

## LEGISLATIVE FRAMEWORKS

[22 September 2009, DLA Piper]

This Appendix to the MSBC Commercial Case sets out in further detail the key legislative frameworks that the Promoters have identified. It considers the options described in section 3.1 of the Commercial Case in more detail, setting out the legal basis upon which the conclusions on the suitability of each option to meet the NGT Procurement Objectives in section 5 of the Commercial Case have been drawn.

The Promoters have in particular considered in detail whether they can deliver the NGT Scheme using the powers provided under the Transport Act 2000 ("**2000 Act**"), as amended by the Local Transport Act 2008 ("**2008 Act**"), in addition to the use of an order ("**TWAO**") under the Transport and Works Act 1992 ("**1992 Act**").

The reason for this review of legislative options is due to the nature of a trolley vehicle, as a road-going passenger service vehicle with an external power supply. This means that the vehicle can be viewed, for many purposes, as a conventional passenger service vehicle (like a bus), and therefore many powers relating to the delivery of bus schemes apply equally to a trolley vehicle as to a conventional bus, as both will be public service vehicles under the Public Passenger Vehicles Act 1981. Therefore local public passenger services provided with such vehicles will be local services for the purposes of the 2000 Act. This means that, save where expressly noted, the legislative options could be applicable to either a trolley vehicle, guided bus or other high quality bus solution. In the case of a TWAO, as noted below, the powers under the 1992 Act expressly cover certain transport modes, including trolley vehicle systems, and bus systems that are guided, but would not cover guided buses to the extent there were significant unguided sections of the route.

The following appendix summarises the key aspects of each of the delivery frameworks, and key commercial considerations which arise from the legislative frameworks. It is worth noting that it is possible to combine many of these frameworks together, and therefore the beneficial parts of one delivery mechanism may be used to complement another mechanism. For example, a TWAO might be combined with complementary Quality Partnership Schemes (QPSs) or Voluntary Partnership Agreements (VPAs).

# **1. VOLUNTARY PARTNERSHIP AGREEMENTS (VPA) AND VOLUNTARY AGREEMENTS**

## **Introduction**

- 1.1 The 2000 Act includes competition tests which are applicable in a number of situations where competition in the bus industry is regulated for the benefit of passengers. The 2008 Act modified the competition tests both to take account of the special circumstances that apply with the letting of transport contracts and to ensure that beneficial agreements between Local Transport Authorities ("LTAs") and bus operators were not prohibited by competition legislation, but rather permitted to take account of circumstances in which the public benefit outweighed competition considerations.
- 1.2 Agreements to which the modified competition tests apply are VPAs (between a local authority and an operator or operators) - where the authority provides facilities and the operator(s) agrees to provide services to a certain standard in return for the provision of those facilities) and qualifying agreements (agreements between operators, typically in support of either VPAs or QPSs (see below)).
- 1.3 It is worth noting that the 2000 Act (as amended by the 2008 Act) modifies the competition test which is applicable, but does not otherwise modify the application of other aspects of UK or EU law. Therefore, the EU procurement rules (as implemented in the United Kingdom through the Public Contracts Regulations 2006<sup>1</sup>) still apply to agreements between operators and local authorities, where such an agreement would be viewed as a services contract and is above the threshold.
- 1.4 The application of the procurement rules particularly limits the potential use of VPAs to smaller scale agreements, where provision of service requirements by bus operators is not in return for significant benefits (whether monetary or otherwise).

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<sup>1</sup> The Public Contracts Regulations 2006 (SI 2006/5) (as amended)

## Relevant provisions of the legislation

- 1.5 The 2000 Act (as amended by the 2008 Act) provides<sup>2</sup> that any VPA (whether a bilateral or multilateral agreement) or qualifying agreement is prohibited unless exempt by satisfying the Part 2 competition test<sup>3</sup> ("**Part 2 test**"). Where the agreement is not exempt under the Part 2 test then the Competition Act 1998 will apply. It should be noted that whilst paragraph 4.6 of the OfT's *Guidance on the application of competition law to certain aspects of the bus market following the Local Transport Act 2008* ("**OfT Guidance**")<sup>4</sup> notes that the Part 2 test would not apply in respect of a single bilateral agreement with a single operator (as this would not amount to an agreement between undertakings), this is probably in reality unlikely to happen save where there is only one operator in an area, as any agreements will have to take account of the impact of an agreement with one operator on other operators in the area.
- 1.6 The Part 2 test has four parts:
- 1.6.1 Does the agreement have the object or effect of preventing, restricting or distorting competition in the area of the LTA?
  - 1.6.2 Does the agreement contribute to the attainment of one or more of the bus improvement objectives? If not, then the competition test cannot be met.
  - 1.6.3 Does the agreement impose on the undertakings concern restrictions which are not indispensable to the attainment of the bus improvement objectives? If so the competition test cannot be met.
  - 1.6.4 Does the agreement afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the services in question? If so, the competition test cannot be met.
- 1.7 The OfT Guidance sets out more detail on how these tests would apply in practice.

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<sup>2</sup> Paragraph 20(1) of Schedule 10 Transport Act 2000

<sup>3</sup> Paragraph 22 of Schedule 10 Transport Act 2000

<sup>4</sup> [http://www.oft.gov.uk/shared\\_of/business\\_leaflets/general/oft452.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/general/oft452.pdf)

- 1.8 It should be noted that the Part 2 test only applies if the agreements fall within the narrow category of the definition of VPAs or qualifying agreements in Schedule 10 to the 2000 Act. Any other agreement between the LTA and operators (a voluntary agreement) would be subject to usual competition rules.
- 1.9 As with VPAs, whilst a single voluntary agreement between a LTA and an operator may not be subject to the application of competition law (as a LTA itself would not be viewed as an undertaking by the OfT in circumstances where the LTA was entering into a voluntary agreement), if there was more than one agreement, then it is quite possible that the overall impact of the agreements would be for competition rules to apply, especially where operators only enter into their own agreements with the LTA on the basis that other operators are also entering into similar agreements (as this would effectively amount to a multilateral agreement between operators).
- 1.10 Separate from the issue of competition law, as noted above, is the question of whether any such agreements are subject to the procurement rules. It should be noted that there is a relatively low threshold above which service contracts become subject to the procurement rules (currently £139,893<sup>5</sup>). Additionally, it should be remembered that, even where an individual service contract does not fall within the thresholds, there is EU guidance ("**Interpretative Communication**")<sup>6</sup> which makes it clear that local and regional authorities should use competitive procurement even below these thresholds. In particular, the Interpretative Communication states that although certain contracts below the threshold may not require full compliance with the directives on public procurement, public authorities will still be required to comply with "the fundamental rules of the Treaty."<sup>7</sup> It goes on to suggest that, even for service contracts below the threshold, there will still be a requirement for contracts to be tendered, unless the exclusions set out in the directives are met (for example, extreme urgency, or artistic reasons). There are therefore many circumstances in which it may be that a service contract, even if low, should go out to competitive procurement.

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<sup>5</sup>[http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_eu\\_procurement\\_thresholds\\_.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_eu_procurement_thresholds_.asp)

<sup>6</sup> EU Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)

- 1.11 Any agreement between an operator(s) and the LTA therefore requires analysis to determine whether or not it is a service contract for the purposes of the Public Contract Regulations 2008. If it is determined that the agreement is a services contract then an analysis will have to be carried out to determine whether public tendering is required for that agreement either in accordance with the Public Contracts Regulations, or on the basis of the Interpretative Communication.
- 1.12 A public services contract is defined in the Public Contracts Regulations as "a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services ..."<sup>8</sup>. Under English law "consideration" does not need to be monetary. A services contract could therefore potentially exist where no monetary consideration passes between the parties, but each party provides benefits to the other. This will cover many agreements between operators and LTAs, including VPAs, as they will require that the operators provide bus services to a specified standard (a service provided to the LTA) in return for the provision of facilities. Therefore, even where an agreement truly is a bilateral agreement between an operator and a LTA (and therefore the competition test is not necessary) there may still be a risk of challenge on the basis of breach of either the Public Contracts Regulations, or a wider failure by the authority to comply with the requirements of European law, on the basis of the Interpretative Communication. The risk of challenge of such an agreement for breach of either the Public Contracts Regulations requirements or wider requirements of EU law may be increased where the benefits accruing to operators through the VPA are greater - for example where an authority relies upon a VPA to provide significant facilities, from which the operator can benefit.

### **Application to the NGT Scheme**

- 1.13 The 2008 Act envisaged that VPAs could be used to assist in securing investment for facilities, by giving LTAs greater confidence that the operators would utilise facilities after the authority had invested in them. However, for this confidence to actually be well founded, the LTA would need to be in a position to make aspects of the VPA

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<sup>7</sup> Paragraph 1.2 of Interpretive Communication, quoting paragraph 20 of Case C-59/00, Bent Moustén Vestergaard [2001] ECR I-9505

<sup>8</sup> Regulation 2(1) Public Contracts Regulations

binding. If the agreement is not binding on the operators, with appropriate recourse if the operators breach their agreements, then the VPA will not give the LTA any greater comfort, as the voluntary nature of the agreement will mean that the operator can "walk away" if the terms of the agreement no longer suit them. Unlike the provision of facilities by a LTA, which may be difficult (and expensive) to remove, once provided, the provision of services is something that an operator can quickly stop, if it no longer proves beneficial, with the operator often able to quickly re-allocate resources elsewhere.

1.14 Given the level of investment to be made in the NGT scheme it is assumed that any VPA that is used to provide the NGT scheme is likely to require each relevant operator to enter into binding agreements which incentivise them to provide services to a certain standard in return for the provision of facilities, and are enforceable where such operator fails to provide such services. This raises a number of questions that would need to be answered appropriately for the NGT scheme to be able to proceed utilising such a VPA:

1.14.1 On what basis have the operator(s) determined that they will enter into such a VPA? For an operator to enter into a VPA which potentially imposes penalties upon them if they breach that agreement by failing to provide services, it seems likely that they would be expecting to gain a significant benefit from complying with that agreement, otherwise, as a commercial entity, there would not be a clear reason for them entering into the transaction. Under a VPA this could be the case where the facilities provided were likely to provide the operator with significant benefits (either by increasing patronage (and therefore increasing income even without fare changes), or allowing the operator to charge more for the provision of services) to the extent where the operator was willing to be bound to provide services (and to potentially suffer consequences for failure to deliver) in return for the provision of those facilities. It is also worth noting that if a LTA agreed *not* to proceed with something which would have a detrimental effect on operators, in return for operators entering into a VPA, this could itself be valuable consideration. For example, if a LTA had determined that it was going to proceed with a quality contract scheme (see section 3 below), which an operator had determined would have a significantly detrimental impact on its business, and the LTA then agreed not to proceed, on the basis

of the operator entering into a binding commitment to provide benefits under a VPA instead, it is arguable that in these circumstances the operator has received a considerable benefit in the removal of the quality contract scheme, which would therefore be valuable consideration.

1.14.2 If the VPA does give that operator a benefit, in return for such operator providing services as specified by the LTA, then this would appear to be a public services contract, as they would have agreed to provide services to a standard required by the LTA, in return for the provision of facilities, and the benefits that flowed from the provision of those facilities. If the agreement is therefore found to be a services contract, this then raises the query as to whether such an agreement could be let without compliance with the public procurement regime. If such a contract could not be let without procurement, this undermines the benefit of a VPA with an individual operator (see below).

1.14.3 If the VPA consists of agreements with more than one operator (or consists of an agreement with one operator, with other operators agreeing not to participate) then it will be necessary to consider whether the competition test applies, as in these circumstances there will potentially be a deemed agreement between operators, and the VPAs, taken as a whole, may have an anti-competitive effect.

1.14.4 If the VPA is not legally binding in a manner which gives the LTA worthwhile remedies in the event of breach by an operator, then the LTA will need to consider whether it has actually locked in the benefits expected to arise from the provision of the facilities (which is one of the NGT procurement objectives). If the VPA is not legally binding (or has limited penalties for non-compliance) then operators may simply "opt-out" of their obligations after a few years of operation, if the benefits do not match their expectations.

1.15 In respect of the NGT scheme, it would appear that either:

1.15.1 the benefits provided would be significant enough for procurement to be required, as even under the low cost alternative the Promoters will be providing quite considerable bus facilities, which will benefit those operators who enter into the VPAs; or

1.15.2 there will need to be an application of the Part 2 test, if more than one operator was required to reach agreement with the Promoters.

It is quite likely that both procurement and competition issues will have to be reviewed, given the benefits of the NGT scheme, and the clear potential for the NGT scheme to significantly benefit operators who are able to make use of it.

1.16 In respect of the procurement requirement, it is not clear how a VPA used for the purposes of the NGT scheme could be competitively procured in a way which would achieve best value:

1.16.1 the VPA (and any associated QPS, if the Promoters chose to combine a QPS with the VPAs) does not grant any exclusivity of operation to an operator entering into the VPA, and therefore even if an operator did agree to provide services to a specific standard under a procured VPA, another operator could still make use of the facilities provided (although if a QPS was introduced in parallel, then other operators would at least have to comply with the same standards);

1.16.2 whilst it would therefore be technically possible to procure such an agreement (as there is no technical limitation on new bus operators registering services on a route), incumbent operators would be at a significant advantage (due to already operating services along the route) compared to any incoming operator (who would not only be starting a new service on the route, but would also potentially have to compete with the incumbent operator) whichever operators chose (or chose not) to enter into VPAs. This would therefore potentially limit the effective competition within the agreement, whilst raising concerns for incumbent operators that new entrants may be attracted to the market, making the VPA less attractive to incumbent operators;

1.16.3 the VPA will not provide a signatory with protection from competition by other bus operators. Even where a separate qualifying agreement ensures that existing (and new operators) provide services in a coherent fashion, this will still not protect those operators from the impact of new operators entering the market outside the remit of the VPA and any qualifying agreement, which may make it difficult for those operators subject to the VPA to continue to fully comply with their obligations, if revenue is then abstracted by incoming

operators. Unless the VPA was protected by a QPS on similar terms, then such incoming operators could provide services to a lower standard.

- 1.17 If a VPA was introduced in conjunction with a QPS, then it is arguable that many of the benefits of the VPA could actually be embodied in the QPS, at which point, there would be fewer benefits accruing directly under the VPA, as the requirements of the VPA would also be imposed by virtue of the QPS, and the benefits of the VPA (being able to use the facilities) would also be provided by complying with the QPS standards. In these circumstances, the VPA would simply be an adjunct to the wider QPS. Whilst this may reduce the risk of such a VPA requiring procurement, or being seen as anti-competitive, it also significantly reduces the benefits of having a VPA at all.
- 1.18 An approach utilising a QPS and a VPA may therefore give the most benefits from a VPA without encountering significant state aid or procurement concerns. This would however be little different to the QPS approach set out below (in section 2), other than the LTA would have slightly greater certainty going into the QPS consultation that operators who were party to the VPA would not object to the terms of the QPS.
- 1.19 Assuming that a VPA was entered into with a number of operators, the competition test would have to be applied. Whilst an agreement for the purposes of the NGT scheme would clearly be for the purposes of the bus improvement objectives required under the competition test for the Part 2 test to be satisfied, it would also need to be considered whether the terms of the agreement were such that they were only those terms that were indispensable to the attainment of those objectives.
- 1.20 This would require consideration in the context of the final agreements with operators. Therefore to procure the NGT scheme using multiple VPA agreements, the Promoters may have to negotiate agreements with all relevant operators prior to commencing work on the required facilities, and carry out a competition assessment to ascertain whether the terms of all the VPAs were necessary to achieve the relevant objectives. Where operators were relying upon other operators entering into similar agreements (for example where higher standards were agreed to by a number of operators) then these agreements would have to all be negotiated in parallel, and an assessment carried out of the terms of all of these agreements.
- 1.21 It should be noted that where significant investment is dependent upon the certainty that would be provided by the VPAs, this potentially creates timing difficulties,

especially where the VPAs would have to be combined with appropriate compulsory purchase and planning processes, so that the facilities could be constructed following entry into the VPAs.

1.22 It is worth noting, however, that VPAs have the advantage that any approach using VPAs that is successful and satisfies the competition tests should be equally applicable to any new route proposed for the NGT scheme. Therefore, to the extent that VPAs can be used, the approach may easily allow for future extensions, once the principle of the agreement had been determined. However, if the operator(s) concluded that they were not comfortable with the terms of the original VPA (although nonetheless bound by its terms) this would make delivery of future schemes using an equivalent method very difficult.

1.23 It should also be noted that due to the competition test, VPAs may not actually achieve many of the objectives that are sought for the NGT scheme. In particular:

1.23.1 It may be difficult to argue that all operators should use a single branded vehicle, or use vehicles of a similar type, for reasons discussed below in respect of QPSs;

1.23.2 Operators will not necessarily be able to agree to offer the same fares, nor will it be possible to use the VPA to fix the price of multi-operator tickets. Both of these are likely to be viewed as price-fixing agreements, and would be prohibited. This may significantly reduce inter-operability of different operators under VPAs.

### **Summary**

1.24 More complex VPAs are likely to fail either the competition test or be subject to a competitive procurement process. Applying a competitive procurement process to a VPA may not achieve the LTA's aims. Additionally such a VPA may not gain co-operation from local bus operators, if they believe that it will encourage new entrants into the market. Therefore this approach is unlikely to assist in promoting the NGT scheme.

1.25 Less complex VPAs may be useful, but are unlikely to achieve the procurement objectives set for the NGT scheme, as they cannot deliver significant benefits to

operators without falling foul of procurement rules, and therefore are unlikely to deliver significant benefits to passengers.

- 1.26 The application of the competition test to proposed VPAs may mean that many key objectives of the NGT scheme including single branding and integrated ticketing may not be easily achievable.
- 1.27 VPAs may be a useful support to the process of introducing a QPS. In these instances the issues associated with QPS will apply (see below).
- 1.28 It is unlikely that operators (without any guarantee of exclusivity or other significant benefits) will enter into binding VPAs which impose significant obligations on them (and significant penalties for breach). If such a VPA cannot be agreed with major operators in the area then the VPA process may not give the certainty required to give the LTA sufficient confidence to invest in a significant scheme, as investment would not be guaranteed to be locked in either in the short term or for the future. If an operator does offer to enter into such an agreement, it will need to be considered why they have agreed to enter into such an agreement, and whether they are doing so because it leads to them being provided with significant benefit elsewhere, which would amount to consideration (see for example paragraph 1.14.1 above).
- 1.29 In summary, use of VPAs is unlikely to provide the benefits or certainty that the Promoters are looking for, and does not appear appropriate for the scale of investment that the Promoters are intending to make with the NGT scheme.

## **2. STATUTORY QUALITY PARTNERSHIP SCHEME (QPS)**

### **Introduction**

- 2.1 The 2000 Act, even prior to amendment by the 2008 Act, set out a model, a "QPS whereby when a LTA, or a number of LTAs jointly, agreed to invest in improving facilities at specific locations along a bus route, then operators who used those facilities would be required to provide services to a specified standard<sup>9</sup>.
- 2.2 The 2008 Act amended the 2000 Act to expand the scope of a QPS further, including control over (minimum) frequencies, timings and (maximum) fares of services using

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<sup>9</sup> section 114(2) Transport Act 2000

those facilities. The amendments from the 2008 Act also ensure that protections are in place both to ensure that a QPS does not impact on the commercial viability of an operator's existing operations, and to assess the impact on competition of the scheme.

- 2.3 The Department for Transport ("**DfT**") has issued guidance<sup>10</sup> on QPSs ("**DfT Guidance**"), and the OfT Guidance also applies to QPSs.
- 2.4 It should be noted that, subject to the comments in section 1 above, a QPS ""could be used in conjunction with a VPA or a number of VPAs to implement schemes. This section looks at the specific implications of using a QPS to implement the NGT scheme, but will also note where VPAs or other voluntary agreements may be of benefit.

### **Relevant provisions of the QPS legislation**

- 2.5 For a LTA to introduce a QPS they must be satisfied that both the provision of facilities and the provision of local services of the required standard will bring benefits to persons using local services in the area, by improving the quality of service, or reducing or limiting traffic congestion, noise or air pollution<sup>11</sup>.
- 2.6 In addition, a LTA can only make a QPS if it satisfies the requirements of the competition test set out in Part 1 of Schedule 10 to the 2000 Act ("**Part 1 test**"). The test will be satisfied where:
  - 2.6.1 the QPS does not have a significantly adverse effect on competition; or
  - 2.6.2 the effect it has on competition is proportionate to the achievement of one or more of the following purposes:
    - 2.6.2.1 improving the quality of vehicles or facilities covered by the scheme;
    - 2.6.2.2 securing other improvements to local services of benefit to their users;
    - 2.6.2.3 reducing or limiting traffic congestion, noise or air pollution.

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<sup>10</sup> <http://www.dft.gov.uk/adobepdf/165237/299192/qps.pdf>

<sup>11</sup> section 114(2) Transport Act 2000

- 2.7 DfT guidance (at paragraph 101) notes that: "the standards of service should be ones which can be reasonably met by any competent and efficient operator, unless the standard is higher but the benefits derived from its application outweigh the cost of compliance (in this respect, an assessment of the benefits and the costs will, in all likelihood, take account of the extent to which existing passengers are prepared to pay for that compliance)."
- 2.8 As noted above, the scheme will apply to all operators who use facilities within the QPS. Therefore, if operators cannot provide services to the specified standard (and cannot, or choose not to, challenge the scheme) but the scheme is still held to be valid, then those operators who are unable to comply will either have to alter their services to use different facilities, or de-register the services provided.
- 2.9 Whilst it is possible to exclude services from a QPS<sup>12</sup> by reference to either specific services or specific classes of services, any such exclusions would have to be on a logical basis, such as those set out in paragraph 47 of the DfT Guidance. In particular, in excluding any specified services<sup>13</sup> the Promoters would have to consider whether this had any effect on competition, as this may impact on whether the standards of service imposed on the services not excluded from the scheme had a greater adverse effect.
- 2.10 The 2000 Act also allows for registration restrictions (which affect whether operators can register new services, or withdraw existing services) to be included within the QPS, but only where the "provision, or (as the case may be) variation or withdrawal, of services might be detrimental to the provision of services under the scheme"<sup>14</sup>.
- 2.11 Enforcement of any QPS is not directly by the LTA, but rather through the auspices of the local traffic commissioner. Operators participating in a QPS are required to give appropriate undertakings to the traffic commissioner when registering services which fall within the scheme<sup>15</sup>. Similarly, the application of any registration restriction would be determined by the traffic commissioner in accepting or rejecting an application by an operator for a registration. This does mean that, overall, the

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<sup>12</sup> section 116(s) Transport Act 2000

<sup>13</sup> pursuant to section 116(3)(a) Transport Act 2000

<sup>14</sup> section 114(3B) Transport Act 2000

<sup>15</sup> section 118(4) Transport Act 2000

terms of the QPS are not enforced directly by the LTA, but effectively provide a further level of regulation for the traffic commissioner to enforce.

- 2.12 A QPS must be for a minimum of 5 years, but the DfT guidance notes (at paragraph 125) that LTAs should "bear in mind that policies and service requirements are likely to change over time and that schemes should therefore be reviewed at reasonable intervals." Such an end date would be required to give operators certainty as to their investment (given that early revocation of the scheme could impact on investment decisions made by operators to comply with the scheme).
- 2.13 The facilities that are specified in the scheme may be new facilities or existing facilities. Where existing facilities are used, then facilities which are over 10 years old cannot be included in the scheme; 5 - 10 year old facilities can only be included where operators already using the facilities do not object; and facilities under 5 years old can be included. It would potentially be open for a LTA to upgrade an existing facility, and for the upgrade of the facility to be viewed as a facility, but clearly this will be more likely to only be an incremental improvement, and therefore carry less weight in assessing whether the benefits of the scheme outweigh the impacts on the operator(s).
- 2.14 This also means that where a long term QPS has been put in place, none of the facilities within the original QPS (unless introduced at a later stage of the scheme), would be available for use in any subsequent QPS, requiring the LTA to vary the QPS for any future changes, rather than making a new QPS. This potentially limits the use of a QPS for locking in long term benefits from facilities, unless the passenger benefits derived from those facilities can be used to justify a long term QPS. The length of any QPS will also have an indirect effect on competition as a longer QPS will exclude lower quality operators from the market for a longer period of time potentially allowing operators within the scheme to better consolidate their market share and therefore this will have to be taken into account in determining whether the scheme meets the Part 1 test.

## **Application to the NGT Scheme**

2.15 If a QPS was used to implement the NGT scheme, this would have a number of impacts on what could be achieved. In particular, the following assumptions would appear to flow, logically, from the constraints of a QPS:

2.15.1 contracts would not be let for operation of the QPS, save where it was not possible for particular required services within the QPS area to be provided commercially to the required standard, in which case METRO, as the relevant LTA, would be able to use its tendering powers to provide such services;

2.15.2 other than by using tendering powers, METRO would not be able to guarantee the level of service provided. Even if minimum frequencies were specified on a route, this may lead to a challenge to the QPS by operators, or alternatively lead to operators choosing to withdraw services rather than operate at a specified frequency. If this did happen, then METRO would have to consider whether it would tender those services (or the additional services required to ensure that the services offered met the requirements of the QPS).

2.15.3 METRO would have to be careful as to how high a standard of vehicle was specified, as the higher the cost of vehicle provision, the greater the barrier to entry for potential operators. METRO would therefore have to evaluate its requirements against the potential impact on competition, and assess whether they were proportionate. In particular, if the vehicle cost increased significantly, METRO would have to consider whether the additional cost was justified by the passenger benefits (including the passenger benefits provided by the complementary facilities).

2.15.4 In particular it would be unlikely for METRO to be able to specify a single (high standard) vehicle type for provision of all services within the NGT scheme, due to the impact that this would have on competition. In particular:

2.15.4.1 different operators often favour vehicles from different manufacturers, and therefore vehicle choice would potentially impact on competition between operators, by favouring operators who used vehicles similar to those specified by the QPS;

2.15.4.2 specifying a single vehicle type would have an impact on competition within the vehicle manufacturing industry, which whilst relatively small (given the scale of NGT compared to the bus market in the UK), may still be viewed as disproportionate especially given the specialist nature;

2.15.4.3 the key benefit of specifying a single vehicle - that it provides the impression of a single "system" even where provided by multiple operators - is itself anti-competitive, as it means that there is less opportunity for differentiation by different operators. It would also prevent operators from offering a higher quality vehicle than that specified;

2.15.4.4 specifying a specific vehicle therefore has relatively limited benefits compared to these impacts on competition, and therefore is unlikely to be possible under a QPS.

2.15.5 To meet the competition test whilst specifying vehicle standards for a QPS it therefore seems more likely that METRO would specify a set of characteristics for the vehicle, and operators would be able to choose vehicles which met the standards, but which were not necessarily identical. This could potentially mean that there could be significant differences between vehicles, as the more prescriptive that METRO are in specifying standards, the greater the impact on competition. This may make it difficult to specify something as specialised (and expensive) as a trolley vehicle within a QPS, as the additional cost of the trolley vehicle will significantly limit entry to the market, as it would be a considerable risk for a new entrant to invest in trolley vehicles when entering a route which already had services operating on it. This is particularly the case given the absence of other trolley vehicle systems in the UK on which such vehicles could be run, meaning that if an operator was unsuccessful on the NGT route they could not mitigate their losses by operating the trolley vehicles on another route.

2.15.6 Additionally METRO would only be able to specify limited branding for the vehicles, as full branding would have a significant anti-competitive effect on the operators (with full branding, for example, it would be difficult for customers to distinguish between the vehicles of different operators, making

it hard for them to compete on fares or ticket options), which may be seen as out of proportion to the benefits to passengers of having full branding (in particular the single "system" feel).

2.15.7 Whilst it may be possible to specify integrated ticketing, this would not prohibit individual operators from providing their "own-brand" fares at a lower rate, effectively discouraging passengers from using integrated tickets. It is typically in operator's interests for passengers to use "own-brand" tickets rather than multi-operator tickets, as it makes it harder for new entrants into the market. Whilst METRO could specify as a requirement of a QPS that the operators participated in integrated ticketing schemes (such as the existing METRO card scheme), the pricing for such schemes is controlled by a separate competition regime, and pricing is effectively set at a level which can be accepted by operators. This would mean that the NGT ticket price would almost certainly be higher than individual operator tickets on the same route. Whilst the QPS could be used to set a maximum fare for such ticket types, the lower this maximum fare was set, the more likely operators would be able to claim that the standards threatened the commercial viability of their services.

## **Summary**

2.16 A QPS would allow the Promoters to specify relatively high standards for the NGT scheme, but would not achieve all of the Promoter's procurement objectives. In particular it may not be possible to lock in all the benefits of the investment for the long term, without the potential need for long-term subsidy for non-commercial parts of the route, and METRO may be unable to achieve a single system feel, due to the constraints of the specification possible through a QPS.

2.17 It may not be possible to specify the highest standards for the system, due to the potential impact on competition. As a QPS continues to rely on competition in the de-regulated bus market, account would probably also have to be taken of the existing competitive situation on the NGT routes, and whether the QPS actually had the effect of locking-out competition on the routes.

2.18 Furthermore, enforcement of the QPS is through the traffic commissioner, rather than directly by the Promoters, meaning that the Promoters would be dependent upon a third party enforcing the requirements of their scheme. Whilst not necessarily a bar

to use of the QPS, this does remove a level of confidence in whether a scheme would always be quickly and effectively enforced, as the traffic commissioner will have to satisfy himself of a breach (even if already identified by the Promoters) before taking enforcement action.

- 2.19 The QPS is an effective route to delivering quality bus schemes, but may not be capable of effectively delivering the step-change in service for something similar to a trolley vehicle system without having a significantly adverse effect on competition.

### **3. QUALITY CONTRACT SCHEME (QC)**

#### **Introduction**

- 3.1 QCs were introduced in the 2000 Act, but the provisions were significantly amended by the 2008 Act, after the original provisions were found to be unworkable in practice (as far as we are aware no QC has been introduced to date under the 2000 Act).
- 3.2 QCs allow a LTA (or a number of LTAs, jointly) to define an area in which (save for services excluded from the scheme), only services pursuant to competitively tendered quality contracts can run.<sup>16</sup> Effectively, this would allow a LTA considerable control over delivery of services in an area, akin to the bus franchising model still used in London.
- 3.3 A QC effectively moves from a model of competition between services, as is the case in the de-regulated bus market that exists throughout the UK, save for in London, to a model of competition at the point of tender. Assuming that an effective tender process is carried out, this removes the concerns relating to competition that arise in respect of VPAs and QPSs.
- 3.4 The amendments to the 2000 Act made it considerably easier for a LTA to introduce a QC. However, the concept of a QC is not popular with bus operators (as the imposition of a QC could potentially disrupt existing competitive and commercial positions built up by operators over a number of years). Some bus operators have in the past stated that they are opposed to QCs and therefore are likely to challenge any QC that is introduced, including through challenge on the basis of breach of their

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<sup>16</sup> section 124(3) Transport Act 2000

human rights or alternatively withdraw completely from the market. Whilst it is not possible to judge the strength of any such challenge at this point (given that no QC has yet been set up and so no challenge has yet been made), it appears that such statements have been intended to dissuade LTAs from considering QC schemes as viable, and the possibility of challenge necessarily creates a risk where significant investment is based upon the introduction of such a scheme.

- 3.5 It should be noted that currently the new legislation on QCs has not been introduced (those sections of the 2008 Act have yet to come into force), and the DfT is currently engaged in consultation on the guidance and secondary legislation which will be required prior to any QC being brought into force.<sup>17</sup> The DfT consultation ends in October 2009, and therefore it seems unlikely that there will be certainty on the precise provisions of the QC legislation until late in 2009 at the earliest.

### **Relevant provisions of the legislation**

- 3.6 As noted above, the 2008 Act modifies the 2000 Act to make it more workable. The original 2000 Act drafting only allowed for a QC where this was the "only practicable means"<sup>18</sup> of achieving a LTA's objectives. This was unworkable in terms of introducing a scheme, as in many cases where such a scheme was imposed an operator could very easily undermine the proposals by offering at least some of the benefits on a voluntary basis, at least until the scheme proposals were rejected through the enquiry process (or otherwise). By offering the benefits of the scheme in the short term, an operator could effectively undermine any set of proposals, by demonstrating that there was another method of achieving the benefits. Even where an operator did not go to the lengths of actually providing services, they could demonstrate that there were other ways of providing similar benefits.

- 3.7 The 2000 Act now applies a modified test<sup>19</sup>, to determine whether a QC is appropriate, that requires that:

- 3.7.1 the proposed scheme will result in an increase in the use of bus services in the area of the scheme;

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<sup>17</sup> <http://www.dft.gov.uk/consultations/open/qcs/>

<sup>18</sup> section 124(1)(a) Transport Act 2000 prior to modification by Local Transport Act 2008

<sup>19</sup> section 124(1) Transport Act 2000

- 3.7.2 the proposed scheme will bring benefits to persons using local services in the area of the scheme by improving the quality of those services;
- 3.7.3 the proposed scheme will contribute to the implementation of local transport policies;
- 3.7.4 the proposed scheme will contribute to the implementation of those policies in a way which is economic, efficient and effective; and
- 3.7.5 any adverse effects of the scheme on operators will be proportionate to the improvement in the well-being of persons living or working in the area of the scheme and in particular in the achievement of the other objectives.

This is a potentially achievable test, although clearly there is scope for challenge by operators on the proportionality of any scheme, where such operator believes that they will suffer significant adverse effects.

- 3.8 If a QC is made then it will provide the authority with the power to "grant to another person the exclusive right to operate the local services to which [each] contract relates".<sup>20</sup>
- 3.9 Where QCs are let, the LTA would be under an obligation to monitor the extent to which they are complied with. Enforcement is contractual by the LTA which has implemented the QC, rather than by the traffic commissioner as is the case with a QPS.
- 3.10 The 2000 Act sets out detailed notice and consultation requirements for any scheme<sup>21</sup> including an express requirement to consult any operators who the authority believe will be affected by the scheme.
- 3.11 The 2008 Act has amended the requirements for approval within the 2000 Act, with an independent QC board reviewing the proposals for a quality contract<sup>22</sup>, and approving or recommending amendments to any proposals. Making a scheme in accordance with the proposals will mean that appeals are limited to points of law (and

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<sup>20</sup> section 124(4)(a) Transport Act 2000

<sup>21</sup> section 125 Transport Act 2000

<sup>22</sup> s 126 - 126E Transport Act 2000 and draft Quality Contracts Schemes (QCS Boards)(England) Regulations 2009

not fact)<sup>23</sup>. Where a scheme is made that does not fully accord with the recommendations of the QC board, then an appeal will also lie with operators in respect of matters of fact.<sup>24</sup>

- 3.12 The LTA can make a scheme once it has responded to any recommendations that are made by the QC board to its proposals<sup>25</sup>, and then has six months to make the scheme. The scheme cannot come into operation for a further six months, and can come into operation on a staggered basis if required.<sup>26</sup>
- 3.13 Operators can appeal a scheme which has been made, with the possibility of orders being made by the Transport Tribunal that an authority must reconsider matters within the scheme, consult further on certain aspects of the scheme, or vary the scheme. If the Transport Tribunal determines that there are defects in the scheme which cannot be rectified then they may quash the decision of the authority to make the scheme<sup>27</sup>.
- 3.14 QC schemes can last for a maximum of ten years<sup>28</sup>, with each extension of the scheme also being for a maximum of ten years. It is worth noting that a separate process<sup>29</sup> must be carried out in order to continue a scheme that has been made.

### **Application to the NGT Scheme**

- 3.15 In theory a QC would seem like an ideal mechanism for delivering high quality bus schemes, including trolley vehicle based-schemes, and would therefore appear suitable both for the preferred option and next-best option. Use of tendered agreements would allow a LTA to competitively tender the operation of NGT by one or more operators and potentially also for other integrated services, allowing the creation of a viable high quality integrated network. The QC would also potentially allow the LTA to build an optimised network, ensuring that other services complemented, rather than conflicted, with the NGT scheme.

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<sup>23</sup> s 127A (5) Transport Act 2000

<sup>24</sup> s 127A (4) Transport Act 2000

<sup>25</sup> s 127 (1A) Transport Act 2000

<sup>26</sup> s 127 Transport Act 2000

<sup>27</sup> s 127B (5) Transport Act 2000

<sup>28</sup> s 127(2)(c) Transport Act 2000

<sup>29</sup> s 131A-131F Transport Act 2000

- 3.16 However, on evaluation of the approach, a number of significant problems with the use of a QC for the NGT scheme become apparent.

*Challenge and timing risk to delivery*

- 3.17 As noted above, final secondary legislation and guidance has yet to be completed, and is still open to consultation<sup>30</sup>. At this stage in the process it is difficult to determine precisely when the DfT will introduce this secondary legislation and guidance which creates a problem in terms of certainty of programme. If the Promoters were to proceed with the NGT scheme based upon the use of a QC they would currently not know, for sure, when they could introduce the scheme.
- 3.18 This certainty issue is made more difficult by the possibility of operator challenge. Whilst decisions should not be based purely upon threatened challenge, there is clearly a risk that incumbent operators could see themselves as risking significant parts of their business if a QC were to be introduced and such operator failed to win tenders for quality contracts under the QC scheme.
- 3.19 It therefore seems at least possible that operators with significant market share may challenge any scheme which could potentially undermine part of their business. Even where an operator would be expected to have a significant chance of winning any QCs tendered due to their existing position in the wider market this will not necessarily mean that they do not seek to challenge such schemes. Again, there is no clarity as to what impact this will have on delivery, but as a related example, bus operators are currently challenging (through a judicial review of the DfT) the validity of concessionary travel on similar human rights grounds as those which have been suggested as applying in the case of a QC. Whilst, to date, they have not had any success in court, the claim is still outstanding, with the possibility of appeal to the Court of Appeal and Supreme Court, should they fail at first instance. A similar length of delay could occur were operators to challenge a QC although it may be possible to expedite any such legal challenge to an extent. Not only does the risk of such a challenge remove certainty of investment for a LTA (if such a challenge is successful it would remove the proposed legal protections to lock in benefits achieved from investment in facilities), it would also cause concerns for any party bidding for

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<sup>30</sup> <http://www.dft.gov.uk/consultations/open/qcs/>

quality contracts under a QC scheme whilst such a challenge existed, as there would be a risk that the contracts would be set aside at a later date as *ultra vires*.

3.20 Whilst this is a potential risk with the introduction of any QC, there are a number of reasons why it is potentially more significant with a QC being used to implement a scheme such as the NGT scheme:

3.20.1 The NGT scheme would potentially be introducing a new mode of transport (trolley vehicle or high quality bus solution) into quite crowded transport corridors. It would therefore be necessary to very carefully define the scope of the scheme, to avoid unintended adverse effects. This will increase the risk of challenge from operators who may feel that they will be affected;

3.20.2 The NGT scheme is introducing a high quality rapid transport mode. Again, care will need to be taken to ensure that the scheme definition does not adversely affect other transport on the corridor;

3.20.3 The preferred option for the NGT scheme is a trolley vehicle-based system, not a conventional bus service, making the arguments which may be raised to challenge such a scheme potentially different and more varied than may apply to a typical "bus-based" QC. In particular, the potential arguments regarding limbs (d) and (e) in section 124 of the 2000 Act<sup>31</sup> are likely to be more complex. Whilst this does not fundamentally alter the challenge risk for the scheme, it potentially increases the delivery risk, whilst QCs are still an untested mode of delivering transport schemes.

3.21 It is also worth noting that the QC only deals with operational aspects of the scheme i.e. delivery of services. Therefore, if a QC were used, the Promoters would also have to separately promote relevant powers in respect of building fixings (in the case of a trolley vehicle solution), land acquisition, planning permission etc for the system. Whilst the same argument applies, in part, to delivery of a scheme using either VPAs or QPSs, the risk is greater with a QC, due to the need for a further, separate, enquiry process. This potentially increases the number of points of failure for delivery of the

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<sup>31</sup> (d) the proposed scheme will contribute to the implementation of those policies in a way which is economic, efficient and effective; (e) any adverse effects of the proposed scheme on operators will be proportionate to the improvements in the well-being of persons living or working in the area to which the proposed scheme relates and, in particular, to the achievement of the objectives mentioned in paragraphs (a) and (b).

NGT scheme using a QC. If any of these legislative processes failed or were delayed this would impact on delivery of the overall system.

- 3.22 Similarly, many of these processes would be supported by having an appropriate QC in place, but the scheme itself would not necessarily be able to be progressed until the time period in which the infrastructure was already being constructed. There is nothing in the DfT guidance which deals with dual promotion of planning and Compulsory Purchase Order (CPO) powers in respect of a system and the promotion of the linked QC.
- 3.23 This potentially creates a timing difficulty - there will be no certainty about the success of the QC at the point when the infrastructure is being initially procured, making it difficult to confirm that investment will be locked-in. Additionally, the acquisition of land and rights to construct the NGT scheme cannot easily be supported by the presence of guaranteed quality contracts to support delivery of high quality services, as the QC will not be in place at that point. This may cause difficulties for any necessary CPO, as the absence of a QC could be seen as an impediment that may block the implementation of the CPO. Compulsory purchase guidance advises that CPOs should not be confirmed where such an impediment to implementation exists<sup>32</sup>, so it may be impossible to acquire the necessary land while the QC remains unconfirmed.
- 3.24 Overall, there are therefore significant programme and delivery difficulties with using a QC for the NGT scheme.

#### *Duration*

- 3.25 Additionally, the original QC would only last for 10 years, and therefore contracts are also capped at 10 year duration. The Promoters would therefore have to ensure that the contract let under the NGT Scheme was established in a way that ensured appropriate competition at the end of the initial 10 year contract otherwise there would be a risk that on a re-letting, there may be no way of judging value for money. The QC would probably therefore have to contain appropriate information requirements to ensure that transparency of pricing could be achieved on a re-let, and

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<sup>32</sup> ODPM Circular 06/2004, *Compulsory Purchase and the Crichton Down Rules*

impose appropriate handback conditions (where an operating and maintenance contract was let), to ensure that the vehicles were returned in an appropriately maintained condition. This would include any contracts let for services which integrated with the main NGT services (e.g. if feeder services were let under QCs).

- 3.26 It is also worth noting that the continuation process carries with it an appeal process, and therefore there would be the possibility of appeals by operators against the continuation of the scheme after 10 years. The Promoters would therefore need to consider whether they are comfortable with only having a scheme that would be guaranteed to operate for 10 years, with the possibility of being able to tie in the benefits of the investment for longer, assuming that the continuation process was successful.

### **Summary**

- 3.27 The QC regime may be useful in providing a framework for providing high quality bus services, where the competitive environment is failing to deliver such services. In particular, where use of VPAs and QPSs has failed to deliver the appropriate level of service provision that a LTA requires (and believes is possible).
- 3.28 There are, however, a number of significant delivery risks which mean that this approach is unlikely to meet a number of the procurement objectives set for the NGT scheme, in particular in terms of certainty of deliverability. The risks inherent in introducing an untested regime for delivery of bus services, with a delivery framework which is still awaiting final guidance, and with a high possibility of challenge by bus operators (whatever the scheme contents), mean that this approach would only seem appropriate for a scheme involving this level of investment if the Promoters did not have less risky options. The need for separate planning and CPO processes, in addition to the process for introducing the QC highlights the fact that this would be a complex way of delivering a trolley vehicle scheme. It is also worth noting that, until the Transport Act 2008 provisions have been brought into force, a QC would be unlikely to be a viable route for delivery of such a scheme, due to the availability of other options, which means that a QC would not be the only means practicable (for example, see the potential use of a TWAO, as set out below).

## 4. TRANSPORT AND WORKS ACT ORDER (TWAO)

### Introduction

- 4.1 The Transport and Works Act Order<sup>33</sup> (TWAO) process is commonly used for the promotion of tram and light rail schemes. It has also been used for the promotion of a number of guided bus schemes (such as the Cambridge Guided busway and the proposed Manchester Leigh guided busway) in respect of the guided sections of such schemes, and necessary ancillary parts. A trolley vehicle system could also be promoted by way of a TWAO, as the 1992 Act makes specific provision for "*the construction or operation of ... a trolley vehicle system*"<sup>34</sup>.
- 4.2 TWAOs have the advantage over the other legislative frameworks discussed above of providing the powers to construct and operate a system in conjunction with the relevant planning, traffic regulation and land acquisition powers. Therefore, as with recently promoted tram systems, if a TWAO was made the Promoters would gain the ability to acquire land for the system, construct the system, exclude other services from aspects of the route through traffic regulation and orders, and let the operation of the system, with a single process including a single inquiry;
- 4.3 It is worth noting that, unlike the other legislative frameworks discussed above, the TWAO process is expressly intended to be used for trolley vehicle-based systems. The other proposed frameworks make use of legislation proposed for application to more general bus-based schemes, and apply it to a wider range of schemes, including trolley vehicles, on the basis that such vehicles can still be classified as "buses" by virtue of being passenger service vehicles.

### Summary of relevant provisions of the TWAO legislation

- 4.4 The 1992 Act states that: "The Secretary of State may make an order relating to, or to matters ancillary to, the construction or operation of a transport system of any of the following kinds ... (c) a trolley vehicle system ..." <sup>35</sup>. The 1992 Act goes on to state that "An order under section 1 or 3 above may--

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<sup>33</sup> Part I, Transport and Works Act 1992

<sup>34</sup> section 1(1)(c) Transport and Works Act 1992

<sup>35</sup> section 1(1) Transport and Works Act 1992

- (a) apply, modify or exclude any statutory provision which relates to any matter as to which an order could be made under section 1 or, as the case may be, 3, and
- (b) make such amendments, repeals and revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of any provision of the order or otherwise in connection with the order;

and for the purposes of this subsection "statutory provision" means provision of an Act of Parliament or of an instrument made under an Act of Parliament."

The process therefore gives Promoters the ability to gain, within a single order, the relevant powers for delivery of major transport schemes. This is a process that transport authorities have significant experience of using to promote major transport schemes such as trams, and typically allows for planning, compulsory purchase, operational and other powers to be granted to promoters, following a single inquiry process.<sup>36</sup>

- 4.5 It is worth noting that the order process can apply fully to a trolley vehicle system, as it is listed as a relevant mode. In respect of guided bus systems, a TWAO could only be used in respect of those areas of the system where guidance was utilised, and any necessary ancillary parts of the system, as the 1992 Act allows for extension to include other modes of *guided* transport only<sup>37</sup>, which has been extended to include a variety of potential guided bus systems by secondary legislation.<sup>38</sup> Therefore a TWAO could only be used for the guided and ancillary parts of a guided bus system. It is worth noting that the majority of the NGT scheme is not intended to be sufficiently segregated to allow for guidance along its whole (or even the majority of) its length.
- 4.6 The 1992 Act makes specific provision for model clauses to be provided for potential TWAOs through secondary legislation<sup>39</sup>. Whilst there are no specific model clauses available for trolley vehicles, there are model clauses available for tram and light rail

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<sup>36</sup> sections 6 - 14 Transport and Works Act 1992

<sup>37</sup> section 2 Transport and Works Act 1992

<sup>38</sup> Namely, the Transport and Works (Guided Transport Modes) Order 1992, SI 1992/3231, as amended

<sup>39</sup> section 8 Transport and Works Act 1992

schemes, which may be adapted to form the basis for other guided transport modes, such as trolley vehicles<sup>40</sup>.

- 4.7 As the process is already well understood, this Appendix does not seek to reiterate the requirements, save where they are specifically applicable to the NGT Scheme.

#### **Application to the NGT Scheme**

- 4.8 A TWAO could provide sufficient powers for the land acquisition, construction and operation of the core NGT scheme. Such an approach would have the benefit of a single inquiry process being used to gain approval for the key construction and operational requirements of the system.
- 4.9 Use of a TWAO for the NGT scheme also has the advantage of giving the Promoters considerable flexibility as to how they contract for the final scheme. Indeed, it would potentially allow for market testing of different contractual solutions prior to proceeding with the final procurement, as the TWAO itself would confer powers on the Promoters to operate the system, subject to constraints. Compared to other options discussed above, it is worth noting that with a QC scheme there are specific requirements that must be met in how contracts are let, and as noted above, with a QPS there are limited opportunities for contractual enforcement, save through VPAs, which carry with them additional enforcement problems. Therefore a TWAO would give the Promoters the greatest flexibility in how they obtained the final contractual solution, including determining whether a single operator operated the whole system, or whether more than one operator could use the system.
- 4.10 The use of a TWAO would allow the Promoters to specify key issues such as integrated ticketing, smart-card usage, common branding etc., even where different contractors were utilising the system - giving the single system feel, and certainty of service that as noted above is likely to be far less achievable utilising other legislative options.
- 4.11 A TWAO on its own would not, however, give the Promoters the benefit of wider integration with existing transport services (such as bus services operated by existing operators). However, to the extent that these were required, these could be imposed

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<sup>40</sup> Transport and Works (Model Clauses for Railways and Tramways) Order 2006, SI 2006/1954

by a separate QC or QPS overlaid on the NGT scheme. It should be noted that this also has the benefits that any such proposed QC scheme or QPS may not be focussed purely on delivery of the NGT scheme, but on wider benefits in integration, and could be introduced as a separate complementary measure.

- 4.12 Use of such schemes as complementary measures would mean that to the extent such a complementary scheme was challenged, it would not undermine the core benefits of NGT, whereas to the extent that such a scheme was successful, it could enhance the benefits from the NGT scheme. It would also mean that there would be no requirement to introduce such a scheme at the same time as the introduction of the NGT scheme, allowing for introduction of measures which were complementary to the actual operation of public transport services, following introduction of the NGT scheme. This has the benefit that the Promoters can both avoid impacting on the existing operations of bus operators any more than is necessary and introduce complementary schemes at a later date in a way that can be demonstrated to improve passenger benefits once the actual impact of introduction of NGT services can be assessed.
- 4.13 A TWAO process would be less appropriate where an option other than a trolley vehicle was proposed, as it would only be applicable to the guided sections of the route. However, even here, the TWAO process may be the most efficient way of procuring "off-road" sections of the scheme, and any sections of on-highway guidance. It would, however, probably have to be combined with other legislative provisions (such as those discussed above) in order to provide a full working system.
- 4.14 It should be noted that with a TWAO contract lengths are not necessarily constrained by UK primary legislation (for example, light rail schemes have traditionally had quite long operating contracts). However, EU legislation<sup>41</sup> will place constraints on the length of coach and bus contracts, which would appear to include trolley vehicle contracts (as a trolley vehicle is not a "track-based" mode), so that the operating agreements can be for a maximum of 10 years<sup>42</sup>, with any longer contracts only being possible where there is significant investment in the assets by the operator<sup>43</sup>. Therefore, even with a TWAO, the longest operating contract is likely to be 10 years.

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<sup>41</sup> Regulation (EC) 1370/2007 on public passenger transport services by rail and by road: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0001:0013:EN:PDF>

<sup>42</sup> Article 4(3) Regulation (EC) 1370/2007

<sup>43</sup> Article 4(4) Regulation (EC) 1370/2007

Unlike with a QC, however, there will be no requirement for the "scheme" to be renewed after 10 years, as the TWAO powers to operate will subsist. It will therefore only be necessary for each contract to have appropriate handover requirements to ensure that there is an appropriately level playing field for the letting of future operational contracts. This both allows a TWAO based scheme to tie in investment for the long term, but also gives a degree of flexibility, as there will be natural breaks in service contracts at least every 10 years.

## **Summary**

- 4.15 The Transport and Works Act Order approach appears to offer the legislative route best suited to the promotion of, in particular, the preferred option of a trolley vehicle based scheme. Unlike the other processes it provides a single mechanism for acquiring required land, gaining appropriate planning approvals and other associated rights and requirements, and gaining the ability to operate the system (or let the rights to operate the system). Unlike the other processes, it does not offer any significant delivery difficulties in meeting the procurement objectives.
- 4.16 The process is less optimal for options other than a trolley vehicle due to the level of guidance required for the overall scheme. Whilst this is a route that has already been used for acquiring the powers for a number of high quality guided bus schemes elsewhere in the country, it would not be appropriate for the bus options considered for the NGT Scheme, which do not generally require guidance, and could not use guidance for the majority of the route (as the route is typically not sufficiently segregated from the highway). Where the level of guidance was insufficient to allow use of a TWAO for the whole of the route, it would be necessary to combine such a scheme with quality partnerships and/or other solutions discussed above, to ensure that there was a fully operational system, making the use of a TWAO, rather than usual planning and compulsory purchase powers, unnecessary.