

**Draft - 6 April 2005**  
**Paper for discussion with DfT**  
**Consultation on Franchise Specifications**

**Purpose**

1. DfT has asked for proposals on how consultation on forthcoming Franchise Specifications may be minimised, using other relevant consultation activities where possible. The purpose of this paper is to make proposals for consultation on the Greater Western and Thameslink franchise, and to highlight risks and issues to inform DfT's decision.

**Background & the requirement to consult**

2. The legal requirements to consult on franchise specifications are set out in a number of places and can be summarised as follows.
3. Under the SRA's Directions and Guidance there is no specific requirement to consult on a Franchise Specification, but even where there is no specific requirement the Secretary of State requires "an appropriate level of consultation with persons likely to be affected by the actions" (paragraph 12.6). At the very least the SRA must comply with Common Law principles and its published consultation policy.
4. A paragraph was included in previous Directions and Guidance requiring current minimum service levels (Passenger Service Requirement) to be maintained but this requirement has been revoked and replaced. The October 2004 Directions and Guidance says "The Authority is required to provide ... a clear specification of what the franchise is expected to deliver. The specification will be determined primarily by the availability of funding, taking into account the Authority's overall priorities for its budget" (paragraph 10.5)
5. Previous franchise replacement projects have always included consultation with stakeholders on the Service Level Commitment to be included in the franchise agreement.
6. An obligation to consult may arise where the public has a legitimate expectation that they will be consulted, even if there is no statutory requirement to do so. The SRA's statement of consultation policy creates a legitimate expectation that we will consult in the manner set out in the policy. Common Law principles mean that:
  - a. Consultation must be undertaken at a time when proposals are still at a formative stage.
  - b. The SRA must provide sufficient information to the consulted body to enable it to consider proposals intelligently and provide a meaningful response, and it must provide an adequate amount of time for them to do so.
  - c. The SRA must give sufficient consideration to the results of the consultation before reaching a decision.
  - d. The SRA must provide sufficient time for it to consider the results of the consultation.

The SRA has to undertake a consultation with an open mind and must not be seen to have made its decision before the results of it can be considered.

7. Freedom of Information requests have been received on issues such as the development of the IKF timetable specification. These are being responded to on the basis that the information is currently 'commercially sensitive' but may be released at a later date.
8. This synopsis of the key legal issues has been extracted from legal advice issued to SRA staff, set out in appendix 1.

### **Other consultation activities relevant to the Franchises**

9. A RUS or RPA provides an input to a Franchise Specification, and includes consultation during the development stage. The scope of these studies and the level of detail is different to a Franchise Specification and is therefore unlikely to have been sufficient for it to be considered as the consultation on a Franchise specification.

### **Current Specification Projects**

10. Stakeholder consultation on the Greater Western and Thameslink/GN franchise specifications was originally planned to take place in Autumn 2004, during the development of the detailed franchise specification. A draft stakeholder engagement process was produced, as a template process that would apply to all specification projects. However, consultation was not carried out on the instructions of the DfT. Instead it was planned that consultation would be carried out in parallel with the issue of the ITT in June 2005. There is a significant risk that issuing a consultation document at the same time as the ITT will appear to stakeholders as too late in the process to constitute genuine consultation and introduce a material risk of increased costs arising from project delay, advisor spend and extension negotiations with incumbent franchises.
11. The current transition timetable (Rail Strategy functions transfer late June 2005) and the planned timing of the ITTs (early June 2005) means that it is likely that any consultation on these two franchise specifications will be started by the SRA and will transfer to DfT Rail to conclude. As these are the first specifications to follow the new specification process it also sets a precedent for future specification projects. It should be noted that the Railways Bill requires consultation with third party specifiers (PTEs, TfL, SE, WAG) prior to publication of the ITT (and in time for them to specify increments/decrements). A general process for consultation on franchise specifications is emerging, as described in the draft PTE guidance document, assuming that similar principles are applied to other 3<sup>rd</sup> party specifiers.

### **Proposals for consultation on the Greater Western Franchise Specification**

12. The GW Main Line RUS is currently being consulted on and it is intended that the final RUS will be published in early June. The scope of the RUS is to focus on capacity issues on the main line, it does not include any proposals for service changes on branch line services or overnight services (sleepers). The finalised franchise specification is likely to include timetable changes that were outside the scope of the RUS, therefore these have not been included in any previous consultation.
13. During the development of the franchise specification there has been informal consultation with TfL and WAG. Discussions have been held with the SRA's Regional Planning team on the aspirations of local and regional authorities.

14. We know from responses during the RUS consultation that there is an expectation amongst stakeholders that they will see the detailed timetable proposition during a consultation on the franchise specification and that there will be an opportunity to influence the process. Some will make an issue of the lateness of consultation, irrespective of the franchise proposals. David Quarmby and Jim Steer recently met West Country MPs on RUS and GW Franchise issues, where the expectation of consultation was clearly communicated.
15. The team would like to commence informal discussions with Local Authorities after 5 May when the specification is finalised, and prior to the ITT being issued in June. This would be in parallel with approvals being sought from DfT. A formal consultation document will be prepared and published in parallel with the ITT in June.
16. If proposals emerging from the consultation had previously been considered and rejected they could be declined rapidly and conclusively. If they were new they would need to be evaluated in operational and financial terms. Clearly given the timing of consultation the risk of new proposals delaying the process is greater.
17. There is a risk that changes to the timetable specification emerging from the consultation could delay the procurement activities as the timetable would have to be re-validated and bidders may have to amend their bids - all bidders must be given equal opportunities to bid otherwise procurement rules may be breached.
18. Bidders are also expected to undertake consultation during the development of their bids, however it is for them to consult on options they are proposing above base specification. If we and bidders are simultaneously but separately consulting the process will be confusing to some and may be exploited by others.