South Essex Rapid Transit Major Scheme Business Case

Appendix 6A Procurement Strategy for *sert* Services

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Essex County Council

THURROCK COUNCIL

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BOOSTING ADVANCED PUBLIC TRANSPORT SYSTEMS

A partnership project between Essex County Council, Southend-on-Sea Borough Council and Thurrock Council

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file note

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Project	South Essex Rapid Transit	Project No.	22149101

Subject **Delivery of Procurement Mechanisms**

Introduction

DfT Guidance[1] on Major Scheme Business Cases states that "*At an early stage authorities should consider the most suitable procurement route. Authorities are advised to conduct a fairly high level preliminary sift of a range of procurement options and shortlist maybe the 2 or 3 most viable options which should then be considered in more depth*".

This process has been adopted in developing the procurement strategy for the ***sert*** services as detailed in this paper.

Procurement of *sert* Services

This section outlines the options considered and the rationale behind the choices made in establishing the preferred operational delivery mechanisms. These were subsequently discussed in a meeting with DfT on 20th July (minutes attached as Appendix A).

Option Sifting Process

The following delivery options were considered:

- Tendered Routes - where specified services are competitively procured by the Local Transport Authority;
- Voluntary Partnership Agreement (VPA) - where local authorities voluntarily agree to provide enhanced facilities or other benefits and operators voluntarily agree to operate services in specific ways in return;
- Quality Partnership Scheme (QPS) – statutory scheme made by the Local Transport Authority requiring that operators wishing to use specific facilities provided by the Authority must operate to some minimum standards reasonably prescribed by the Authority;
- Quality Contract Scheme (QCS) – statutory scheme made by the Local Transport Authority whereby deregulation is suspended and all services in the scheme area are specified and then competitively procured by the Authority; and
- Commercial Operation - provision of services is entirely left to the market and operators could choose to use facilities provided by Authorities but with no formal Local Authority influence over service standards and network design.

[1] **Guidance for Local Authorities seeking Government funding for major transport schemes: Main document**

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The positive and negative effects of each of these options were considered, the results of which are summarised in the following tables.

TABLE 1 TENDERED ROUTES

Advantages	Disadvantages	Potential 'Show Stoppers'
Legislation is already in place and clearly understood	Requires subsidy to operate	Subsidy not available
No legal challenges to date	Subject to open market prices	Abstraction of passengers from other routes leading to wholesale service deregistration and destabilisation of wider network
2008 Transport Act allows increased standards as grounds for tendering	Potentially de-stabilises commercial network	Lack of competition if there are too few bidders
Exclusivity regarding operation of specific routes	Competition with existing commercial routes could leave open to challenge	Risk of legal challenge if considered an inappropriate use of Local Transport Act
Parts of route may have to be subsidised anyway	Size of contract will require OJEU process	
Control of the contract - therefore branding/pricing options	No protection against parallel commercial operation over part of routes	

NOTES: It may be possible with tendered routes for the ***sert*** promoters to lease vehicles to the operators for use on the services

TABLE 2 VOLUNTARY PARTNERSHIP AGREEMENT (VPA)

Advantages	Disadvantages	Potential 'Show Stoppers'
Formalised in recent legislation Potential to use penalty clauses Useful to tie up "loose ends" e.g. ticketing proposals, feeder services DfT approve of this method Can work well if there are appropriate legal agreements	Procurement issues (see notes below) No guarantee of delivery from either party to the agreement No exclusivity	No guarantees of delivery of service to specified quality or frequency. Operator could "walk away" from agreement after due notice No exclusive use of infrastructure ***sert*** branding can't be delivered

NOTES: The Transport Act sets out the principles of Voluntary Partnership Agreements between operators and local authorities – such agreement (s) would allow ***sert*** to evolve.

The new formal guidance on the Transport Act (para 47) says that the act does not alter procurement law. If there is a cash flow to the operator as a result of the partnership (whether from additional revenue or directly from the authority), the service may need to be procured. Local authorities will need to consider the risk of legal challenge to their arrangements, though this risk may in practice be low.

TABLE 3 QUALITY PARTNERSHIP SCHEME (QPS)

Advantages	Disadvantages	Potential 'Show Stoppers'
Strengthened by recent legislation DfT will be keen for authorities to use the new tools they have given them "Made" schemes, lodged with Traffic Commissioner, not an "agreement" Must be linked to specific improvements provided by the local authority A QPS can cover part of a route or area covered by a VPA Can specify standards: ▪ Quality (must be proportionate) ▪ Minimum frequency ▪ Maximum fares	Rights of objection Competition issues – cashless system, ***sert*** branding Enforcement dependent on Traffic Commissioner's resources	No exclusivity if operators meet standards May not be able to define route network ***sert*** branding can't be delivered

TABLE 4 QUALITY CONTRACT SCHEME (QCS)

Advantages	Disadvantages	Potential 'Show Stoppers'
Legislation in place Controls fares Controls frequency and routes Exclusivity allowed	Untested - disadvantage of being the pioneer Danger of "planning blight" Affordability Value for money from public purse Takes a long time to implement	Need to prove that other methods won't work Opposition may repeal legislation Risk of large destabilisation of other services in area Breakdown of effective relationships with operators

NOTES: A Quality Contract Scheme will see services procured through individual Quality Contracts. These are, in essence, a special kind of tender. To date there are no Quality Contracts in the UK. However the potential exists as an option of last resort if co-operation under less onerous arrangements is unsuccessful. There is considerable flexibility available in the size of a Quality Contract scheme e.g. it could just be used for ***sert*** operations or could be a wholesale area scheme covering bus operations as well.

TABLE 5 COMMERCIAL OPERATION

Advantages	Disadvantages	Potential 'Show Stoppers'
Legislation in place	No control No certainty Does not satisfy DfT investment requirements	Risk of conflicts between bus operators Scheme promoters have no control at all over operation No guarantee of delivery

Rejected Options

Following the sifting process, Quality Contracts and Commercial Operations were both considered unsuitable.

Whilst a Quality Contracts Scheme (QCS) would deliver ***sert*** to the exact standard and quality required, their implementation would require that the other mechanisms had been explored and been shown to fail to deliver the desired service, an outcome that is not envisaged. In the unlikely event that a quality contract is the only remaining mechanism to deliver ***sert*** however, then Quality Contracts would be used.

Commercial operation without any constraining agreement in place would not provide any guarantee of long term delivery of the desired service level and quality to justify the capital investment involved.

Preferred Method for Service Procurement

Whilst each mechanism was initially considered in isolation, it was determined that a combination of QPS, VPA and Tender Route was most likely to be appropriate to ***sert***. Specific restrictions apply to each option and these are considered in Table 6.

Quality Partnership Schemes (QPS)

QPS should be 'made' by the Local Transport Authority for any pieces of infrastructure or other qualifying facilities that are provided as part of the ***sert*** scheme. Typically these will include but not be limited to segregated busways, bus lanes, priority through signalled traffic intersections, enhanced stops and interchanges. It is important to note that, whilst these QPS should be made to support ***sert*** standards, operators who meet these standards on bus services cannot be excluded from these facilities.

Commerciality – Critical to Tender Route, VPA and a Combination of Both

Fundamental to the exact arrangement used will be whether the day to day operation of ***sert*** services can be delivered commercially by operators, to the standards required, for all or part of the day.

Option 1 - Route Tendering

If it is determined[2] that the day to day operation of ***sert*** services (at the frequencies envisaged, to the quality standards required and at fare levels comparable to adjoining commercial bus services) is unlikely to deliver sufficient net revenue to be able to be provided commercially, then option 1, route tendering, is a straightforward and capable tool for delivering ***sert***. However, it would imply that the ***sert*** operation would need ongoing financial support for day to day operation.

This option is eminently suitable if vehicles meeting the ***sert*** specification are procured by the promoters and leased to one or more operators.

Option 2 – Voluntary Partnership Agreements

If it is determined[2] that the day to day operation of ***sert*** services can be fully provided commercially by one or more operators (probably by virtue of high margins at some times of day cross-subsidising the costs of operation at quieter times), then the appropriate mechanism to guarantee delivery of ***sert*** services to the standards required is through VPA. VPA can ensure delivery of ***sert*** services to most of the standards required commercially by one or more operators, so long as both operators and local authorities are prepared to make such agreements.

[2] This 'determination' could be by demand/financial modelling techniques and/or by negotiations with operators to ascertain their willingness to operate the services.

Combination of Options 1 and 2

Much more likely is that ***sert*** operation would be commercial for parts of the day (typically Monday to Saturday 0700 to 1900) but not at other times. This suggests that a combination of VPA and tendering would be the appropriate mechanism, however this brings complications. It is common for bus services to be provided by two operators, one operating commercially during the day, and another under a local authority tender in the evenings and on Sundays. This results in a reasonable provision for the user, but means that liveries, and often fares, vary between different times of day. The evening operator provides buses it uses on other routes during the day. For ***sert*** services, this raises an interesting problem as a key requirement of the scheme is for distinctive vehicles to specific standards. This leaves two possibilities: a) only the daytime operator can validly tender for the evening work or b) a lower standard of vehicle would have to be acceptable for evening services.

The solution would seem to depend on the losses that would be incurred by the daytime operator if it were to run the evening services commercially.

If the losses are very small, the operators might be persuadable, perhaps through judicious use of QPS to provide more 'protection' to the operator, to undertake through the VPA to run these services without subsidy. The long term sustainability of such an operation would depend on ***sert*** services seeing good growth in patronage and revenue over time.

If the losses are quite low, but beyond the operator's means to absorb, then it is possible for the local authority to enter into a 'de-minimis' tender agreement whereby a subsidy is paid direct to the operator without a competitive tender. Not surprisingly, there are limits on how this procedure can be used.

If the losses are quite high, but it is deemed essential to use the same vehicles during the day and evening, it may be feasible to put the whole service out to tender. This option is feasible at the initial date of operation, but would be difficult to bring about if a commercial daytime ***sert*** operation was already in place.

The Broader Picture

It is possible that operators can provide ***sert*** services wholly or largely commercially, but that the introduction of the ***sert*** routes leads to parts of the existing bus network becoming unviable. A study is being carried out on the impacts of ***sert*** on bus operations so that the full consequences are understood. This will also help to inform future discussions with bus operators.

sert services could also be considered as part of a much broader assessment of overall bus provision which could well include significant adjustments to existing bus services so as to complement and support ***sert***.

Satisfying the sert Specification and Other Criteria

What can be achieved between the various options above is constrained by procurement and competition law, even though the Local Transport Act 2008 introduces lower constraints on competition. Table 6 should assist in assessing how and what the different mechanisms considered can deliver:

TABLE 6 HOW DIFFERENT DELIVERY MECHANISMS CAN PROVIDE FOR *SERT* REQUIREMENTS

Criteria	Op 1: Tender Route	Op 2: VPA	Ops 1+2	Op 3: QPS	Op 4: QC	Op 5: Commercial Operation[3]
Technical vehicle standards	Y	Y	Y	Y	Y	Y
Standard livery for ***sert*** operators	Y	N[4]	N	N	Y	N
Active Control Centre	Y	Y	Y	N	Y	Y
Specified service levels	Y	Y[5]	Y	Y[5]	Y	Y
Co-ordinated timetables between ***sert*** operators	Y	Y	Y	Y	Y	Partially
Simple fare structure	Y	Y	Y	N	Y	Y
Maximum fares	Y	Y	Y	Y	Y	N
Specific fares across all ***sert*** operators	Y	N[6]	N	N	Y	N
Off-vehicle ticketing	Y	Y	Y	N	Y	Y
Protection from competition	N	N	N	Some	Y	N
Easy to deliver	Y	Medium	Medium	Y	N	Y
Subsidy Requirement	Y	N	Y	n/a	Y	N
Risk of legal challenge	Medium	Low	Low	Low	High	N
Likely to meet DfT MSBC approval	Medium[7]	Y	Y	Y	Y	N

[3] A 'Y' in this column means that one or more commercial operators can choose to provide this standard, but there can be no enforcement of delivery of it. An 'N' says they are forbidden from doing so.

[4] This potentially falls foul of competition law as it would stop passengers being able to distinguish between operators and therefore stop them making fare based choices between operators

[5] Can only include minimum service levels

[6] A VPA cannot contain any agreement on actual fares to be charged as this would be considered a 'cartel' and fail competition law.

[7] The risk here is that DfT MSBC approval may not be forthcoming if it appears that the services cannot be operated commercially in the long run.

Conclusions

There is no singular path that meets all criteria for procurement of the ***sert*** services, rather a combination approach would be best adopted as follows:

- for all ***sert*** infrastructure propose Quality Partnership Schemes to define minimum standards necessary to use that infrastructure;
- initially offer the ***sert*** routes as tendered services using vehicles purchased with ***sert*** capital finances and leased to the winning operators. These tenders should include all day operation and lay down the service standards required and the fares to be charged. Bidders could be given the opportunity to bid on one or more of a gross, net or revenue share basis;
- as ***sert*** matures in parallel with South Essex development, it is likely that the services will become close to break even and then profitable. At this stage, having set the operating standards and commercial ticket arrangements, it should be feasible to look at transferring the services to the private sector, but with Voluntary Partnership Agreements in place to protect standards;
- by such time, it is likely that one or more Quality Contract Schemes will be in place elsewhere in England. This mechanism could provide a last resort to deliver the ***sert*** scheme without falling foul of procurement or competition law.

Appendix 1: Minutes of Procurement Meeting with DfT, 20 July 2009

meeting note

Venue	Department for Transport, Great Minster House, London, SW1
Date	20 July 2009
Attendees	**DfT:** Carl Sutcliffe, Mike Acheson, Umran Azir, Robert Fox,
	***sert*:** Sean Perry, **John Pope,** Nigel Astell (ECC) Chris Ferrary, Tony Walmsley (SDG)
Circulation	Project Team; Ed Vokes (Thurrock) Paul Mathieson (Southend BC)
Project	South Essex Rapid Transit (***sert***) Project No. 221491-01
Subject	**Procurement of Infrastructure and Services**

ACTION

1. NA gave the background to the project, based on the presentation previously circulated. The fact that the project is a partnership between the three Highway Authorities in TGSE was stressed. The nature of BRT generally was discussed, together with the basis of cost estimates for infrastructure.

2. The basis on which the routes to procurement of ***sert*** infrastructure and services should be presented in the MSBC submission was discussed. CS indicated that DfT would like to see: NA/CF

- More than one option presented;
- Implications for VFM and deliverability spelt out; and
- Commentary on how quality of outputs would be ensured.

  This should be backed up with analysis of the preferred approach and a 'next best option. Evidence of discussions with **several** bus operators should be presented to demonstrate deliverability as far as can be done at this stage.

3. Reference was made to the DfT Guidance on the partnerships approach that was issued in March 2009. The DfT view is that the recent legislative changes have opened up opportunities. The role of the scheme and the method of procuring services in the potential growth of the public transport market overall should be highlighted, indicating the potential for ***sert*** to benefit existing services (e.g. through more extensive availability of bus priority measures and a general uplift in the quality of the public transport offer in TGSE).

4. MA commented that the MSBC needed to demonstrate deliverability, VFM and compliance with Procurement Rules. For infrastructure elements of the scheme, it is likely 'traditional' local authority routes for procurement is used. MA suggested involvement of corporate Heads of Procurement at the partner authorities in developing the options, and seeking legal advice to ensure the robustness of the options presented.

   JP confirmed that 'traditional' procurement for the infrastructure and RTI elements of the scheme was likely. He also noted that this will need to be discussed with Procurement Teams. One approach could be for a single delivery vehicle to procure ***sert*** infrastructure across the TGSE area on behalf of the 3 authorities. CF observed that there were precedents where the three partner authorities have set-up joint legal agreements (e.g. waste management).

5. TW briefly set out the Project Team's current thinking on likely procurement options, i.e.:

- Tendered services, with vehicles bought/leased by the public sector under powers from the extension of 1986 Act;
- A Voluntary Partnership Agreement under the 2008 Act with the existing bus network merging with ***sert***, with operators providing the vehicles; or
- A Quality Contract under the 2008 Act, as a last resort.

   A revenue-sharing arrangement may be preferred. The measures envisaged to avoid the introduction of sert destabilising the existing bus network should be indicated.

   JP observed that most of the ***sert*** routes are likely to be able to be operated on a commercial basis, and that there could be more than operator interested in the routes. A base level exists for ***sert***, and enhancements brought by the new services should enable this to grow. The ***sert*** network is potentially big enough to attract an entirely new operator, not presently running services in TGSE.

6. CS invited the Project Team to submit the draft version of the procurement sections of the MSBC informally to DfT for comment prior to finalising the document (to CS, copy to RF) This is very much the preferred approach of DfT. NA/CF