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1. PURPOSE

- 1.1 The purpose of this procurement is to procure a qualified and experienced legal Adviser (the **Legal Adviser**) to provide advice to the Department for Transport (**Department**, or **Authority** elsewhere in this Invitation to Tender (**ITT**)) in relation to legal matters relating to the design of rail franchise alternative delivery models (ADM).
- 1.2 This ITT has been issued to both Tier 1 and Tier 2 Providers in view of the breadth of its requirements for this project.

2. BACKGROUND TO THE CONTRACTING AUTHORITY

- 2.1 The Department is the franchising authority for most of the Great Britain (GB) rail industry.
- 2.2 The Franchising Programme supports the Department's mission of leading a world-class railway that creates opportunity for people and businesses. A published, predictable, steady flow of competitions will select delivery partners who will support the Department's vision and secure the most cost effective and value for money operation of rail services from suppliers who will continuously seek to improve services for passengers.
- 2.3 The Legal Adviser will be required to work as part of the Department's team including internal and external stakeholders along with consultants providing technical, business case and financial services. From time to time the Department issues high level principles (the "**Principles**") and guidance to all legal advisers to guide and inform the working relationship between internal and external lawyers. A copy of the latest Principles is at Annex 1 to this Appendix B. The Legal Adviser will be required to acknowledge and agree to adhere to these Principles when working with the Department. The Principles are not amendments or additions to the contract terms but specify Departmental processes that the Department expects all our legal advisers to follow which we consider to be a matter of professional good practice. The Department reserves the right to review, clarify, amend and update the appended Principles at any time. The Legal Adviser will be advised of any changes to the Principles and asked to provide a written acknowledgement and agreement to the Principles as amended/updated.
- 2.4 The DfT's Rail Group Passenger Services is responsible for the design and procurement of new and replacement rail franchise services on the national rail network. Its vision is to provide world class train services that drive economic growth and exceed passenger expectations. Further information on rail franchising can be found at:

<https://www.gov.uk/government/organisations/Authority-for-transport/series/railfranchising>
- 2.5 This procurement will be managed by the Franchising Commercial Strategy team in the Policy Operations and Change (POC, formerly Passenger Services Design) Directorate.

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3. BACKGROUND TO REQUIREMENT

- 3.1 In the Secretary of State's speech of 6th December 2016, he announced that the Department for Transport (DfT) will re-shape the way the railway operates to drive better results for passengers. This will require the whole industry to work together to put the interests of passengers and users at the heart of its objectives¹. The Government recently published, on 29 November 2017; Connecting People: A Strategic Vision for Rail which reiterated these priorities and provided an update on progress and thinking in these key areas².
- 3.2 Following the publication of the rail strategy, the DfT invites tenders for specialist legal advice on the reform of aspects of the passenger rail franchise model. Providing this advice will require working with the Franchising Commercial Strategy team in the Policy Operations and Change (POC, formerly Passenger Services Design) Directorate as well as with Market Teams in Passenger Services and more broadly across the Department. It will also involve engagement with external stakeholders.
- 3.3 The Government's recently-published rail strategy sets out areas of franchising that are to be reformed, including those that are to be addressed by this service request. The strategy states:
- 3.3.1 "The franchise model is a partnership between the public and private sectors and has helped to deliver significant benefits for Britain's railways, including record levels of growth, performance, safety and customer satisfaction. The success of franchising lies in its inherent advantages as a commercial mode. However, to respond to changing circumstances and passenger expectations, we must continue to evolve our approach to franchising. In particular, we need to ensure that our approach is commercially sustainable and manages financial risk and reward fairly and sensibly. Train operating companies have strong commercial incentives and an excellent track record for attracting more passengers to the railway, but forecasting future revenue perfectly within any market remains an inexact science, particularly over the long term, with factors such as wider social and economic trends playing a part. We need to strike the right balance of risk and reward to protect taxpayers' interests whilst also attracting investors. And we need to consider how to maintain that balance through periods of uncertainty or in the face of unexpected events."
- 3.4 The strategic vision then sets out that:
- 3.4.1 "The franchise competitions and contracts of the future will introduce more integrated working between track and train, building on the direction set out by Sir Roy McNulty in his report of 2011. Reforms will build on the best of the public and private sectors, with private sector involvement bringing innovation, investment and competition. Our reforms will ensure that the railway is run by an integrated local team of people with an absolute commitment to meeting the

¹ <https://www.gov.uk/government/speeches/an-innovative-modern-passenger-focused-railway-network>

² <https://www.gov.uk/government/publications/a-strategic-vision-for-rail/connecting-people-a-strategic-vision-forrail>

needs of their passengers, while securing the best value for fare payers and taxpayers. Future contracts will:

- 3.4.1.1 Create one-team working locally, with the right incentives for train operators and Network Rail to co-operate on reliability and high performance.
- 3.4.1.2 Present a single accountable face of the railway for passengers.
- 3.4.1.3 Adopt joint branding and identity where appropriate, giving joint teams a shared culture and giving passengers a better sense of who to hold to account.

3.4.2 Joint working between track and train companies will take different forms tailored to each area, including new joint operational teams, short-term task forces to manage improvement, or longer-term contracts and agreements.

3.5 We will formalise the creation of new, tailored alliances on franchises as they come into effect, building on the experiences in Scotland and learning the lessons from the first generation of alliance contracts. The next of these new alliances will be on the South Eastern franchise once the Thameslink works are completed (and we have now issued the Invitation to Tender for the franchise), and on the Midland Mainline, once the new franchise launches in 2019. We will encourage bidders on these routes to include features such as shared strategies to improve performance on the network, joined-up leadership, and joint operational teams.”

4. DEFINITIONS

Expression or Acronym	Definition
ADM	Alternative Delivery Model
ECP	East Coast Partnership
POC	Policy Operation and Change
TOC	Train Operating Company

5. SCOPE OF REQUIREMENT

5.1 The overall aim is to support and assure the Department in delivering effective, value for money franchises in an efficient and robust manner. The Department reserves the right to extend the scope of legal adviser work until September 2018.

5.2 DfT have recently procured commercial advisers to provide advice on the identification, consideration and development of options for bringing about; (i) closer alignment of track and train to the extent permissible under the legislative framework, and (ii) a more sustainable franchise over a longer term with a commercial reset mechanism and

potential for further extension of term based on train operating company (TOC) infrastructure investments as well as performance-based criteria. DfT require legal advisers to challenge and explore the bounds of the possible within the limits of existing legislation. We are particularly keen to learn from the best of established models in other sectors and countries.

5.3 The initial focus of this work will be development of the East Coast Partnership (ECP) as set out in the Strategic Vision; however, it is also important to retain a wider perspective and consider how the model might be evolved for the longer term and wider applicability. The work should assume that current EU and UK legislation remains in place and unchanged.

5.4 Taken together and with other changes under development, these measures are intended to improve the passenger experience, support economic growth, improve franchise stability and deliver value for money for the tax payer and the fare payer.

6. THE REQUIREMENT

6.1 The Legal Adviser's role is likely to include some, or all, of the activities outlined in Annex 2 (Scope of Service) to this Appendix B and any other similar undertakings and/or related tasks.

7. KEY MILESTONES

7.1 The Legal Adviser should note the following project milestones:

Milestone	Description	Timeframe
1	Inception Meeting	By 3 rd April 2018
2	Advice on initial commercial interim report	April 2018
3	Advice on final commercial report and strategic outline business case	June 2018
4	Handover report	July 2018

7.2 Dates are indicative only.

8. AUTHORITY'S RESPONSIBILITIES

8.1 Following the appointment of the Legal Adviser, the Department and the Legal Adviser will agree a clear understanding of respective roles and responsibilities in the interests of building a successful partnership for the duration of the project. The requirements outlined in Annex 2 (Scope of Service) will form the basis of this understanding but the Department may require adjustments to the duration or volume of work to be completed within these specific tasks.

9. REPORTING

9.1 The Legal Adviser is requested to prepare regular (weekly, or as otherwise agreed) updates for the Department team giving details of:

9.1.1 Emerging issues that need to be addressed;

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- 9.1.2 Actual time and costs incurred to date by activity and estimated time and cost to completion (to be updated on a four-weekly basis that coincides with the Department's internal reporting cycle).
- 9.2 The Legal Adviser will be required to produce monthly timesheets for approval by the Department detailing:
- 9.2.1 work completed by task;
- 9.2.2 hours charged together with the name of the person who has carried out the work and their hourly rate;
- 9.2.3 recoverable expenses; and
- 9.2.4 approved disbursements.
- 10. VOLUMES**
- 10.1 The scope of this project is confined to work on the Rail Franchise ADM Design contract. As this is a call-off contract, volumes of work cannot be guaranteed.
- 11. CONTINUOUS IMPROVEMENT**
- 11.1 The Legal Adviser will be expected to suggest ways they may improve the way in which the required Services are to be delivered throughout Rail Franchise ADM Design Contract (or **Contract**) duration.
- 11.2 The Legal Adviser should present new ways of working to the Authority during Contract review meetings.
- 11.3 Changes to the way in which the Services are to be delivered must be brought to the Authority's attention and agreed prior to any changes being implemented.
- 12. SUSTAINABILITY**
- 12.1 Not applicable to this procurement.
- 13. QUALITY**
- 13.1 The Potential Provider must be BS EN ISO 9001:2008 compliant as requested in question 1.5 in Appendix D.
- 14. PRICE**
- 14.1 The Department is looking to secure excellent value for money from the Legal Adviser and potential Legal Advisers are encouraged to discount their rates. Discounts from Rail Panel rates should be clearly set out in your submission. The Legal Adviser will be required to provide a solution that offers cost reduction, efficiency and improvement opportunities throughout the contract term. This will include making full use of available Department resources including non-legal resources (e.g. printing) where it is appropriate and cost effective to do so.
- 14.2 Payment will not be made in respect of:
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- 14.2.1 Normal office overheads (e.g. hard copy reports, photocopying and postage, etc.)
- 14.2.2 Internal supervision or checking the work of junior members of the team where duplication provides no demonstrable benefit;
- 14.2.3 Two or more Advisers attending one meeting without the prior consent of the Project Team; and
- 14.2.4 Travel and subsistence within the M25 area.
- 14.3 For meetings outside of the M25, reasonable travel and subsistence cost will be considered for such meetings, subject to the Department's standard travel and subsistence arrangements. Requests for travel or subsistence must be agreed in advance with the Project Team and before any expenditure is agreed.
- 14.4 The Department requires potential Legal Advisers to submit hourly and daily fees for each of the individuals/grades (e.g. Partner, Associate) to be used in this contract. Rates provided within the Pricing Schedule – Appendix E should be exclusive of VAT and submitted via the Crown Commercial Services e-Sourcing Suite.
- 14.5 The Department may, subsequent to the award of the Contract, request capped fees for those discrete elements of the Contract which are able to be separated out as individual tasks (for example mobilisation of the franchise). The Provider will be expected to agree on an estimate of the hours or total cost of processing the work on behalf of the Authority.
- 14.6 The estimate will be reviewed at regular supplier meetings, but only adjusted if the Potential Provider can demonstrate sufficiently to the Authority that the complexity or scale of the work has necessitated this.
- 14.7 Where a capped price is specified, the capped price represents the maximum amount the Authority will incur. The Authority will only be liable to the value of the capped cost and no excess costs may be carried forward or otherwise applied to other activities.
- 15. STAFF AND CUSTOMER SERVICE**
- 15.1 The Department requires the Legal Adviser to provide a sufficient level of resource throughout the duration of the procurement of the Rail Franchise ADM Design contract in order to consistently deliver a quality service.
- 15.2 Legal Adviser's staff assigned to the Rail Franchise ADM Design contract shall have the relevant qualifications and experience to deliver the relevant aspects of Rail Franchise ADM Design contract.
- 15.3 The Legal Adviser shall ensure that its staff understand the Department's vision and objectives and will provide excellent customer service to the Department throughout the duration of the Rail Franchise ADM Design contract.
- 15.4 Interaction between the Legal Adviser and the Project Team will need to be flexed as appropriate, dependent upon project deliverables, but as a minimum the following is expected of the Legal Adviser:
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15.4.1 For a lead contact to be nominated, with overall responsibility for the Legal Adviser's quality of deliverables and reporting.

15.4.2 For appropriate representation to attend a start-up meeting and regular meetings with the Project Team, with attendance to be determined as appropriate by consultation with the Department's Internal Legal Lead. The regularity of representation at team meetings will be determined by the relevant focus on deliverables during the project lifecycle.

16. SERVICE LEVELS AND PERFORMANCE

16.1 In accordance with Schedule 2, Part A of the Panel Agreement for Provision of Rail Legal Services applies.

17. SECURITY REQUIREMENTS

17.1 The Department takes data security extremely seriously and applies agreed government security procedures to all contracts involving the handling of data and 'Official Sensitive' and 'Commercial Sensitive' information.

18. INTELLECTUAL PROPERTY RIGHTS (IPR)

18.1 Any outputs from this appointment as Legal Adviser to the Rail Franchise ADM Design contract may be re-used by the Department at its own discretion.

19. PAYMENT

19.1 The Department requires there to be a clear line of sight from progress reporting (including financial outturn against projection) through to timesheet reporting.

19.2 The Legal Adviser will be required to produce timesheets for approval by the Department in accordance with paragraph 9.2

19.3 Once a Departmental Goods Received Notice (GRN) has been produced, the Department will confirm that the invoice may be submitted for payment to the address below.

19.4 All invoices should be submitted to the Department's Shared Services Centre. Invoices should include the Purchase Number provided by the Department at the Contract Start. Invoices should be submitted to:

DfT Shared Services Arvato

Accounts Payable Team

5 Sandringham Park

Swansea Vale

Swansea

SA7 0EA

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19.5 The Legal Adviser will also be required to forward plan and predict future work.

20. ADDITIONAL INFORMATION

20.1 The information specified within this document, concerning the service requirements and business activity of the Department, is as available at the time of issue. Whilst every endeavour has been made to give Legal Advisers an accurate description of the requirements, the potential Legal Adviser should form its own conclusions about the methods and resources needed to meet them. The Secretary of State cannot accept responsibility for the Legal Adviser's assessment of the requirements.

20.2 The Department will not be responsible for the costs or expenses of any Legal Adviser in relation to any matter referred to in this document howsoever incurred.

21. LOCATION

21.1 It is expected that the Legal Adviser will work at their own office, but frequent attendance at meetings in London will be required. It may be appropriate for lawyers to work for extended periods at the Department's offices if they are required to work in a team alongside Departmental lawyers or other client staff. Additionally, the Project Team may require permanent, dedicated and secure working space (along with ad-hoc or pre-booked meeting space) at the Legal Adviser's offices for the duration of the Contract (or for specific phases of the Contract) and the potential Legal Adviser should confirm their ability to provide this space (at no extra cost to the Department) in their responses.

21.2 The office of the Department is: Department for Transport, Great Minster House, 33 Horseferry Road, London SW1P 4DR

22. TRAINING, KNOWLEDGE AND SKILLS

22.1 The Legal Adviser will, if required, be expected to work with the Departmental team and other external advisers – including other external legal advisers – to undertake a knowledge transfer. The Legal Adviser should describe how they anticipate transferring knowledge to the Department as part of the services offered in accordance with the Framework commitment.

22.2 The Legal Adviser will be required to attend a handover meeting with the Department's Commercial Management teams who will be responsible for managing the relevant franchise agreements. The Legal Adviser would be expected to provide information and guidance on the key aspects of the final Contract at the point of handover to the Department.

22.3 In addition, the Legal Adviser may be required to provide additional services free, including free attendance for Departmental representatives at the Legal Adviser's general client training seminars and tailored legal training, in particular relating to franchising and procurement issues generally.

ANNEX 1 – HIGH LEVEL PRINCIPLES FOR INTERNAL / EXTERNAL LAWYER INTERFACE

- 22.4 These are high level principles to guide and inform the working relationship between internal and external lawyers.
- 22.5 It is recognised that the balance of responsibilities as between external lawyers and internal lawyers may vary from matter to matter and that the degree of involvement of the internal lawyers in a matter where external lawyers have been appointed may also vary. However, the principles which are set out below in relation to identification and handling of risk will apply in all cases, from the date agreed between the Department and the external lawyers for this purpose.
- 22.6 It is also recognised that in most matters there will be a variety of relationships, including direct engagement between the clients (administrators) and the external lawyer as well as between the client and the internal lawyer and between the internal lawyer and external lawyer. Information gleaned in any of these contexts may need to be passed on additionally to the client, internal lawyer or external lawyer as appropriate. In particular, any substantive information or advice given by the external lawyer must be in writing and must be sent to both the client and the internal lawyer.
- 22.7 The principles below must be read together with the external lawyers' agreed scope of service. They are as follows:
- 22.7.1 The relationship between internal and external lawyers has to be based upon clear communication and swift and effective escalation of issues at all times in line with these principles.
- 22.7.2 It is acknowledged that lawyers (internal and external) are only able to advise on matters of which they have actual knowledge. However, if the lawyer has a concern in relation to a matter but insufficient information to know whether the matter creates a significant legal issue, the lawyer should seek extra information to establish the position. It is expected that the external lawyers will apply any acquired knowledge of the industry or market which is relevant to the issues on which they are advising, subject to any confidentiality constraints.
- 22.7.3 For each matter, the responsible internal lawyer (and their Deputy Director) will be identified to the external lawyers along with a description of matters (if any) on which the internal lawyer is taking responsibility for advising. This will be made clear at the time of appointment.

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- 22.7.4 The external lawyers should notify the internal lawyer about any issues of procurement law, public or administrative law, state aid, particular issues which require an interface with the European Commission, data protection, human rights and freedom of information, or issues which could lead to allegations of negligence or some other tort against the Secretary of State, a Minister, the Department or its officials. The external lawyers should agree with the relevant Deputy Director how such issue(s) will be progressed. It is likely that the internal lawyers will be in the lead in dealing with them.
- 22.7.5 If the external lawyers have concerns in relation to any legal issue related to the matters on which the external lawyers are advising, the external lawyers must notify the appointed internal lawyer in writing as soon as reasonably practicable. In this context, concern about a legal issue means a concern that the Secretary of State, a Minister, the Department or its officials is/are or will be at particular risk of acting unlawfully or in breach of obligation, or otherwise is/are or will be taking an unusual legal risk in the context of a transaction or matter of that sort. The internal lawyer and relevant Deputy Director must be told what the issue is and why it is a concern, and be the recipient of or copied in on any written advice given on the issue. Oral advice will need to be put in writing for this purpose. If it is apparent to the external lawyers that the issue is very serious or urgent, or where the Deputy Director is not available, advice must be copied to the Legal Director or Deputy Legal Director, or those individuals must be orally notified of the issue, in either case as soon as reasonably practicable.
- 22.7.6 Where relevant to the external lawyers' instructions, and subject to the agreement of the clients, it is expected that the relevant representatives of the external lawyers will be present at any Board Investment and Commercial Committee (or equivalent) in order to be able to provide legal advice at first hand.
- 22.7.7 Irrespective of their scope of work, external lawyers may be required to provide a report on the legal risks arising on any particular matter and, if so, how those risks have been mitigated. In some cases the Department will require a written note of advice from external lawyers confirming that the decision or action the Department proposes to take is lawful. External lawyers will be expected to work with internal lawyers and clients in order to be able to provide such a note. Alternatively, if external lawyers conclude that such a note cannot be provided, they will be expected to work with internal lawyers and clients with a view to resolving the issues in question to the satisfaction of the Department.
- 22.7.8 The Legal Director or Deputy Legal Director (as appropriate, or a nominated substitute) may require regular meetings with the relationship partner (or equivalent senior representative of the external lawyers) to discuss any issues and concerns.
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- 22.7.9 Executive Agencies of the Department which are not separately constituted bodies may be involved in matters to which these arrangements apply. In those cases the teams in the agencies dealing with the relevant matter(s) will need to be made aware of the existence of these arrangements by the Department. Where the external lawyers operate on the basis of a framework or call off arrangement with an Agency, the internal lawyer or Deputy Director (as appropriate) may also require regular meetings with the external lawyers to discuss any issues and concerns. [Again, meetings should be on a quarterly basis.]
- 22.8 It is not anticipated that these arrangements will apply in respect of separately constituted bodies

ANNEX 2 – SCOPE OF SERVICE

- 22.9 Working closely and collaboratively with the DfT project team and the recently appointed commercial and technical advisers to provide legal advice and support to the Department in its work to consider options for reforms to the franchise model to deliver the Department's strategic vision as set out at paragraphs 3.1 to 3.8 above and in particular in the areas of achieving:
- 22.10 Closer alignment of track and train operations to the extent permissible under the current legislative framework;
- 22.10.1 A more sustainable franchise model, potentially with a commercial reset mechanism and contingent extensions linked to investment in infrastructure and possible performance based criteria.
- 22.10.2 Working closely and collaboratively with the DfT to provide legal advice and support on related work considering reforms to the franchising and industry structure.
- 22.11 Legal advisers will:
- 22.11.1 Participate in workshops and other activities to provide overall legal advice and support to the Department and its commercial and technical advisers in generating, developing and testing options to be included in a report prepared by the commercial and technical advisers.
- 22.11.2 Provide overall legal support to the delivery of the report at its various stages from generating ideas and advising on the range of options included in the report through to ensuring that the final report is legally robust and takes due account of the constraints of the legislative framework including procurement law (liaising with the nominated Legal Deputy Director as appropriate).
- 22.11.3 Work with the Department to develop the most appropriate way to handover their advice and thinking which may involve a handover report or briefing to other advisers.
- 22.11.4 Provide dedicated resource and a lead lawyer to support the project. The lead lawyer will need to liaise closely with the nominated Legal Deputy Director in the Rail Commercial Contracts Team. The Department does not currently anticipate being able to provide dedicated internal legal support to this work stream. This may mean that the lead lawyer may at peak times need to work on an embedded basis with the project team and take primary responsibility for comment on the preparation of documentation by the Department for internal approval purposes.

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