

Edinburgh Tram Project – Governance Arrangements

The City of Edinburgh Council

20 August 2009

1 Purpose of report

- 1.1 This report sets out proposals for changes to the governance arrangements within tie Ltd, TEL and Lothian Buses in preparation for moves, by 2011, towards a unified company providing provide integrated bus and tram services across Edinburgh and the Lothians by 2011. The report seeks Council approval for the required changes.

2 Summary

- 2.1 In May 2008, the Council entered into separate operating agreements with tie Ltd and TEL in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network (Lines 1 and 2). A number of changes to the existing governance arrangements are now required to enable the transition towards the integration of tram and bus services in Edinburgh and the Lothians.

- 2.2 The changes proposed involve drafting and agreement of a revision of the current Memorandum of Understanding between the Council, tie Ltd and TEL, and revision of the Operating Agreement between the Council and TEL. These changes facilitate the transfer of tie Ltd's shares from the Council to TEL. Other significant changes will include:

- ~~the transfer of tie Ltd's shares from the Council to TEL;~~
- the revision of the Boards of tie Ltd and TEL to ensure that TEL has the necessary skills and resources to oversee the entire Tram Project through from construction, into operation and ongoing maintenance;
- arrangements for the delivery of the prospective Gogar Intermodal Station by tie Ltd, on behalf of Transport Scotland;
- revised provisions relating to remuneration matters within tie Ltd and TEL;
- clarification of the role of the Council's Tram Monitoring Officer (TMO) so as to avoid any potential future conflict of interests; and,

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Comment [CM1]: As far as I can recall there was no prior tripartite agreement, this is new.

- variation to the scope of delegated authority given by the Council to TEL to ensure that the Council has the ability to manage the costs of the project tightly closely.
- effecting any consequential changes to the Memorandum and Articles of Association for each company which may be necessary given the uncertainties that have emerged from disputed matters between tie Ltd and BSC, the contractor consortium responsible for delivering Edinburgh's tram system.

3 Main report

- 3.1 Sound and effective corporate governance is crucial to the long term success and sustainability of any business. In the case of tie Ltd and TEL this is especially important given their contractual statutory responsibilities agreement with the Council accepting its statutory responsibilities for managing public funds in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network and, in due course, its planned integration with public bus services in Edinburgh and the Lothians.
- 3.2 Work on the completion of Line 1a (Edinburgh Airport to Newhaven) is now well underway and it is timely and appropriate to make revisions to existing corporate governance arrangements to ensure that the remainder of the construction project can be managed, as effectively and efficiently as possible, in anticipation of the move, in 2011, towards a unified single company providing integrated tram and bus services.

Memorandum of Understanding

3.3 It is proposed that the Memorandum of Understanding amongst the Council, tie Ltd and TEL will reflect the changing situation described above, be subject to a number of changes. The practical impact of these changes will be that:

- While day to day management of the Tram Project will remain with tie Ltd, all strategic and other material decisions will be made by TEL and direction will be given to tie Ltd on such matters, through the Tram Project Board.
- The settlement of any claims and payments will be within the control of TEL and the Tram Project Board, subject to overall scrutiny as described below.
- Remuneration matters will be monitored and controlled by the Remuneration Committee of the TEL Board following policy principles to be agreed by the Council's Chief Executive (including success criteria for payment of staff bonuses).
- Tie Ltd will no longer be required independently to produce a business plan (its plan will be subsumed within the business plan prepared by TEL).
- Tie Ltd will have no authority to approve changes to contractual arrangements, scope, programme, cost or other substantive aspect of the Tram Project except under an expressed delegation of authority to tie Ltd by TEL or the Tram Project Board.

Comment [CM2]: Need to be careful here and ensure that the Chief Executive has delegated power from Council to set the milestones. Express recommendation to that effect may be required.

Comment [93]: This is uncomfortable for me. Where is the control on affordability? Is there scope for Equal Pay claims from Council staff using tie and TEL staff as comparators?

Comment [CM4]: This is very sensitive politically and financially. It has already been mentioned to the IPG that this is an area of risk for the Council in the current economic and political climate. The Council needs to exercise greater control over the overall salary and bonus package. That has previously been left with tie who then effectively tell the Council how much it requires to run the company. In my opinion the Council requires to have greater visibility and accountability from its companies. All of the company expenditure is derived from public funds.

Comment [95]: This worries me vis a possible perception that tie is being allowed to abdicate its responsibilities to TEL. Is there a robust safety valve to stop this becoming a reality?

- The Tram Monitoring Officer (TMO) will no longer formally be a voting member of the Tram Project Board or TEL but will continue to attend meetings, ex officio, as required.

3.4 The terms of the tie Ltd Operating Agreement of 2005 otherwise remain extant except where superseded by the Operating Agreement of May 2008 and the revised Memorandum of Understanding as summarised above.

TEL Operating Agreement

3.5 In addition to the above proposals for changes to the Memorandum of Understanding, the Operating Agreement between the Council and TEL will be subject to a number of changes to better regulate the relationship between the parties with regard to the delivery of the tram system and its operation, in due course, as part of an integrated tram and bus network. It is acknowledged that this agreement will require further adaptation prior to the operation of the tram system, including the transfer of Lothian Buses' shareholding to TEL.

TEL's Obligations

3.6 The Operating Agreement places obligations upon TEL and the Council as summarised below. TEL's main obligations include:

- the provision of services to the Council to assist in, carry out, promote, manage and administer the Edinburgh Tram Project;
- ensuring a general duty of care to the Council in respect of third party advisers and contractors it may engage with;
- using its best endeavours to deliver the project within the timescale and budget of the Final Business Case;
- managing tie Ltd to deliver the project within the terms of the tie Operating Agreement;
- the formation of sub-committees, where required, to execute its duties, ensuring that its Board of Directors employ the requisite blend of skills, experience and aptitudes;
- ensuring that it remains properly resourced to provide the required services and complies with the terms of its funding agreement;
- compliance with relevant health and safety, equalities legislation (including best endeavours in relation to contractors and other third parties) and also with the Freedom of Information Scotland Act;
- securing appropriate insurance cover, including corporate public and products liability and professional indemnity policies;
- using best endeavours to ensure best value in the use of funds provided by or through the Council;

Comment [96]: In my opinion, the TMO should not be a formal Board Member of either tie, TEL or Lothian Buses to be completely objective. A non-voting membership feels like a fudge.

Comment [CM7]: Comment 96 above is agreed. At best the TMO should have observer status only. There is a creeping culture of drawing Council officers in to participate in what should be tie/TEL decisions as the contracting parties

Comment [CM8]: There is an issue here as to whether the FBC has ever been formally amended and thereafter approved by the Council. I wonder also about the validity of an FBC which was approved by Council 2 ½ years ago.

Comment [99]: Feels too vague

Comment [CM10]: Comment 99 is spot on. The Council has a very clear statutory duty under the 2003 Act to secure best value. In addition to that the Council is a party to the Funding Agreement with Transport Scotland. At very least we should be insisting that our duties under statute and by way of grant award are imposed back to back upon TEL.

- adherence to the Council's Code of Corporate Governance (approved 29 June 2006);
- providing access by to the Council, its auditors and other delegated appointees, to financial and other information, as requested; and
- determining and reporting to the Council all relevant matters affecting the programme, cost and scope of the Tram Project.

Comment [911]: Is this not a given in the same way as compliance with Health & Safety standards?

3.7 The agreement reserves, to the Council, any programme, scope and cost changes involving:

Comment [912]: I'm not clear on the import of this word? Again, I'm worried about ostensible abdication of duties

- any actual or reasonably expected delay to the Project revenue commencement date of over 3 months beyond the baseline date;
- any actual, or reasonably expected, increase in the capital cost of the project beyond £1,000,000 of the baseline programme cost; and,
- any substantial change to the design, scope or service pattern set out in the Final Business Case.

Comment [CM13]: Council should be clearly advised what the baseline date is. I am not sure if the intention is to specify that in the other report to Council for 20 August.

Comment [CM14]: See comment CM8 above, has FBC already been changed since approval ?

3.8 TEL is required to liaise with the Tram Monitoring Officer, the Council (and any other bodies which the Council may specify) and report, on a four weekly and annual basis, on financial matters, and notify the TMO immediately it becomes aware of the likelihood of delay to, or overspend in the project.

3.9 Provision has been made in the revised TEL Operating Agreement for tie Ltd to have its remuneration policy approved by the TEL Board setting out the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any bonuses are linked. TEL's Board will also be required to have its remuneration policy approved annually by the Council's Chief Executive. The remuneration package of the Chairman of TEL and tie Ltd will, upon appointment, be required to be approved by the Council's Chief Executive, as will any changes thereafter.

Comment [CM15]: Tie will still have the majority of employees after the share transfer. We must be clear that Council controls overall budget for salaries and bonus for tie and TEL. If matter is one for the Chief Executive, authority may need to be delegated to him by Council.

3.10 TEL will also be required, as a matter of course, to:

- protect the Council's reputation in matters relating to the project;
- not novate, or otherwise transfer, any rights or obligations under any contractual arrangements without the prior written consent of the TMO;
- liaise regularly with the Council on publicity and communications arrangements; and
- help the Council properly discharge its responsibilities and obligations relating to the maintenance of roads and structures which are integral to the tram system.

Council Obligations

3.11 The Council's main obligations under the revised operating agreement with TEL include:

- authorising TEL to operate within a revised delegated authority structure (see Appendix 1);
- providing guarantees in relation to TEL's financial obligations for certain aspects of the project;
- releasing funding to enable TEL to discharge its obligations under the terms of the agreement;
- nominating a Council officer (the Tram Monitoring Officer) to act as a day to day liaison point for communications with TEL;
- ensuring adequate personnel are made available to the project;
- approving any work that TEL may undertake on other projects;
- waiving its rights to claim against any director, officer or employee of TEL (save in respect of any criminal, fraudulent or wilfully negligent action by any such person); and
- facilitating the integration of the operations of trams and buses in the City of Edinburgh to help the Council, tie Ltd, Lothian Buses and TEL function as a single, co-ordinated entity in the delivery, management, operation and ownership of an integrated transport system.

Comment [916]: Why? Is this safe from a Council perspective?

Comment [CM17]: I cannot recommend acceptance of this to the Council. The likelihood of pursuing a "family member" is remote, but I do not recommend binding the Council not to so pursue.

Gogar Intermodal Station

- 3.12 As a key element of the planned Edinburgh-Glasgow improvement programme (EGIP) for rail connectivity in central Scotland, Transport Scotland wishes to ensure that a tram, train, bus interchange is completed at Gogar. The new station will enable rail passengers connecting from the Fife line to transfer easily from train to tram or bus, and vice versa, improving significantly ease of access to Edinburgh Airport, the City Centre and all other parts of the tram and bus network.
- 3.13 Transport Scotland has asked tie Ltd to manage the delivery of the Gogar Intermodal Station, ensuring that it is programmed for completion at the same time as the tram network opens for revenue service operations. Initial modifications have been made to the Memorandum of Understanding to accommodate this project and further changes may be required as formal legal agreements are firmed up. These will be reported to the Council, in due course, and any changes which may require a revised business case to be prepared will be brought to the Council for its approval.

Comment [918]: What is the sequencing of this work and will it impact on tie's delivery of the tram infrastructure?

4 Financial Implications

- 4.1 The proposed changes to governance arrangements between the Council, tie Ltd and TEL aim to streamline and clarify the current approach and achieve further progress towards the ultimate goal of achieving integrated public transport services in the City of Edinburgh. The proposed arrangements will help reduce overlap and duplication of effort by reinforcing a combined team effort, with clearly defined roles and contributions, to help deliver a high quality tram system for the City. The proposed improvements will help to better

Comment [CM19]: This has already been flagged as a possible risk for the Tram Project and for the Council. Not sure if it is capable of mitigation.

regulate the relationship between the Council, tie Ltd and TEL and achieve improved cost efficiency in the management of the project.

Comment [920]: Nothing here about affordability overall and of bonus payments specifically. Need also to comment on the costed Risk Allowances and their hypothecation rather than just being treated as another part of the overall budget.

5 Environmental Impact

- 5.1 The development of integrated public transport services within the City of Edinburgh will help to improve mobility into, out of and across the City and provide a viable alternative to private car use. The revised governance arrangements proposed in this report should help to enhance the prospects of the Council's goal of integrated public transport being realised, as well as delivering a more resource efficient approach to project delivery.

6 Conclusions

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6.7 Recommendations

- 6.7.1 a) The Council is asked to approve the key changes to corporate governance outlined in this report and to delegate, to the Chief Executive, the authority to sign the revised versions of:
- The Memorandum of Understanding among the Council, tie Ltd and TEL; and
 - The Operating Agreement between the Council and TEL.
- b) The Council is asked to approve that the consequential changes that will flow from the revised corporate governance arrangements should be implemented as quickly as possible, and to ask the Chief Executive to report on their implementation no later than December 2009.

Comment [921]: Very wide??

Dave Anderson TNA?
Director of City Development Chief Executive

Appendices 1

Contact/tel/Email

Wards affected

Single Outcome Agreement

Background
Papers

General:

- Needs the governance diagram added
- Needs commentary about Lothian Buses Plc shares coming into TEL
- Needs comments about Non Exec Directors
- Needs to comment on affordability and have a stronger data set

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