

# EDINBURGH TRAM NETWORK GOVERNANCE MODEL REVISION – JULY 2009

This note captures the points of principle discussed and agreed at a meeting on 28.7.09 involving Tom Aitchison, Dave Anderson and Donald McGougan from CEC, David Mackay, Richard Jeffrey of tie / TEL and Graeme Bissett (advisor). It is recognised that legal advice on the drafting of the agreed positions is now required.

The note is supported by revised drafts of the Family Memorandum of Understanding (MoU) and the TEL – CEC Operating Agreement (TEL OA). These revised drafts are amended versions of the documents received from CEC Legal on 15.7.09. In addition to the points of principle described below, a number of more minor and hopefully uncontentious changes are highlighted on the face of the MoU and TEL OA.

A separate communication deals with Board composition.

## Model revision

The principles behind the revised overall structure are :

- Tie's shares will be transferred to TEL from CEC
- The Boards of tie and TEL will be revised, in particular so that TEL has the full complement needed to oversee the entirety of the tram project through construction and into operations, including maintenance.
- The tie Board retains its normal statutory responsibilities but the focus of governance over construction activity moves to TEL (away from tie), executed under delegation to TEL's sub-committee, the TPB.
- The TEL OA needs to be revised to reflect these matters.
- The tie OAs (the original 2002 "general" OA and the 2007 "tram" OA) would not be amended so that the detail of the changed arrangements are given a low profile with BSC's machinations in mind and also to preserve the documentation which supports tie's status as the Council's "in-house provider" under the procurement regulations.
- The MoU is intended to codify the relationship between TEL, tie and CEC under these new arrangements.

## **MoU**

### Status of MoU as a legally binding document

It was agreed that, despite its name, this document would be legally binding on the parties – CEC, TEL and tie. This aligns its status with the operating agreements.

### Inclusion of Gogar interchange (1.3)

It was agreed that the prospective Gogar interchange should be mentioned in the MoU, but that the drafting had to be executed such that finalisation of the MoU was not dependent upon any third party (including Transport Scotland) contributing documents or information.

### Remuneration Committees (1.6)

It was agreed that there was no requirement for a tie RemComm once tie was a subsidiary of TEL, with the TEL RemComm required to oversee and direct relevant remuneration matters for TEL and tie.

### Operations of RemComms (1.6), (1.7)

The existing model requires that the tie Board or TEL Board as appropriate deal with all remuneration matters, subject to (1) confirming to CEC that incentivisation arrangements are aligned to project milestones ; and 2) that the package for tie's Executive Chairman is approved by the Council Chief Executive.

It was agreed that these principles would be maintained in the new arrangements, so that the TEL Board through its RemComm would continue to communicate the confirmation at (1) to the Council and this would include the arrangements for tie. It would be for the TEL Board to determine matters such as salary levels and bonus structures.

The packages of the Chairman and CEO of tie and TEL will continue to be approved on appointment by the Council Chief Executive. Any changes to the packages of the tie or TEL Chairman would continue to be determined by the Council Chief Executive. Thereafter, any changes to the packages of the tie or TEL CEOs would be determined by the tie or TEL Chairman through the TEL RemComm.

### Position of Tram Monitoring Officer (TMO) (1.11)

Concern was expressed that parallel reporting channels could develop if the TMO was not a member of the formal governance bodies (TEL Board and TPB). If there is no barrier to such membership within the Council's governance rules, then the TMO should continue to be a member of the TPB and potentially the TEL Board. However, if there was a barrier to this membership, efficiency can be achieved by a commitment that the TMO should attend the TPB and TEL. The revised drafting presumes that membership is not appropriate, but this can be revisited.

### Sweeper clause specifying tie OA position in hierarchy of documents

It was agreed that a general "sweeper" clause should be incorporated into the MoU to recognize the revised position of the tie Board to ensure that the tie Board cannot be expected to take actions under the two OAs which are restricted by the terms of the MoU.

## **TEL OA**

### References to Phase 1B

These should be retained as Council policy remains that Phase 1B will be constructed when conditions and funding are right.

## Introduction of Gogar Interchange

Same comment as under MoU. A reference can be included to the possibility of revised business cases which reflect the Gogar Interchange being prepared and approved by the Council in due course.

## Statement of scope of delegated authority from CEC to TEL

It was recognised that the detailed definition of delegated authority to TEL was difficult to draft while the dispute with BSC continued. However, the principle of providing TEL with limited delegated authority was agreed and that this should be set at £1m and / or 3 months programme delay. This replaces the current authority of up to £10m and / or 3 months programme delay. These changes align the authority to that offered down the governance hierarchy to the Project SRO and the Tram Project Director. In addition, the remit of the Financial, Commercial and Legal sub-Committee of the TPB is also being changed to align with this level of delegated authority. Finally, the revised structure aligns with the revisions to the claims approval limitation, which is currently £500k or £1m in a 12 month period, the problems with which have been previously discussed.

The baseline against which these delegations are to be measured will be stated to be subject to Council Chief Executive approval rather than specified at this stage, in view of the uncertainty about BSC disputed matters. Firm baselines can be installed when the uncertainty clears.

In practice, this means that the existing baseline of £512m and July 2011 revenue commencement will continue to apply and therefore that all cost increases above £1m and delays beyond 3 months will require Council approval. In fact, as the £545m threshold is also threatened, all cost increases are currently matters reserved to the Council. The practical means to manage the current period of uncertainty will be to roll up the impact of anticipated cost increases and / or programme delays with the emerging conclusions to the BSC contractual process and seek an omnibus Council approval at the appropriate time, most likely at the December 2009 or January 2010 Council meetings.

Council officers will wish to consider how this aligns with internal Council approvals processes and it is acknowledged that further amendment may be required.

Finally, it was agreed that the proposed machinery around the components of cost and risk allowances would not be needed, with focus remaining on changes to the aggregate cost position.

## Remuneration matters

The arrangements noted above, including parallel requirements on TEL, are installed into the TEL operating agreement.

## **Next steps**

- 1. Revised drafts to be reviewed (CEC Legal) and terms finalised (CEC senior officers / CEC Legal / tie / TEL)**
- 2. DLA review – assessment (especially with respect to BSC interests)**
- 3. DLA / PwC review in support of tax planning**
- 4. Assess H&S responsibilities and ensure no conflict with OAs**
- 5. Review obligations on CEC, tie and TEL within MoU, TEL OA and tie OAs and ensure no conflicts and hierarchy clear.**
- 6. Agreement execution (MoU, TEL OA, FCLC remit) aligned with embedding of new governance model**