



EDINBURGH TRAM

Highlight Report to the Chief Executive's Internal Planning Group

29 April 2009



1 Background

This 'highlight report' is an update to the Chief Executive's Internal Planning Group (IPG) on the Edinburgh Tram Project to inform on the progress on this project and any decisions required.

A version of this report (with commercially sensitive and confidential material removed) is also to be circulated within the Council as a means of communicating progress with the Tram project.

2 Executive Summary

2.1 Matters Arising

Update on Dispute Resolution Process (DRP) and Strategic Options

Work on the DRP and Strategic Options continues with Council officers working closely with **tie ltd** to establish levels of confidence with regard to the current DRP. This will allow a full assessment of the Strategic Options to take place.

Communications Update

An update is provided on the Communications Campaign, the tram mock-up and the Open for Business marketing.

Council Reports

Five tram related Council reports will be considered at Council meetings in the next month.

Statutory Council Approvals and Consents

As the detailed design continues, there are several statutory consents that the Council must provide. These include Planning Prior Approvals, Building Warrants, Roads and Structures Technical Approvals.

Financial Update

A financial update is provided for the project which includes a breakdown of the Council's contributions and projected cash flow, including the Tram Developer Contributions.

Progress Update for Mudfa, Infraco and Tramco

An updated position on the major contracts is provided. There remains some concern about the lack of Infraco progress and that BSC have yet to provide a programme in an acceptable format.

Tram Monitoring Officer Update

No contractual claims have been submitted for approval by **tie ltd** to the TMO since the last IPG meeting. The TMO and other chief officers are now briefing political Group Leaders on a monthly basis.

Third Party Agreements

Senior level involvement is required to resolve the ongoing difficulties with Network Rail and the Bridge Agreements. This will be raised at the next quarterly Transport Scotland meeting.

CEC Resources

An update is provided on internal resources along with additional resources brought in to assist with the tram project.



2.2 Matters to Note or for a Decision

- To note the update on the Dispute Resolution Process and Strategic Options including the recap on the commercial strategy.
- To note the communications update.
- To note the reports that will be presented to the Council meetings over the next month.
- To note the position with the status of the statutory Council approvals and consents.
- To note the financial update and the Tram Developer Contributions
- To note the progress on Mudfa, Infraco and Tramco.
- To note the Tram Monitoring Officer (TMO) update.
- To note the position with the third party agreements with Network Rail and that this matter will be taken forward at the next quarterly Transport Scotland meeting.
- To note the position with Council resources.

3 Dispute Resolution Process & Strategic Options (Presented by Marshall Poulton)

Dispute Resolution Process (DRP)

DLA Piper have provided certain initial information relating to the DRP matters. A note on DRP issues is attached as Appendix 1. Further information is awaited from **tie ltd** in the context of the strategic options.

In short, there are a number of disputed issues and there appears to be a significant difference of interpretation in relation to certain terms of the contract. Realistically these points of principle will need to be agreed via the adjudication process, which may take several months. Once the broad principles have finally been established, this should allow the specific disputed issues to be agreed, hopefully relatively quickly.

Council officers will be working closely with **tie ltd** and DLA Piper over the next few weeks to establish levels of confidence with regard to the current and future disputed issues. Whilst the DRP process is fluid and unforeseen events can have a significant effect on the project, establishing confidence levels in relation to known disputes will allow a full assessment of strategic options to take place in early course and give the Council the fullest possible indication of the full range of outturn costs at the present time.

Recap on Commercial Strategy

tie ltd's commercial strategy for Infraco engagement, selected from a number of options and approved by the joint tram and **tie ltd** boards, has the following broad elements:

- Target pursuit of matters through the contractual DRP thereby exposing the detail of disputed matters to all members of the consortium and help minimise further delays by instructing the commencement of work whilst matters are being pursued through DRP.
- Use DRP as a means to the end of facilitating more constructive resolution of issues in accordance with the contract and delivery of cost and programme confidence.
- Leverage involvement of Siemens (and CAF) who are responsible for performance under the contract on a joint and several basis – up to and including replacement of Bilfinger as the civils partner in the consortium.



The commercial strategy recognises the absence of grounds so far to initiate termination of the Infraco contract without exposing **tie ltd** and the Council to significant risk of claims from the consortium, the value of the contribution by Siemens and CAF to date and the supply chain (subcontractors) assembled for the civil works.

Progress

The change in momentum and engagement over the past month has been significant and more encouraging:

- Work has commenced on Princes Street under a Supplemental Agreement (SA) which provides an equitable and constructive way forward to facilitate the consortium working flexibly when encountering impediments or obstructions and is consistent with obligations under the Infraco Contract.
- A Project Management Panel (PMP) has been established as the forum for the more constructive engagement between **tie ltd** and BSC which is a key element of the commercial strategy.
- Delivery impetus by BSC at other worksites has improved and work commenced by Infraco at the depot site on 6 April.

This progress represents achievement of most of the short “litmus tests” of progress **tie ltd** set in early March – the notable exception being the execution of all principal subcontracts and associated collateral warranties to **tie ltd** in respect of the civil engineering work being undertaken by Bilfinger.

tie ltd very much welcome the establishment of the PMP, but must also consider the reality that the authority delegated to the Bilfinger and Siemens members of the PMP to make decisions without unnecessary referral back up their respective governance and management chains remains to be proven. This is a key ingredient to successful engagement without the risk of meeting entrenched commercial resistance on existing or new issues as **tie ltd** move forward. The strength in depth of the BSC resources deployed at Edinburgh Park remains a concern and will be kept under review by **tie ltd**.

Next Steps

tie ltd are now implementing a number of interrelated workstreams and related milestones within which they will pursue assurance and confidence regarding programme and outturn costs. That confidence will be founded on their experience of effective delivery and engagement by the BSC consortium as currently constituted in the short term. This process is now 2-3 months behind the targets **tie ltd** set in early December as a result of the distractions surrounding the work on Princes Street.

The interrelated workstreams are broadly grouped as:

A. **Rebaselined Programme** – **tie ltd** have established a re-baselined programme with an open for revenue date of 23/02/12 (17/10/12 without mitigation). The remit of the PMP includes an objective to deliver a commercially agreed updated programme within 3 months of its establishment – ie by the end of June 2009. To help with engagement with BSC on this issue, improve confidence in risk allowances (and therefore cost outturn) and prepare for any referral to DRP on this issue.



B. **Key commercial and legal disagreements** – Despite the establishment of the PMP, it is likely that there has not been any softening on the key principles of commercial / contractual disagreement which have surfaced in the last 3 months over:

- Responsibility for design management and costs of design evolution
- Liability for delays to date and in the future
- Preliminaries % to be added to value of changes
- Responsibility for unforeseen ground conditions
- BSC failure to provide estimates / abide by contractual change mechanism

In addition to the analysis of delays to date **tie ltd** are procuring very detailed technical analysis of their position and potential liabilities under each of these headings and reinforcing legal opinion from Senior Counsel on the interpretation of the contract. Again this will improve confidence in the risk allowances (and therefore cost outturn) and prepare for referral to DRP on these issues if necessary.

C. **DRP/Infraco breach** - BSC did not agree to the referral of DRP1 (which related to an disputed estimate as a result of incorrect application of preliminaries) direct to adjudication and it is now being pursued via mediation. The next tranche of potential DRP issues has been the subject of internal review and preparatory work. They can be progressed through the DRP mechanism (internally in the first instance) if they cannot be resolved either through normal contract management channels or within the PMP.

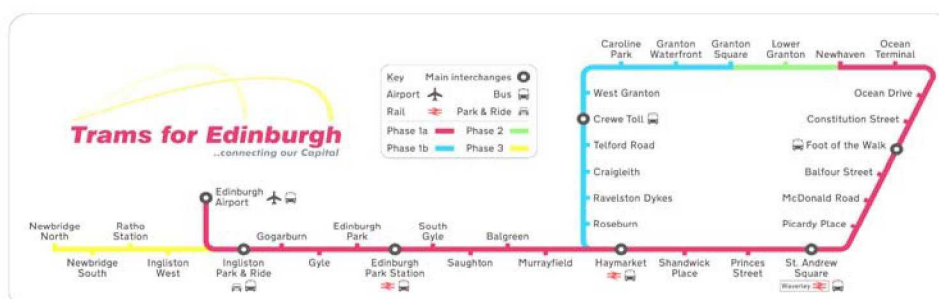
In addition to resolving specific issues of a particular commercial, contractual or programme critical nature, **tie** continues to monitor BSC's compliance with their obligations under the Contract. Currently, evidence of failure of the "hard" obligations within the Infraco Contract is intermittent but this is being scrutinised at the weekly contract management progress and correspondence reviews.

D. **Settlement of existing changes** - There are a number of different categories of existing "changes" which have been notified by BSC. Whilst **tie ltd** still await the provision of estimates for a very large proportion of "changes" notified by BSC, they have recently committed to providing these in accordance with priorities driven by the construction programme. **tie ltd** is proposing a "without prejudice" settlement of many minor changes during April to "clear the decks" of items which are not disputed in principle.

E. **Review of risk allowance and outturn cost estimates** - **tie ltd** have reported an as yet unapproved outturn estimate for Phase 1a of **£527.1m** which includes a risk allowance of **£35.7m** for Infraco and is based upon the re-baselined programme with an opening date of 23/02/12. After allowing for the probable costs of Phase 1b postponement of **£6.2m** there is headroom of **£11.7m** against the total approved funding of **£545m**. As **tie ltd** move forward they will update the total outturn estimate by reassessing the risk allowance as the outputs from the legal and commercial activities of workstreams A to D above are delivered and **tie ltd** resolve other cost uncertainties.

Updating the Infraco risk allowance

The risk allowance of **£35.7m**, which are for the most part derived from a statistical Quantitative Risk Analysis (QRA), were based upon achieving constructive engagement with Infraco, there being no significant new delays to construction and **tie ltd** own position prevailing on most of the broad issues of commercial or legal disagreement



F. Review of other cost uncertainties

Other than the Infraco risk allowance, the most significant remaining cost uncertainties are:

- Completion of the utility diversions – the outturn estimate inclusive of undrawn risk allowance and net of achievable betterment payments from SUs remains robust but will be kept under review.
- Combined resource costs including **tie**/TEL/CEC, legal and technical resource required for the revised programme end date of Feb 2012, completion of the workstreams outlined herein and implementation of an enhanced contract and risk management regime. The review of these costs will continue during April and May.

G. Contract and risk management regime and governance

tie ltd are amending and supplementing their resources and contract management regime to reflect the requirements to manage the contract effectively to address the Infraco approach now taken. This includes amended processes, additional direct resources (particularly contract management and commercial) and utilisation of specific technical expertise on an issues driven basis to support the Project management team. The next planned “Peer Review” from the OGC team is due to address contract management (proposed for 21 and 22 May 2009).

It is also essential that the proposed alignment of the project governance arrangements is implemented swiftly. At this stage, these changes are focussed on the composition, roles and responsibilities of the **tie** and TEL Boards and the Tram Project Board, supported by the transfer of the Council’s shareholding in **tie** to TEL.

It is agreed between the Council and **tie ltd** that there is presently a practical difficulty with **tie ltd** agreeing to settle claims due to the need to comply with the terms of the TEL Operating Agreement, which reflected previous Council decisions. In short, what constitutes a “claim” is not entirely clear (i.e. is it a claim if it does not affect the agreed budget (£512m)?). Whilst it was proposed to address the issue at this week’s Council meeting, **tie ltd** recommended that the matter be delayed until a future meeting in order that further in-depth discussions could take place regarding the practicalities involved. Council officers will work with **tie ltd** to find an appropriate solution in early course. In the meantime, **tie ltd** are aware that they will be unable to agree or settle and claims without prior Council approval.

H. Broader scope and funding options

In the event costs are not contained within the available funding of £545m, CEC will want to consider “safety valves” options are available regarding scope and funding:

- Scope options – Initial analysis indicates that deferring construction from Ocean Terminal to Newhaven is a deliverable option. Termination at Foot of the Walk (or Bernard St) could work operationally but economic benefits of the tram as a stimulant to regeneration would be severely diminished. Any decision to defer construction due to affordability/funding constraints must be made with the benefit of greater certainty as to outturn costs and further examination of the incremental funding options. The utility diversions from Ocean Terminal to Newhaven can be scheduled to take place after the end of June.
- Incremental Funding options - There are a number of possible additional sources of which **tie**/TEL will work with the Council to provide a view of the Council’s capacity to borrow against future TEL combined bus and Tram profits (without reducing dividends or altering fares policy) by the end of June.



Principle Review Points

30th April Council Progress Report – Informed by:

- This work programme detailed above and the approach to deliver certainty and provide decision points for the Council and the Boards
- First version of the Programme Storyboard – by 27 April
- Updated cost estimate and risk allowance at different confidence levels – by 27 April.

6th May and 3rd June Tram Project Boards – informed by:

- Outputs from the technical and legal reviews of liability for delays and other commercial uncertainties
- Further updated cost estimate and risk allowance to reflect these outputs
- Report of progress with BSC engagement, recalibration or contractual programme and physical progress with the works including Princes Street.

8th July Tram Project Board

- Consolidated review of outputs from this 3mth engagement
- Formal consideration of recommendations regarding scope truncation, incremental funding sources and stop/go decision on project.

4 Communications Update (Presented by Leanne Maberley)

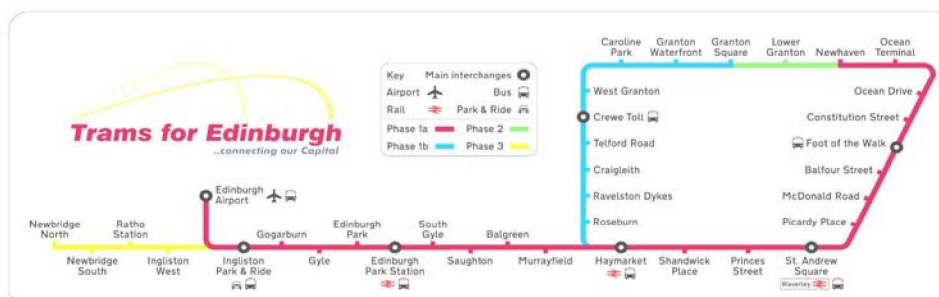
Communications on tram Full Council report

A press release was prepared addressing the postponement of 1b and costs. The BBC ran with the 1B line in advance following a leak, and comment was given on this specific issue.

Princes Street tram mock-up

In total 74,000 people visited the tram mock-up during its time on Princes Street. The top five questions were as noted below. **tie ltd** and the Council are ensuring that these points are addressed in all future communications.

- Q: Does the tram go to the airport?
- Q: Can I use my concessionary bus pass on the tram?
- Q: How much will it be?
- Q: How many people does it hold?
- Q: Can buggies and wheelchairs use it?



Leith Walk tram mock-up

As part of the display of the tram mock-up in Leith, the below activities were carried out. The tram mock-up will be open 11.30-5.30pm for the first week

- Installation of 42 lamp-post banners on Leith Walk/Constitution Street celebrating people and places of Leith
- Window display in Woolworths shop window at the Foot of the Walk
- Small meet and greet event between Leith traders and Cllr Dawe on Monday 27 March
- Media release and photo-call on arrival of the mock-up
- Radio Forth advertising promotion to encourage people to Leith.

Tram open for business campaign

www.edinburghshopper.com is now live and has received 20,000 unique visitors to date. There is a particular issue with getting information from Leith businesses to profile on the website. 170 retailers across the city are now profiled.

100,000 EH Living magazines have now been distributed. This included including 50,000 as inserts within the Evening News

The Spa in the City event will take place in St Andrew Square on Sunday 24 May.

Parking promotion

A meeting has been held with NCP Car Parks to discuss positive marketing opportunities. This includes various ideas, including offer of free parking season tickets as competition prizes.

Specific marketing to promote on-street parking has also been prepared, and this includes a new map and eye-catching air freshener which contains parking messages.

5 Council Reports (Presented by Marshall Poulton) Full Council on 30 April

- Tram report providing an update on sections 1a and 1b plus information on Dispute Resolution Procedure, Strategic Options, and response to the Princes Street diversion motion.

Transport, Infrastructure and Environment Committee on 5 May

- West End Traffic Management – where it is recommended that Hope Street is re-opened one way from west to east to allow traffic to travel onto the south side of Charlotte Square. This is proposed as mitigation against the proposed banning of general traffic on Shandwick Place as part of the tram scheme.
- Bus Priority Measures on Broomhouse/Stenhouse Drive Traffic Regulation Order (TRO), where it is recommended that the TRO be made.

Policy and Strategy Committee on 12 May

- Following on from Council on 30 April, a decision is required regarding the roadworks embargo for Princes Street.

Full Council on 28 May

- Approval of **tie ltd** Business Plan for 2009/10



6 Statutory Council Approvals and Consents (Presented by Andy Conway)

The table below provides an updated summary position on all the necessary approvals required from the Council for the tram project. A further detailed breakdown is attached as Appendix 2.

Fortnightly 'Task Force' meetings are held between **tie ltd**, the designers, BSC and the Council to closely monitor progress and minimise potential delays. Current progress is broadly in line with V31 of the programme. Where delays have occurred mitigation plans are in place.

| CEC Statutory Council Approvals and Consents | Total Number of Submissions | Total number of Approvals | % Complete |
|--|-----------------------------|---------------------------|------------|
| Prior Approval | 63 | 59 | 94% |
| Full Planning Permission | 9 | 7 | 78% |
| Listed Building Consent | 11 | 11 | 100% |
| Scheduled Monument Consent | 1 | 1 | 100% |
| Building Warrant | 16 | 13 | 81% |
| Technical Approvals (including Structures, Roads and Drainage) | 121 | 95 | 79% |
| Total | 221 | 186 | 84% |

An approvals tracker that identifies each of the approvals and their status has been developed. An extract from that tracker is also included as Appendix 3. The status of the approvals relates to the Issue for Construction drawings which is on the critical path for the project construction. However, there remains many 'conditioned matters' that need to be closed out. A programme is awaited from **tie ltd**.

7 Financial Update (Presented by Alan Coyle)

Funding Agreement with Transport Scotland

Transport Scotland (TS) have now contributed £245m to the project to facilitate spending to the end of period 2 of financial year 2009-10 (period ending 25 May 2009). The latest cash application to TS is for £9.3m with the Council contributing £839k.

| Contract | Actual Project to Date £m | Current Approved Budget (CAB) £m | Unmitigated Forecast £m | Variance to CAB £m | % Variance to CAB |
|--------------|---------------------------|----------------------------------|-------------------------|--------------------|-------------------|
| MUDFA | 51.8 | 51.7 | 55.3 | 3.6 | 6.9% |
| Infraco | 69.1 | 243.9 | 264.2 | 20.3 | 8.3% |
| Tramco | 15.3 | 58.2 | 58.5 | 0.3 | 0.5% |
| Risk | 0.0 | 23.2 | 23.2 | 0.0 | 0.0% |
| Other | 94.8 | 135.0 | 143.6 | 8.6 | 6.3% |
| Total | 231.0 | 512.0 | 544.8 | 32.8 | 6.4% |

Council's contribution remains at £45m and is to be made up from a variety of sources. The latest position is detailed below:



| CEC Contribution Breakdown | Planned Contribution | Achieved Contribution |
|--------------------------------------|----------------------|-----------------------|
| Council Cash | £2.5m | £2.5m |
| Council Land | £6.2m | £4.3m |
| Developer Contributions – Cash* | £25.4m | £3.02m |
| Developer Contributions – Land | £1.2m | £0.0m |
| Capital Receipts (Development Gains) | £2.8m | £0.0m |
| Capital Receipts | £6.9m | £0.0m |
| Total | £45.0m | £9.82m |

CEC Cash - £2.5m (No Change) – Achieved - This funding has been contributed through the Council's Capital Investment Programme.

CEC Land - £6.2m (No Change) - £4.3m is for Phase 1a. £2m of the £6.2m is for Phase 1b. If Phase 1b does not go ahead alternative funding sources will be required.

Developers Contributions Land - £2.2m (No Change)

Of the £2.2m land contribution from developers £1m relates to Phase 1b. Again if Phase 1b does not go ahead further funding sources will be required.

Developers Cash Contributions - £25.4m (No Change)

£3.058m received to date. There are circa £12m of developers contributions in the planning system. The table below shows the value of the contributions at each stage in the planning process.

| Breakdown of Phase 1a Contributions | |
|--|---------------|
| Tram Cash | Value (£m) |
| Amount received | £3.06 |
| Amount in concluded legal agreements (where development has commenced) | £1.62 |
| Amount in concluded legal agreements (where development has not commenced) | £2.82 |
| Minded to grant/Pending Consideration | £4.86 |
| Potential Total | £12.36 |

Capital Receipts - £9.7m (No Change)– Work is currently being undertaken to look at the effect on the value of these Capital Receipts due to the wider economic climate. An initial assessment on the sites which made up the previous estimate values them now at £7.4m. The above report on developers contribution assumptions will also take into account the latest assessment of capital receipts.



8 Mudfa (Presented by Alan Coyle)

Spend currently stands at £51.8m excluding risk against a project to date budget of £51.7m. The Anticipated Final Costs (AFC) for MUDFA are currently forecast at £55.3m which includes a transfer from the risk allowance to settle claims. This represents an increase of £600k in the AFC from period 12, relating to the contractor’s assessment of their claim entitlement for delay and disruption (£900k), offset by amounts received from utilities companies for additional betterment, and funding from the Council for traffic signals at Market Street.

MUDFA works are now 70% complete; although this does not look to have increased since last period, reassessment of the scope of works, based on latest information, has resulted in an overall increase in utilities diversions required of 914 linear metres, thus reducing the impact in percentage terms of progress within the period. This increase in scope remains, however, within the assessed AFC.

An August 2009 finish is now predicted other than work at Newhaven Road which is programmed for a November completion.

The table below highlights MUDFA progress in period 13 and cumulative.

| Period 13 | | | | | | |
|-----------------------|---------|--------|----------|-----------------------------|--------|----------|
| (02.03.09 – 29.03.09) | | | | Overall Performance to Date | | |
| | Planned | Actual | Variance | Planned | Actual | Variance |
| Full Phase 1a | 2.7% | 3.1% | 0.4% | 100.0% | 70.1% | -29.9% |

Risk drawdown of £1m was applied for during the period, to cover i) additional traffic management & enabling works to meet stakeholder constraints imposed post-contract, and ii) increased scope of utility diversions for additional works required at Baltic Street, Haymarket and Manderston Street.

tie ltd have expressed concern at the ongoing low output from Carillion, and are implementing additional measures to improve monitoring of the works on a daily basis to maximise Carillion’s output.

9 Infraco (Presented by Alan Coyle)

The Dispute Resolution Process (DRP) continued during the period, however a Supplemental Agreement was put in place relating to Princes Street, which allowed works to commence there on 23 March 2009. The agreement was such that Infraco will be paid on a demonstrable cost basis for additional work relating to unforeseen ground conditions in Princes Street.

At the request of the Council’s Chief Executive a small team of senior Council officers, from Legal, City Development and Finance, are based in City Point for a period, to work alongside **tie ltd** in reviewing Strategic Options noted above. This request was agreed by the **tie ltd** Chairman.

As with previous periods Infraco progress to date is significantly adverse to the look ahead programme. BSC have yet to provide the programme in the necessary format, but it has been agreed that this will be supplied. Ongoing programme discussions have taken place this period between **tie ltd** and BSC.

Serious conflicts have been identified with the Utilities works within Leith Walk, and BSC have been advised that access will not be available until early September 2009. However, early discussions have taken place with BSC regarding an alternative access plan to allow execution of the tram works on Leith Walk.



The four prime Infraco risks identified by **tie ltd** this period are:

- Commercial dispute relating to lack of agreement over design changes preventing progress of critical works
- MUDFA do not finish diversion works prior to commencement of Infraco
- Lack of visibility of design changes from Nov 07
- Failure of SDS/CUS to supply 'as built' drawings to **tie ltd**

Construction milestones continue to be missed which is having a serious impact on the planned spend in the current year; the forecast outturn of £33m is well below the initial forecast of £77m. A further £358k of slippage occurred within the period.

The Infraco Anticipated Final Cost (AFC) line is forecast currently at £264.2m against a budget revised budget of £243.9m. The increase in AFC compared to last period (£3.5m) relates to £1.85m transfer from MUDFA, £1.1m for Princes Street, and £500k for Gogar. The adverse AFC variance of £20.3m does not take account of any drawdown from the Infraco risk allowance which should cover prolongation claims.

There was no movement in Value Engineering (VE) opportunities during period 13, due to the ongoing DRP. VE opportunities of £8.3m have been instructed to date. Total VE opportunities amount to £12.6m in relation to Infraco, **tie ltd's** view of actual savings is currently around £7.1m. This shortfall would effectively be an increase to the AFC.

10 Tramco (Presented by Alan Coyle)

Tramco is currently showing an adverse variance on the final AFC of £312k, relating to a proposed change to tram interior. Budget stands at £58.1m, there is no risk allowance for Tramco. Costs are currently in line with budget. Fabrication of the tram vehicles has begun with the first tram vehicle approximately 2 months ahead of programme. The first tram module client inspection, by the Tram Inspector, took place on 26 February 2009. The first tram is programmed to be complete and delivered by November 2009.

The tram mock-up is being moved to Constitution Street for a short period, following its stint in Princes Street.

11 Tram Monitoring Officer (TMO) Update (presented by Marshall Poulton)

No contractual claims have been submitted for approval by **tie ltd** to the TMO since the last IPG report.

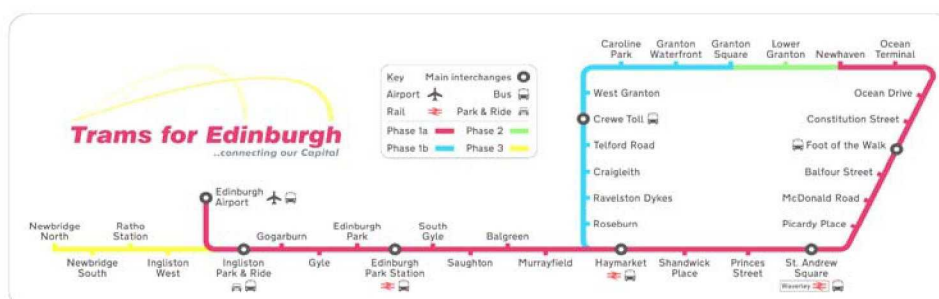
Weekly tram update reports are now being received from **tie ltd** and the TMO is now passing these onto the Chief Executive and the Council Leader.

To improve communications with the political Group Leaders, the TMO and other chief officers are now briefing them on a monthly basis.

12 Third Party Agreements (Presented by Andy Conway)

Network Rail Bridge Agreements

As noted at the last IPG, the impasse reached between the solicitors acting respectively for Network Rail and **tie ltd** (on behalf of the Council) will be brought up at the next Transport Scotland quarterly review (when senior representatives will be in attendance from by the Council and Transport Scotland).



13 CEC Resources

- **Internal Resources**

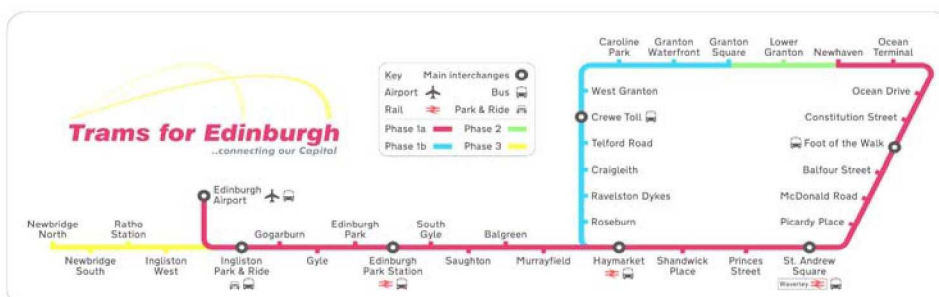
Existing Council staff are carrying out the statutory approvals process and the related necessary administration for the tram project. Over fifty individual internal members of staff are directly involved in the tram project at this time. A total of 965 staff hours has been utilised on the tram since the start of April 2009 at a cost £32K. These costs are being borne by CEC and are contained within existing budgets.

- **Additional Resources**

To assist with the approvals process additional staff have been brought in to either carry out the necessary work directly or alternatively free-up existing resources to do that work and use the extra resources to cover that shortfall. A total of 6 FTE have been employed since the start of April 2009 at a cost of £19K, which was contained within the tram budget costs.

List of Appendices:

- 1 Analysis Update on Dispute Resolution Process – 22 April 2009
- 2 Statutory Council Approvals – Tables 1 and 2
- 3 Statutory Council Approvals – Tracker



Analysis Update on Dispute Resolution Process – 22 April 2009

Dispute Resolution Process (DRP)

This report follows a meeting held at Citypoint on 3 April attended by Nick Smith and Colin MacKenzie (CEC Legal), Andrew Fitchie (DLA Piper), Stewart McGarrity and Dennis Murray (**tie ltd**).

There were initially two matters referred to the formal Dispute Resolution Procedure:

1. Cost/calculation of Preliminaries re Princes Street works
2. Question as to whether BSC were entitled to refuse to start work on Princes Street

DRP 1 We understand that **tie ltd** will very shortly seek appointment of a mediator in order to move this dispute to a resolution.

DRP 2 is on hold as a result of the Princes Street agreement.

Engagement

One of the decisive factors with regard to progression of the project will be the willingness of the contractor to engage with **tie** in moving forward on a constructive basis. **tie ltd** are hopeful that the new management team within BB will lead to a new more positive relationship, with BB on board for the duration of the contract. This will be key in relation to “dispute avoidance” as this largely relies upon a good working relationship, seeking to solve problems rather than argue about them. **tie ltd** have indicated that it is too early in the new process to assess how things are going, but they remain hopeful. This does of course give the Council very little comfort that further disputes will not occur. **tie ltd** do not anticipate any softening of the commercial approach taken by BB thus far. **tie ltd** advise that one of the main issues will be whether the new BB team are given a free hand or whether matters will be dictated from Germany, which is likely to lead to a more adversarial approach.

However, from CEC’s perspective the fact remains that at this time there is little evidence to the effect that the relationship is getting better, especially with the refusal of BSC to agree to move directly to adjudication and dispense with the mediation period. Whilst the Project Management Panel (PMP) has been set up to steady matters and cement relationships, it is too early to say whether this will actually assist in sorting out the disputed issues.

There are presently 350 “notified departures” (ie changes as per the agreement) in process. **tie** acknowledge that around 30 of these are for their account and that 175 of these have little financial value but may be of strategic importance. The remainder still require to be agreed. Broadly speaking, the disputes can be grouped into a number of different “big picture” categories:

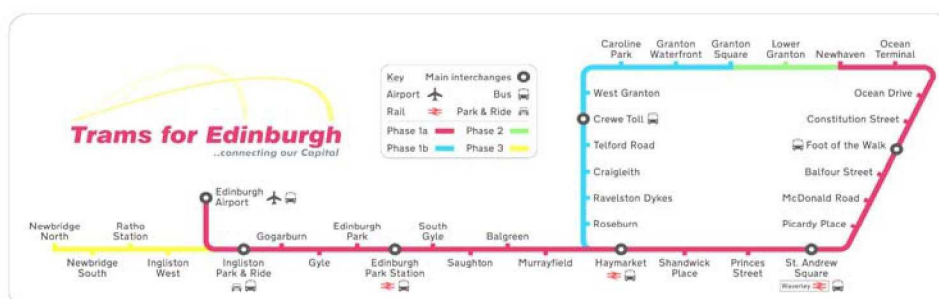
1. *Who has responsibility for design management and evolution?* **tie ltd** is of the view that they are not responsible for certain of the changes which are deemed to be “normal design development”. BSC are taking the view that all changes to design are **tie ltd**’s responsibility. The main problem here stems from the fact that design was not complete at Contract signature.



We understand from **tie ltd** that the design part of the contract therefore had to be based on a number of agreed assumptions, and accordingly, we have assumed that where BSC can argue that the design differs from the agreed assumptions (however small the change), it is possible that any such changes will be for **tie ltd's** account. In short, we understand that the contract does not define "normal design development" (which **tie ltd** advise BBS are responsible for) on the basis that it is a term understood in the market. It now appears that it is more a "term of art" capable of different interpretations. What is normal for one project may not be normal for another. **tie ltd** argue that the onus lies with BSC to prove why completion, however minor a task, lies outwith "normal design development." The difficulty here is that it is a very bespoke contract. **tie ltd** are considering seeking a QC opinion to provide it and CEC with confidence re this issue. One of the difficulties with this is that argument may be more of commercial rather than legal one. The issue on "normal design development" is that (i) the agreed language of the contract does limit, by description, the detail of normal design development but (ii) it is a matter of technical opinion and engineering practice what is 'normal' as opposed to unanticipated or unforeseeable (iii) however the design has evolved, BSC is responsible for managing that process and passing all revisions through the proper contractual design review process.

2. *Who is liable for delays to date?* **tie ltd** state that BSC has a general obligation to mitigate. BSC are of the view that until they have full and unfettered access to the various work sites they are not obliged to start work and should be given extensions of time to deliver. Any examination of the respective positions will require a factual basis detailing what sites were available and when. It is possible that DLA or a QC could provide a view to give confidence (or not) here. The exercise of analysing delay responsibility will have to be painstakingly completed in order for there to be a rational basis for settling allocation of costs. It has always been in BSC's interests to approach this on a "global" basis, since this offers the most effective means of obscuring their own defaults and failings behind assertions about client- side failings
3. *Preliminary costs methodology.* This is as per DRP 1 and relates to largely commercial methodologies used to calculate additional costs. **tie ltd's** view is that BBS's method is too simplistic and unjustified in the circumstances. BSC's methodology is also, on any objective view, wholly inconsistent with what is in the contract and it changed in late 2008 to a more opportunistic and incorrect approach.
4. *Unforeseen ground conditions.* These are to **tie ltd's** account. However, there is a dispute as to what constitutes "unforeseen". **tie ltd** anticipate that they will be in a better position to assess likely liability for this by mid-May.
5. *Failure to agree estimates.* This relates to the operation of the change mechanic in the contract and BSC's approach that indifferent quality/non provision of competent estimates is excused by the number of changes which has occurred.

tie ltd have also indicated that they anticipate that there will be a "tipping point" beyond which it will not be advantageous for BBS to seek to frustrate matters as there will be little for them to argue about. ie the design will be complete to Issued For Completion status, the revised programme will be agreed, all the sub-contractors will be in place and MUDFA will be finished. **tie ltd** anticipate that this tipping point will come around the same time as the revised programme is agreed (anticipated to be summer 2009, possibly by the end of June). However, they expect negotiations re the programme to be very difficult. BBS will seek to lengthen the programme as much as possible in order that they will not be liable for liquidated damages as a result of missing the staged completion dates.



tie ltd's likely approach is that the Council is relatively time rich but funding poor. ie, whilst delay should be avoided where possible it is more important that the Council remain within budget and have a later operational date than to pay substantial extra sums to have delivery on time. However, clearly any delay must have cost implications, even if these are smaller than the alternative. **tie ltd** will therefore use additional time for BBS as the "sweetener" to avoid possibly significant cost increases.

tie ltd have been asked to re-run the risk register with various different confidence levels to provide CEC with the fullest possible information re potential cost overruns. This is expected shortly. This cost estimate will include an estimate of costs assuming that DRP was commenced today and went the full dispute period concurrently for all disputes and **tie ltd** lost all the arguments. Whilst we are advised by **tie ltd** that it is unlikely that they would win none of the arguments, this figure would go some way to taking into account the fact that there are bound to be future disputes which are at present unknown, bearing in mind that the project still has a significant period to run.

tie ltd also advise that there is strategic importance with regard to how to approach referring matters to DRP. The main matters presently requiring resolution (taken from DLA Piper note dated 22 March) are:

- Calculation of Preliminaries
- Princes Street Works
- BDDI to Issued for Construction issue
- Hilton Hotel car park
- V26 to V31 estimate
- Definition of Base date design information
- Overheads and Preliminaries
- Edinburgh Park INTC91
- Management of SDS

DLA Piper have provided a brief overview on these issues and the Council Solicitor is analysing their views. Stewart McGarrity is also currently working on producing an updated strategic options paper which we understand will examine each of the main issues in dispute noted above, giving indications of **tie ltd's** view on the chances of success.

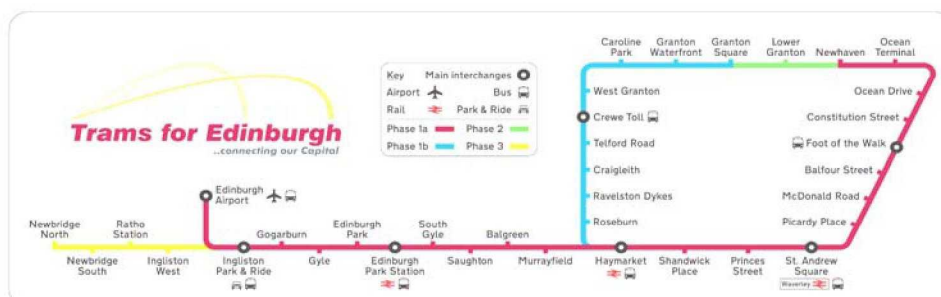
Conclusion

It now appears that the contract terms which **tie ltd** negotiated may be capable of manipulation by BSC to an extent through commercial and technical interpretation. Whilst Andrew Fitchie of DLA has pointed out that the scope for argument over individual items was kept to the absolute minimum, any commercial and legal ambiguity at all will, nevertheless, lead to the possibility of disagreement. However, given that design etc were not complete, it was perhaps inevitable that assumptions would have to be made and that there would therefore always be scope for argument around the facts and components of the set of contractualised assumptions that were negotiated and included by the parties in order to prevail upon BSC to agree to delineate a settled scope of work which corresponded to their tender price.



tie ltd are hopeful that the new team in place will engage more with the project and as the “tipping point” approaches be more agreeable to settling things commercially. Whether this happens remains to be seen, but it is likely to be the summer before **tie ltd** and CEC can be more certain on this issue. Clearly there is a desire to progress DRP as soon as possible in order to achieve certainty for **tie ltd** but this has to be balanced against taking an adversarial approach at this stage of the new relationship. It is noted that BSC are said to have assembled a team of 12 claims experts in Edinburgh, and that they may also have instructed Hill International (Claims Specialists).

The “best guess” figures and confidence levels from **tie ltd** with regard to the possible outturn costs should give CEC an indication of the range of possible cost overruns as at April 2009. Whilst this would not include costs for any future disputed issues, it would at least give a baseline indication to CEC as to possible risks. DLA Piper will continue to give **tie ltd**/CEC advice on DRP strategy (including the use of the contract provisions to avoid/mitigate cost) and outcomes and any other claims or claims likelihood from BSC and how BSC are or are not using the Contract. **tie ltd** will be asked to confirm that they are not aware any other “big ticket” issues which could delay the project or cause further cost increases.



Statutory Council Approvals Summary Table

| CEC Statutory Council Approvals and Consents | Total Number of Submissions | Total number of Approvals | % Complete |
|--|-----------------------------|---------------------------|------------|
| Prior Approval | 63 | 59 | 94% |
| Full Planning Permission | 9 | 7 | 78% |
| Listed Building Consent | 11 | 11 | 100% |
| Scheduled Monument Consent | 1 | 1 | 100% |
| Building Warrant | 16 | 13 | 81% |
| Technical Approvals (including Structures, Roads and Drainage) | 121 | 95 | 79% |
| Total | 221 | 186 | 84% |

Table 1 - Planning and Building Warrant Approvals

| CURRENT STATUS | Sub Totals | Prior Approval | Full Planning Permission | Listed Building Consent | Scheduled Monument Consent | Building Warrant |
|------------------------------------|------------|----------------|--------------------------|-------------------------|----------------------------|------------------|
| Informal consultation not required | 0 | 0 | 0 | 0 | 0 | 0 |
| Informal consultation not started | 2 | 2 | 0 | 0 | 0 | 0 |
| Informal consultation started | 1 | 0 | 1 | 0 | 0 | 0 |
| Application submitted | 6 | 2 | 1 | 0 | 0 | 3 |
| Approval granted | 91 | 59 | 7 | 11 | 1 | 13 |
| GRAND TOTAL and Sub Totals | 100 | 63 | 9 | 11 | 1 | 16 |
| % Complete | 91% | 94% | 78% | 100% | 100% | 81% |

Table 2 - Roads & Structures Technical Approvals

| CURRENT STATUS | Sub Totals | CEC Technical Approval | *Network Rail Form A | *SW Drainage Outfall Consent | *SNH | *BAA Approval | Roads Construction Consent |
|-----------------------------------|------------|------------------------|----------------------|------------------------------|-------------|---------------|----------------------------|
| TA delayed due to recent change | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Issued for informal consultation | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Issued for Technical Approval | 23 | 11 | 1 | 10 | 0 | 1 | 0 |
| Technical Approval Granted | 95 | 80 | 11 | 3 | 1 | 0 | 0 |
| Not Yet Due | 2 | 1 | 0 | 0 | 0 | 0 | 1 |
| Delay | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| GRAND TOTAL and Sub Totals | 121 | 93 | 12 | 13 | 1 | 1 | 1 |
| % Complete | 79% | 86% | 92% | 23% | 100% | 0% | 0% |

* These consents are not CEC's responsibility, but for completeness they have been included as they are required to allow construction to commence.



APPENDIX 3

| Prior Approvals Status | | | | | Approved by CEC | IFC | |
|------------------------|-------|-----------|-------------------|--|-------------------------|------------|---|
| Section | Batch | CEC Delay | SDS/TIE/BSC Delay | Activity ID | Current forecast (live) | v31 | Notes |
| 3B | 3/16 | | | Tram Stop West Pilton | 06/08/2008 | 15/08/2008 | "Application Clock Stopped" SDS issued Change Order 27/2. |
| 5A | 5/06 | | | Tram Stop Murrayfield Stadium (Task 700.2.6) | 01/08/2008 | 27/06/2008 | SDS addressing comments made at the meeting 01/04/09. |
| 5A | 5/06 | | | W18 Murrayfield Stop Retaining Walls (Task 700.2.17) | 01/08/2008 | 27/06/2008 | SDS addressing comments made at the meeting 01/04/09. |
| 5A | 5/07a | | | Murrayfield Accommodation Works | 17/10/2008 | ? | SDS issued estimate 11/02/09. tie to confirm exact scope of works following meeting 11/03/09. |
| 5C | 5/30 | | | Tram Stop Gogarburn | 11/09/2008 | 11/09/2008 | SDS submitted change estimate 13/02/09 |

| Technical Approvals Status - Structures | | | | | Approved by CEC | IFC | |
|---|--|-----------|-------------------|-------------------------------------|-------------------------|------------|------------|
| Section | | CEC Delay | SDS/TIE/BSC Delay | Activity ID | Current forecast (live) | v31 | Notes |
| 5A | | | | S22B Balgreen Road NR Access Bridge | | 16/01/2009 | Submitted. |

Technical Approvals Status - Roads & Drainage

| | | | | | Approved by CEC | IFC | |
|---------|----------|-----------|------------------------------|---|-------------------------|------------|--|
| Section | | CEC Delay | SDS/ TIE/ BSC Delay | Activity ID | Current forecast (live) | v31 | Notes |
| 1A3 | Road | | | VO252 Subsection 1A3 - Roads (Ocean Terminal to Port of Leith) | 09/01/2009 | 21/01/2009 | Submitted for CEC approval 20/4/09. |
| 1A3 | Drainage | | | VO252 Subsection 1A3 - Drainage (Ocean Terminal to Port of Leith) | 09/01/2009 | 21/01/2009 | Submitted for CEC approval 20/4/09. |
| 1C2 | Road | | | | - | 24/11/2008 | Progressing application in accordance with priority list |
| 1C2 | Drainage | | | | - | 24/11/2008 | Progressing application in accordance with priority list |
| 6 | Road | | | Roads, Street Lighting & Landscaping inc. car park | 22/08/2008 | 13/08/2008 | Progressing application in accordance with priority list |
| 6 | Drainage | | | Depot Drainage Design (Task 870.8) | 19/08/2008 | 13/08/2008 | Progressing application in accordance with priority list |