

POLICY FRAMEWORK FOR INVESTMENTS: AN INITIAL CONSULTATION

**Comments From: South Hampshire Rapid Transit
Phase 1: Fareham – Gosport – Fareham**

Introduction

South Hampshire Rapid Transit Phase 1 (SHRT 1) is a proposal for a 9 mile light rail system between the town centres of Fareham and Gosport and Portsmouth City centre and is being promoted jointly by Hampshire County Council and Portsmouth City Council. It would provide a new permanent link, via a tunnel under Portsmouth Harbour, which enables a seamless journey to be made between the Fareham – Gosport peninsula and Portsea Island. It also utilises a disused railway for two thirds of the route, which provides for swift reliable journey times.

SHRT 1 is currently going through procurement leading to the award of a concession contract which would transfer the design, construction, service operation and maintenance risk to the private sector under standard PFI contract terms.

The project involves a limited but complex interface with Network Rail infrastructure. The planning process culminated in a Transport and Works Act Order being granted which conveys powers to construct and maintain a tramway and places obligations on the promoters to protect principal third party interests which include Network Rail (the Protective Provisions). The terms of the Protective Provisions grant Network Rail with substantive authority in approving designs and authorising works. These provisions contrast with the project procurement fundamentals based on output specifications and give rise to unnecessary conflict and inefficiency. The SHRT1 promoting Councils welcome the initiative of the Rail Regulator to moderate the practice of Network Rail to remove barriers for more effective joint working in the interest of the Customer, which in our case is ultimately the taxpayer. In responding it is assumed that the policy framework will apply to enhancements to the transport system which require interface works with Network Rail operating infrastructure.

General

The promoters have had extensive contact with the then Railtrack during TWA submission in 1998 and the subsequent public local inquiry in 1999, and latterly with Network Rail (NR) during the procurement process from 2001 till now. The SHRT 1 project has experienced significant difficulties in dealing with Network Rail. The policy of NR has been to treat the SHRT 1 promoters as an external party and to develop contractual arrangements that insulate NR from any imported risk. The contractual requirements of NR, which are an embellishment of the Protective Provisions, result in unnecessary high costs for the SHRT 1 promoters. At the moment NR see this cost increase as not their concern. The SHRT 1 promoters would like NR to play a more constructive role in delivering SHRT 1, recognising that their position is incompatible with a central PFI concept

of placing risk where it can be controlled and so managed most efficiently. The dominant position of NR enables it to take a very narrow view of its role and interest in the commercial arrangements with the SHRT1 promoters which is a barrier to delivering best value for the public purse.

Therefore, in general, the SHRT 1 project supports this policy initiative as a step in the right direction for providing a more equitable position for dependant third parties in their dealings with Network Rail. Comments on the specific aspects of the consultation are set out below using your number system.

Network Rail's role in investments:

2.51 i) We agree with ORR's proposed approach to securing Network Rail's obligations in respect of investments. However, we would add that it is important that Network Rail is appreciative of its wider obligations to facilitate integrated transport and to facilitate other utility improvements that benefit the overall economic performance of the UK. Our experience is that it hides behind its safety obligations and its dominant position to prevent it from being held accountable and from being made to follow a reasonable approach to asset stewardship. The effect is to limit the potential for local transport authorities to deliver integrated transport systems. NR should not be allowed to run a railway in isolation. They should have the competence to anticipate and deal effectively and efficiently with events in the surrounding environment. Therefore, any appraisal criteria should take account of the wider objectives of any third party scheme and not just the narrow objectives of NR. Hence the policy framework outcome should be applied to third party Customers looking to integrate transport system improvements with the heavy rail network.

2.51 ii) Incentives to facilitate and deliver investments should include criteria that prevent or enable it to be brought easily to account for abuse of its monopoly position. Tests of efficient scheme delivery should be transparent to provide confidence to the sponsoring third party that they are achieving best value for their money.

The terms on which Network Rail should carry out investments:

3.15 a) We agree with the ORR's proposal that, in most cases, it is appropriate for NR to offer the customer a fixed price for the delivery of the required outputs. A target price, as described, is not so attractive. Sharing in the upside of any improvement in outturn price is fine, but to be asked to share in the downside, on risks over which the third party has no control, is unacceptable. These downside risk are part of having the competencies and resources in place to run the railway efficiently and should not be passed on by NR.

3.15 b) The experience of the SHRT 1 project has been that NR is unwilling to accept any risk. The promoting Councils would will support any proposed default allocation of risk that addresses the issues outlined at Annex 1 and provides for the apportionment of risk to party best placed to manage it.

3.24 As a public sector transport project involving substantial public sector funding, SHRT 1 has had submit a quantified risk assessment. This aims to provide a more constructive approach for dealing with scheme risk rather than accepting the blanket figure for optimism bias proposed by the Treasury's Green Book. NR should be exposed to the same rigour in the transparent management of risk.

42 iii) With respect to remuneration it has been the practice of NR to ask for funding up front such that it maintains a positive balance sheet for any work undertaken. This is unusual commercial practise and removes a lever for incentivising NR in the event of a dispute.

We agree that any betterment arising to NR from the enhancement project should be reflected in the costs covered by the third party. In assessing betterment it is important that the total value, in whole life asset terms, of the enhancement is reflected rather than just the capital cost element of the improvement.

3.64 The Industry Risk Fund seems to expose third parties to risks they have no control over simply because they have a project that encroaches onto the railway in some form. The third party should expect to pay reasonable costs of accommodating their project. However, a scheme that requires their contribution, albeit it capped, should be very robustly overseen to ensure it is not used as a sink fund for inefficient working or poor management of the railway network. If third parties are required to contribute on some pro rata basis, using the cost of the interface works would be a more appropriate scale factor than the total project cost.

We would also add that it is important for NR to be able and prepared to participate effectively in public sector PFI schemes. For example NR should be prepared to enter into a direct agreements with third party contractors with limited security provided by the project sponsors. This contrasts with the preferred arrangement by NR where agreements are only available with the project sponsors who are then required to put back to back contractual arrangements in place with their contractors, increasing the scope for disputes and uncertain risk allocation.

Contact Mike Gannon, SHRT 1 Engineering Manager.

Annex 1.

Issue	Commentary	Consequences
Design and Construction Quality Assurance	NR is the approval authority for works that could affect their assets. They appoint an Engineer to carry out this function, but are not prepared to accept liability for his acts or omissions. NR is trying to remove any duty of care owed to the Promoters.	The Engineer will act to protect the assets of NR at the expense of SHRT 1. This could include remedial works and consequential delays to programme. Uncertain performance of NR raises difficult bankability issues which may be unacceptable or result in costly programme contingency for SHRT.
No opportunity for Promoters/Concessionaire to manage risk	NR is not prepared to guarantee the availability of their engineering resources despite SHRT 1footing the bill, or allow an independent approval appointment.	Deemed approval is granted after 56 days, but the Engineer can immediately halt works if they threaten NR's operations. The Concessionaire would have to resubmit plans potentially resulting in a further 56 day programme delay at an estimated of cost of £1M/month.
Failure of NR to perform its obligations	NR is not prepared to guarantee the availability of possessions, or provide compensation for their cancellation due to operational reasons. SHRT 1is treated as an external party and hence low priority when unforeseen operating requirements impact on booked possessions etc.	Uncertainties have to be met by contingency planning in the construction programme. The expense of programming wastage is met by the Promoters in a higher price or through a compensation event.
Step in rights	NR can step in and complete work being undertaken by the Concessionaire if it threatens the operation or safety of the network.	NR will not be liable for any losses suffered by the Promoters/Concessionaire as a consequence of its actions.
Asset Management	NR wants control of any joint structures that could affect their operations, but for the Concessionaire to be liable for any costs. They are not prepared to accept a commuted sum, or allow ownership and risk to reside with the Concessionaire.	Promoters/Concessionaire have to accept the potential for an open end maintenance liability with no influence on scope or costs; and the potential for interruptions to service due to necessary maintenance works for NR.

