), the Franchise Applicant will in any event be required to provide a letter of intent from a bond provider stating that the provider intends to provide bonding for 50% of the Fixed Guarantee (i.e. £10 million) in accordance with C1.6 of the Franchise EoI. Where a Franchise Applicant is seeking to proceed with multiple Guarantors, in respect of a Guarantor which can meet 3 or 4 out of the 4 financial tests the Franchise Applicant will be required to provide a letter of intent from a bond provider under C1.6 of the Franchise EoI in respect of bonding for 50% of the portion of the Guarantee that Guarantor is providing.

Any bond provider proposed must have a credit rating of equal to A- or above for Fitch and Standard & Poor or equal to A3 or above for Moody's. Where the bond provider has a lower credit rating, the letter of intent will be rejected, the Franchise Application will be rejected and the Franchise Applicant will be

eliminated from this Franchise Letting Process.

To provide an example of how these bonding requirements apply to a Franchise Applicant seeking to proceed with multiple Guarantors in respect of the Fixed Guarantee at this Franchise Eol stage:

- an Applicant has 2 Guarantors, Guarantor A is providing 80% of the value of the Fixed Guarantee (£16 million) and Guarantor B is providing 20% of the value of the Fixed Guarantee (£4 million);
- Guarantor A passes at least 3 out of the 4 financial tests, and accordingly the Franchise Applicant provides a letter of intent under C1.6 of the Franchise Eol in respect of bonding for 50% of that Guarantor's portion of the Fixed Guarantee (£8 million);
- Guarantor B does not pass at least 3 out of the 4 financial tests, and accordingly the Franchise Applicant provides a letter of intent under C1.5 of the Franchise Eol in respect of bonding for 100% of that Guarantor's portion of the Fixed Guarantee (£4 million);
- the total bonding required for Guarantors A and B is therefore £12 million, with the remaining £8 million of the Fixed Guarantee being unbonded.

Where there is one Guarantor, a Franchise Applicant may only use one bond provider. Where there is more than one Guarantor, a Franchise Applicant may use one bond provider per Guarantor (in respect of each Guarantor's portion of the Guarantee). This relates to the bonding requirement arising (at this Franchise Eol stage) from the Fixed Guarantee of £20 million (the "**Initial Bonding Requirement**"). See further below under "Re-calculation upon receipt of bids" in relation to the Additional Bonding Requirement (as defined below).

Where a Franchise Applicant secures a letter of intent (see Annex C to the Franchise Eol) from a bond provider under C1.5 or C1.6 of the Franchise Eol, it is permissible for the Franchise Applicant to change its bond provider(s) at any point prior to contract award. It is also permissible in respect of the Additional Bonding Requirement (as defined below), to increase the number of its bond provider(s) at any point prior to contract award. These permissions only apply if any bond provider which the Franchise Applicant proposes to provide the bonding fulfils the requirements of C1.5 or C1.6 of the Franchise Eol (as applicable). Notice must be provided to the Authority, and the Authority will consider the change, in accordance with section 5.2 below of this Franchise PPD.

### **Timetable of Bonding Requirements (Eol stage)**

On submission of Franchise Applications, the Authority's financial advisers will undertake a review of the Franchise Applications received. This review will require Franchise Applicants to engage in dialogue with the Authority's financial advisers. The Authority is unable to state the date upon which this dialogue will commence but it is anticipated that it will commence shortly after the Franchise Application Deadline. Franchise Applicants should note the following intended timings for the conduct of the financial tests (which the Authority reserves the

right to adjust at any time):

- Franchise Applicants will be given 2 working days to comment on the Authority's calculations, or to confirm that they have no comments;
- the Authority's financial advisers will provide Franchise Applicants with finalised calculations within 2 working days of receipt of Franchise Applicant's comments;
- where the Authority's financial advisers indicate to a Franchise Applicant that they have calculated that one or more Guarantor(s) has not passed at least 3 out of the 4 financial tests, and the Franchise Applicant has not secured 100% bonding as part of its submission, the Franchise Applicant will be given 7 working days to secure such bonding. After this point the consolidation and approvals process will commence and shortlisting will follow;
- if the Authority has calculated that one or more Guarantor(s) has not passed at least 3 out of the 4 financial tests, and the Franchise Applicant is unable to secure, or does not secure, 100% bonding within the timeframe stated above, it will be marked "Fail", the Franchise Application will be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.

### **Re-calculation upon receipt of bids**

For Franchise Applicants that are shortlisted to receive the ITT, the Authority will re-calculate the results of the financial tests once the bid has been submitted, both in light of the actual Guarantee required under the Funding Deed (as determined by the requirements set out in the ITT — see below), and to take account of any audited financial statements or credit rating updates issued during this Franchise Letting Process, or any material event of the type defined in C1.3 of the Franchise EoI.

In determining the level of the Fixed Guarantee at this Franchise EoI stage, the Authority has carried out a robust process of scenario and sensitivity testing based around the Authority's comparator outputs. The Authority will carry out further scenario and sensitivity testing prior to the issue of the ITT. At the ITT stage, the Authority therefore reserves the right to increase the Fixed Guarantee to an amount higher than £20 million *where* further scenario and sensitivity testing indicates this is necessary. In addition to the Fixed Guarantee (as increased, if applicable, by the terms of the ITT), the Authority will also require an additional amount (the Variable Guarantee) to be guaranteed by a Bidder's Guarantor(s). The actual Guarantee required from any successful Bidder for the Franchise will therefore be the sum of the Fixed Guarantee (as increased, if applicable, by the terms of the ITT) and the Variable Guarantee. The form of the Funding Deed will be attached to the ITT.

If the Bidder is proposing to fulfil the Part C Financial and Economic Standing requirements by virtue of its Guarantor(s) passing at least 3 out of the 4 financial tests, the Authority will take into account (to the extent considered appropriate) any comments received from the Bidder at Franchise EoI stage when it was a Franchise Applicant (as referred to above) when re-testing the

Guarantor(s) once the bid has been submitted.

Where the Authority indicates to a Bidder on re-testing that its Guarantor, or one or more of its Guarantors, has not passed at least 3 out of the 4 financial tests, the Bidder will be given a reasonable opportunity to secure 100% bonding, so that it may nevertheless continue to be shortlisted in this Franchise Letting Process.

In respect of the bonding required at this stage, the ITT will set out the minimum details that the bond provider must provide (which may be different from, and/or additional to, the minimum details required by the Franchise EoI).

Where, on re-testing, a Guarantor has not passed at least 3 out of the 4 financial tests, the Franchise Applicant is not permitted to propose a substitute Guarantor at this stage as an alternative to securing 100% bonding.

If any Guarantor proposed by the Bidder is unable to pass at least 3 out of the 4 financial tests according to the Authority's re-calculations in light of the actual Guarantee required under the Funding Deed once the Bidder's bid has been submitted, and the Bidder is unable to, or does not, arrange 100% bonding (see above), the Bidder will be eliminated from this Franchise Letting Process.

The amount of the Guarantee which the bond provider(s) will be required to bond will need to reflect the actual Guarantee required under the Funding Deed once the bid has been submitted. The calculation of the amount of the actual Guarantee, and the percentage of bonding required, is described further below.

The Variable Guarantee required under the Funding Deed will be calculated as a percentage of the excess of franchise payments bid over a defined profile of payments set out in the ITT. This means that a Bidder will be in control of the value of the Variable Guarantee required to support its bid.

To the extent that there is an increase in the amount required to be bonded for each Guarantor as a result of the actual Guarantee required under the Funding Deed (the Fixed Guarantee plus the Variable Guarantee) being in excess of £20 million (an "**Additional Bonding Requirement**"), Franchise Applicants may use more than one bond provider to provide this Additional Bonding Requirement. Even though more than one bond provider may be used to provide the Additional Bonding Requirement, Bidders must nevertheless continue to use only one bond provider to provide the Initial Bonding Requirement for each Guarantor.

If the Additional Bonding Requirement is provided by more than one bond provider, the Authority must not be restricted by any arrangements as between the relevant bond providers, the Guarantor(s) or the Bidder, as to the manner in which, or the order in which, the Authority calls upon the relevant bonding commitment(s) provided by any bond provider or bond providers. Where any such restrictions are included in the terms of the bonding commitment provided by the Bidder to the Authority, the Authority reserves the right not to accept the bonding commitment in which case the Bidder will be eliminated from this Franchise Letting Process.

The ITT will set out for all Bidders (a) what percentage of the value of the Guarantee must be bonded where the Guarantor has (or all of the Guarantors have) passed at least 3 out of the 4 financial tests (which percentage may be different to the 50% required at this Franchise EoI stage, as described below); and (b) the point at which a Bidder must secure a formal and binding

commitment from its bond provider(s) to provide the relevant bonding required. The percentage of the value of the Guarantee which must be bonded in accordance with the ITT is expected to be up to a maximum of 50%, unless the Guarantor(s) cannot pass at least 3 of the 4 financial tests, in which case 100% must be bonded.

#### **Further re-calculation**

The Authority may also re-calculate the results of the financial tests at any time up to the award of the Franchise Agreement, to take account of any audited financial statements or credit rating updates issued during this Franchise Letting Process, or any material event of the type defined in C1.3 of the Franchise EoI, or for any other reason.

#### **Part D – Further Technical Questions**

The Further Technical Questions relate to Franchise Applicants' technical ability and experience. If activated, Franchise Applicants will be scored using the marking scheme in Table 2 above.

#### **Franchise Applicant's Declaration**

If the signed Franchise Applicant's Declaration (or, where applicable, each of the signed Franchise Applicant's Declarations) is submitted and is in the form, and includes all of the wording, specified in the Franchise EoI, this will be marked as a "Pass".

If not, this will be marked as a "Fail", the Franchise Application will be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.

#### **Guarantor's Declaration**

If the signed Guarantor's Declaration (or, where applicable, each of the signed Guarantor's Declarations) is submitted and is in the form, and includes all of the wording, specified in the Franchise EoI, this will be marked as a "Pass".

If not, this will be marked as a "Fail", the Franchise Application will be rejected and the Franchise Applicant eliminated from this Franchise Letting Process.

#### **4.4 Shortlisting and ranking on basis of Further Technical Questions**

Where there are 4 or fewer Franchise Applicants that satisfy all aspects of the evaluation process set out above and are not eliminated from this Franchise Letting Process, the Authority intends to issue the ITT to, and invite bids from, all such Franchise Applicants.

Where there are more than 4 Franchise Applicants, the Authority will activate the Further Technical Questions by requiring responses to them from all Franchise Applicants by a specified return deadline. Franchise Applicants should note that, due in part to time constraints, the Authority intends to activate the Further Technical Questions based solely on the number of Franchise Applications received and, at the time of activation, will not have completed the evaluation to ensure that all of the Franchise Applications satisfy all aspects of the evaluation process set out in section 4 above. Franchise Applicants should not therefore assume that an invitation to respond to the Further Technical Questions means that any, or all, of the elements of their Franchise Application are satisfactory or that all pass thresholds have been met.

In respect of the Further Technical Questions, Franchise Applicants should note in particular that the timescales in section 2.10 above are intended as a guide and that the time at which the Further Technical Questions are activated is at the discretion of the Authority and the actual return deadline will be specified at that time.

Where the Further Technical Questions have been activated but, following completion of the evaluation of all of the aspects of the evaluation process set out in section 4 above other than the scoring of the Further Technical Questions, there are 4 or fewer Franchise Applicants that satisfy all such aspects and are not eliminated from this Franchise Letting Process, the Authority intends to issue the ITT to, and invite bids from, all of the remaining Franchise Applicants. In these circumstances, the Authority will not score (or finalise the scoring of) the responses to the Further Technical Questions.

Unless the paragraph above applies, the responses to the Further Technical Questions will be scored on the basis described in section 4.3 above and the Franchise Applicants will be ranked. The Authority intends to issue the ITT to, and invite bids from, the top 4 highest ranked Franchise Applicants.

In the event of a tie for fourth place, the Authority will select the fourth Franchise Applicant on the basis of which "tied" Franchise Applicant achieved the highest total score for question D1.3. If there is a further tie, then the Authority will select the fourth Bidder on the basis of which "tied" Franchise Applicant achieved the highest score for question D1.2. If there is a further tie, the process will continue in respect of the total score for question D1.4 and then if there is a further tie, the score for question D1.1. If scores remain tied after reviewing all Further Technical Questions, all Franchise Applicants tied for fourth place will be selected and invited to submit bids.

## 5. Validation and changes

### 5.1 Validating Franchise Applications

The Authority reserves the right to validate the Applicant's Franchise Application at any time in this Franchise Letting Process, to confirm that the information in it has not changed and remains correct. In particular, the Authority will repeat the tests set out in Part C (Economic and Financial Standing) of this Document during the ITT stage and contract award stage.

If the Authority considers that any of the information in a Franchise Application has changed or is no longer correct, with the effect that the Franchise Applicant would no longer pre-qualify to be shortlisted to receive the ITT (in accordance with the evaluation process set out in section 4 above), the Authority may eliminate the Franchise Applicant from this Franchise Letting Process at that time, whatever stage in this Franchise Letting Process has been reached, or attach conditions to the Franchise Applicant's continued participation.

### 5.2 Changes to information provided or circumstances

Franchise Applicants are required to notify the Authority if any event occurs at any stage during this Franchise Letting Process that changes or impacts upon the information provided in its Franchise Application, immediately upon becoming aware of the relevant change in circumstances. Failure to do so may result in the Franchise Applicant being eliminated from this Franchise Letting Process, whatever stage in this Franchise Letting Process has been reached.

Such events include the following:

- a change to their group structure or the structure of the Franchise Applicant from that set out in their Franchise Application. This includes the grant of any options to acquire shares, any agreement relating to the exercise of rights attaching to such shares, and any amendments to a shareholders' agreement, articles of association or similar constitutional documents;
- a change in the number or identity of the Franchise Applicant's Guarantor(s) or bond provider(s);
- a change in the number or identity of persons the Franchise Applicant proposes to rely on in their Franchise operations, or whose resources the Franchise Applicant proposes to use in their Franchise operations, or which use the same resources that the Franchise Applicant proposes to use in their Franchise operations;
- any other changes to their circumstances, or the basis of their Franchise Application, which may be expected to influence the Authority's decision on the suitability of the Franchise Applicant.

Any such notification shall provide full details of the change or proposed change, including (if subsequently requested by the Authority) final form copies of the documentation required to put such change into effect.



If the Authority considers at any time (including following such notification from the Franchise Applicant) that the Franchise Applicant would no longer pre-qualify to be shortlisted to receive the ITT (in accordance with the evaluation process set out in section 4 above), the Authority may eliminate the Applicant from this Franchise Letting Process at that time, whatever stage in this Franchise Letting Process has been reached, or attach conditions to the Franchise Applicant's continued participation.

As noted in the Passport PPD, failure to comply with the above requirements may also result in the cancellation or suspension of the Franchise Applicant's Passport or in conditions being attached to its continued validity.

### **5.3 Combination of Passport Holders**

The Authority is aware that two or more Passport Holders may wish to submit a combined Franchise Application and participate jointly in this Franchise Letting Process. Such a combined response will be permitted by the Authority, provided that the Passport Holders have jointly notified the Authority of this intended approach prior to submitting their Franchise Application by email to [westmidlands@railexecutive.gsi.gov.uk](mailto:westmidlands@railexecutive.gsi.gov.uk). Where the Passport Holders are intending to participate through a wholly owned subsidiary that is a single purpose entity, the Franchise Application should include the applicable organisation and contact details for that entity in response to Part A of the Franchise EoI and should ensure that the conditions set out in section 5.5 below are met.

### **5.4 Minor changes to Passport Holders and Temporary Visas**

Please refer to section 5.6 of the Passport PPD.

An application for a Temporary Visa may be made at any time on or before the Franchise Application Deadline (including, for the avoidance of doubt, at the same time as the Franchise Application is submitted). As noted in section 5.6 of the Passport PPD, Passport Holders should not assume that a Temporary Visa will be issued. If it is not, it is too late at that point to apply for a Passport to participate in this Franchise Letting Process. Instead, a Passport Holder wishing to participate must rely on its existing Passport and any changes proposed to be made, as described in the application for a Temporary Visa, must not be made. If such changes are made without a Temporary Visa, the Franchise Application will be rejected and the Franchise Applicant will be eliminated from this Franchise Letting Process

Where an application for a Temporary Visa is submitted after the FLPA has been signed and returned in accordance with section 3.1 above, the application must be accompanied by a signed FLPA from any new economic operator proposed to be covered by the Temporary Visa that did not initially sign and return the FLPA. Franchise Applicants should refer to the FLPA for further details.

While an application for a Temporary Visa cannot be made after the Franchise Application Deadline, changes proposed later in this Franchise Letting Process must still be notified to the Authority, and the Authority reserves the right to accept or reject such changes in accordance with section 5.2 above. However the analysis of such changes will not be assessed as a "Temporary Visa" application.

## 5.5 Wholly owned subsidiaries

A Passport Holder or Temporary Visa Holder is permitted to participate in this Franchise Letting Process through a single purpose entity, provided that:

- the single purpose entity is formed solely to participate in this Franchise Letting Process and undertake the operation of the Franchise if the Franchise Applicant is successful in being awarded the Franchise Agreement by the Authority and is:
  - a wholly owned subsidiary of the Passport Holder or Temporary Visa Holder; or
  - (where the Passport Holder or Temporary Visa Holder is an unincorporated joint venture or consortium) wholly owned by the members of the joint venture or consortium in exactly the same proportions as envisaged by the relevant Passport Application and/or Temporary Visa Information;
- the Passport Holder or Temporary Visa Holder is able to prove to the satisfaction of the Authority, if requested to do so, that the single purpose entity will have at its disposal all of the following resources referred to in the Passport Application and/or Temporary Visa Information:
  - the capability and technical abilities relied on in the responses to the questions in respect of capability and technical ability (Part D of the Passport PQQ); and
  - the health and safety management and culture relied on in the responses to the questions in respect of health and safety management and culture (Part E of the Passport PQQ);
- the single purpose entity has not been convicted of any of the offences or committed any of the breaches listed in Part B of the Passport PQQ (Grounds for Mandatory Rejection), and neither has any person who is a member of the administrative, management or supervisory body of the single purpose entity, nor any person who has powers of representation, decision or control in respect of the single purpose entity (including any director or partner of the single purpose entity);
- none of the offences, misconduct, breaches or other relevant situations listed in Part C of the Passport PQQ (Grounds for Discretionary Rejection) have applied, or currently apply, to the single purpose entity, to any person who is a member of the administrative, management or supervisory body of the single purpose entity, or to any person who has powers of representation, decision or control in respect of the single purpose entity (including any director or partner of the single purpose entity);
- the approach proposed is otherwise consistent with the relevant Passport Application and/or Temporary Visa Information; and

- the signed Franchise Applicant's Declaration (or, where applicable, each of the signed Franchise Applicant's Declarations) submitted includes the relevant wording in respect of wholly owned subsidiaries in square brackets in the form of Franchise Applicant's Declaration in the Franchise EoI.

In these circumstances only, the single purpose entity may rely on the Passport and/or Temporary Visa of the Passport Holder or Temporary Visa Holder (as applicable).

## **5.6 Status of intention as to operation of the Franchise**

Both the Franchise EoI and the Passport PQQ require responses to questions on the basis of how the Franchise Applicant (or the Applicant for the Passport PQQ) intends to operate the Franchise should they be successful.

For the avoidance of doubt, at ITT stage Bidders may propose changes to the intended allocation of elements of the Franchise operations, as reflected in those responses, in any subsequent proposal submitted as part of this Franchise Letting Process, including in any bid submitted in response to the ITT. This may include changes of the type described in section 5.6 of the Passport PPD that are proposed by a Bidder after the ITT is issued.

Such changes will be assessed by the Authority in accordance with the process to be outlined in the ITT. For the avoidance of doubt, as part of that process the Authority will reserve the right to eliminate the Applicant from this Franchise Letting Process if the Franchise Applicant, as a consequence of that change, would no longer pre-qualify to be shortlisted to receive the ITT (in accordance with the evaluation process set out in section 4 above) and/or the Passport requirements are no longer met (i.e. that the Passport, and/or Temporary Visa if applicable, would not be awarded on the basis of the evaluation process outlined in the Passport PPD if a fresh application was made at the relevant time).