

**Director Rail Delivery**

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Your ref:

Our ref:

2 August 2010

Dear Stakeholder

As a rail franchising authority, Scottish Ministers are required, under s26 of the Railways Act 1993, to publish a statement – a franchising policy statement – about how they propose to select the franchisee to operate the ScotRail services from among bidders. They also are required to consult on this in advance of publication.

This statement of policy specifies when a franchisee is and is not likely to be selected by means of an invitation to tender, and the means by which Scottish Ministers propose to select a franchisee where no invitation to tender is issued.

The statement and the consultation on it are not a consultation on the form, type, duration, service specification or any element of the content of the next franchise. Public consultation will be held on these matters in due course.

The statement of policy relates only to the ScotRail franchise, which Scottish Ministers are responsible for letting.

Please find attached a consultation document and draft franchising policy statement. You are invited to respond to the questions within the consultation and to provide any further comments on the draft franchising policy. Publication of the statement will follow any agreed amendments resulting from the consultation.

Responses where confidentiality is not requested will be made available at the Scottish Government Library. A report on the consultation will also be placed on the Transport Scotland website following analysis of the consultation responses.

**BILL REEVE**

## **Consultation document**

### **Executive Summary**

1. Scottish Ministers are required, under section 26 (4A) of the Railways Act 1993 (as amended), to publish a statement of policy on how they propose to exercise their powers in selecting the person who will provide passenger rail services under a franchise agreement.
2. The statement of policy relates only to the ScotRail franchise, which Scottish Ministers are responsible for letting.
3. This statement of policy specifies when a franchisee is and is not likely to be selected by means of an invitation to tender, and the means by which Scottish Ministers propose to select a franchisee where no invitation to tender is issued.
4. Scottish Ministers are inviting comments on whether the content of the policy statement:
  - a) complies with the statutory requirements
  - b) makes clear Scottish Ministers' policy with regard to the matters mentioned above.

### **Responding to the consultation**

5. The consultation period will run from 2 August 2010 until 22 October 2010. Consultees wishing to respond should ensure their comments are received by the closing date.
6. Please send consultation responses, preferably by email, to:  
[michael.fariss@transportscotland.gsi.gov.uk](mailto:michael.fariss@transportscotland.gsi.gov.uk) or to:

Rail Operations  
7th Floor  
Buchanan House  
58 Port Dundas Road  
Glasgow G4 0HF  
Tel: 0141 272 7492

Further copies of this consultation document are available at  
[www.transportscotland.gov.uk](http://www.transportscotland.gov.uk) or by contacting Mike Fariss at the address and telephone number above.

### **Handling responses**

7. Responses to this consultation will, unless you indicate otherwise, be made available to the public through the Scottish Government Library and the Transport Scotland website. Let us know how you wish your response to be handled and whether you are content for your name and response to be made public. Please

complete and return the Respondent Information Form attached to this consultation paper to ensure that we treat your response appropriately.

### **Freedom of Information**

8. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and is therefore required to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### **Consultation Questions**

9. Does the statement of policy:

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

### **What happens next?**

10. Thank you for taking the time to consider this consultation. We will acknowledge individual responses if requested.

11. A summary of the responses, including comments from Scottish Ministers, will be published in the Scottish Government Library and on the Transport Scotland website. Paper copies will be available on request by contacting the Scottish Government Library on 0131 244 4552. A charge may be made for this service.

### **Comments and Complaints**

12. If you have any comments or complaints about the way in which this consultation has been conducted, please send them to the person named above.

### **List of Consultees**

It is proposed to consult a wide range of stakeholders including, but not limited to:

ATOC	Train Operating Companies
STUC	Unions
Passenger Focus	Network Rail
ORR	Department for Transport
CoSLA	MSPs
Regional Transport Partnerships	Local authorities

## ***Draft Franchising Policy Statement***

*1. This statement of policy is published by the Scottish Ministers pursuant to section 26(4A) of the Railways Act 1993 (as amended) (the 'Act').*

*2. Terms defined in the Act have the same meanings when used in this statement unless the context requires otherwise.*

*3. Section 26(1) of the Act provides that the appropriate franchising authority may select the person who is to be the franchisee in relation to a franchise agreement from among those who submit tenders in response to an invitation to tender under section 26 of the Act for the right to provide, or to secure that a wholly owned subsidiary provides, services for the carriage of passengers by railway under that franchise agreement.*

*4. Scottish Ministers are the appropriate franchising authority in relation to all franchise agreements let in Scotland.*

*5. Section 26(4A) of the Act requires the Scottish Ministers to publish a statement of policy about how they propose to exercise their power under section 26(1) (the 'Franchising Power').*

*6. Section 26(4B) of the Act requires that statement to include the policy of the Scottish Ministers about:*

*a) when their selection of the person to be a franchisee under a franchise agreement is likely to be from among those submitting tenders in response to an invitation to do so;*

*b) when it is likely such an invitation will not be issued; and*

*c) the means by which they are proposing that the selection will be made in cases where there is no such invitation.*

### ***General use of the Franchising Power***

*7. The Scottish Ministers intend in accordance with their duties under section 4 of the Act to award franchises by means of a competitive process whenever possible, selecting a franchisee from among those submitting a tender in response to an invitation to do so. It is therefore likely that their selection of the person to be a franchisee under a franchise agreement will be from among those submitting tenders in response to an invitation to do so in all cases except those mentioned at paragraph 9 below.*

*8. Where a franchisee is selected from among those submitting tenders in response to an invitation to do so, that selection will be based on an analysis of those tenders in relation to criteria referred to in the invitation to tender and associated documents made available to the bidders. Such criteria are likely to include:*

*a) consistency with the Scottish Ministers' strategic objectives*

*b) affordability*

*c) the ability of the bidder to deliver the specification set out in the invitation to tender*

*d) value for money.*

***Circumstances in which an invitation to tender will not be issued***

*9. It is likely that an invitation to submit a tender for the right to provide, or to secure that a wholly owned subsidiary provides, passenger railway services under a franchise agreement will not be issued where:*

*a) it is necessary to re-let a franchise earlier than anticipated as a result of the early termination of that franchise;*

*b) the Scottish Ministers' duty under section 30(1) of the Act arises;*

*c) a short-term franchise agreement is required to facilitate franchise remapping; or*

*d) the Scottish Ministers consider that, as a result of some temporary uncertainty or instability, best value would be secured by letting a franchise on a short-term basis;*

*and in the Scottish Ministers' opinion:*

*e) it would be impracticable to issue an invitation to tender because of the shortness of the interval between any circumstances falling within paragraphs a) to d) above arising and the date when services are required to begin under the new franchise agreement; or*

*f) if an invitation to tender were issued any bids received in response to that invitation would not represent value for money or would not be affordable as a result of the shortness of the term of the proposed new franchise agreement or any other circumstance.*

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

***Section 30(1) duty***

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

## **Franchise remapping**

11. The Scottish Ministers are required by section 23(1) of the Act from time to time to designate such services for the carriage of passengers by railway as they consider ought to be provided under franchise agreements. The designation of these services may provide the opportunity to award more than one franchise within the rail network in Scotland.

12. In exercising the Franchising Power Scottish Ministers may from time to time require to revise the allocation of the services designated under section 23(1) to particular franchise agreements. This may require simultaneous changes to the scope of services provided under franchises with different expiry dates. They may therefore from time to time require a short-term franchise agreement to be put in place in order to secure the provision of services during the interval between the cessation of services under an existing franchise agreement and the commencement of a new 'remapped' service.

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

13. If no invitation to tender is issued in circumstances where a short-term franchise agreement is required in relation to a franchise to facilitate franchise remapping, and if the existing franchisee agrees, the Scottish Ministers propose to appoint the existing franchisee to be the franchisee under the short-term franchise agreement on terms substantially the same as those of the existing franchise agreement.

14. If no invitation to tender is issued in other circumstances where the Scottish Ministers' duty under section 30(1) of the Act arises in relation to a franchise agreement, then the Scottish Ministers propose to select as franchisee or operator of the franchise to which that franchise agreement relates a company which is wholly owned by Scottish Ministers and which has not previously traded.

### **No adequate tender for franchise received**

15. Section 26ZA of the Act sets out courses of action available to the appropriate franchising authority where, in the case of an invitation to tender under section 26 of the Act for the provision of services:

a) the appropriate franchising authority receives no tender in response to the invitation; or

b) it receives a tender but considers that the services would be provided more economically and efficiently if they were provided otherwise than under a franchise agreement entered into in response to the tender.

In these circumstances, Scottish Ministers may:

c) issue a new invitation to tender under section 26 for the provision of the services;

*d) decide to secure the provision of the services under a franchise agreement with a person who did not submit a tender; or*

*e) decide not to seek to secure the provision of the services under a franchise agreement.*

*Nothing in this section prevents the Scottish Ministers, where they have decided not to seek to secure the provision of services under a franchise agreement, from subsequently making a decision to issue a new invitation to tender for the provision of those services.*

### ***Franchise extension provisions in franchise agreements***

*16. A franchise agreement may contain provision for the term of the franchise to be extended either automatically in specified circumstances or at the discretion of, or by agreement with, the Scottish Ministers. This statement of policy does not apply to such extensions. However it is likely that the Scottish Ministers will exercise any such discretion, and consider any such agreement, in accordance with the criteria set out at paragraph 8 above.*

### ***Franchise Contract Model***

*17. Scottish Ministers will be open-minded on the contract model used for the next ScotRail franchise. The form of contract will be designed to:*

- best encourage and support sustainable economic growth;*
- best deliver the Scottish Ministers' specific policies in respect of the rail industry and services; and*
- best incentivise the operator to deliver quality services which meet the needs of passengers in Scotland against the broader policy and economic background.*

## RESPONDENT INFORMATION FORM

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- |  |                          |                          |
|--|--------------------------|--------------------------|
| (a) as an individual                         | <input type="checkbox"/> | go to Q2 a/b and then Q4 |
| (b) <b>on behalf of</b> a group/organisation | <input type="checkbox"/> | go to Q3 and then Q4     |

## INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government website)?

Yes (go to 2b below) ☐

No, not at all ☐ We will treat your response as confidential

- 2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available ☐

Yes, make my response available, but not my name or address ☐

Yes, make my response and name available, but not my address ☐

## ON BEHALF OF GROUPS OR ORGANISATIONS

3. The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Transport Scotland website). Are you also content for your **response** to be made available?

Yes ☐

No ☐ We will treat your response as confidential

## SHARING RESPONSES/FUTURE ENGAGEMENT

4. We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes ☐

No ☐