



**EDINBURGH TRAM  
Governance Report  
23<sup>rd</sup> October 2008**

## **1 Purpose of report**

- 1.1 The purpose of this report is to brief the Director of Finance and the Director of City Development on the Governance framework set out at Financial Close of the contracts for the Infraco and Tramco, to highlight certain issues that Council Officers have over how the Governance arrangements are working in practice and a suggested action plan, which forms Appendix 1 of this report, of how these issues should be addressed.

## **2 Summary**

- 2.1 The agreed governance arrangements for Phase 1a of the Edinburgh Tram Network came into effect when contracts for Infraco and Tramco were signed.
- 2.2 This report highlights issues where the governance framework set out and approved by Council differs from what is actually happening in practice. The report also makes recommendations to address the issues, provides an action plan on how to progress matters and seeks guidance on how other governance issues can be taken forward.

## **3 Main report**

- 3.1 The proposed tram governance structure was approved by Council on 20<sup>th</sup> December 2007 and highlighted the role of the Tram Project Board (TPB), the Tram Monitoring Officer (TMO) and the Tram Sub Committee (TSC).
- 3.2 These roles were detailed further in Appendix 2 of the tie Close Report, showing the Governance and Management model for the construction period of the project. This document was sent from tie Ltd to the tie Board, TPB, TEL Board and the Council.
- 3.3 Further documents have been used as reference for this report including the CEC/tie Tram Operating Agreement, The Grant Letter from Transport Scotland (TS), Council Reports and The Code of Construction Practice for the tram project.

### **CEC/tie Tram Operating Agreement**

- 3.4 The tie/CEC operating agreement for Tram came into effect when it was signed on 12<sup>th</sup> May 2008.
- 3.5 The tie operating agreement regulates the relationship between the Council and tie for the procurement and delivery of the tram project and defines the services tie will provide to the Council.
- 3.6 Following examination of the operating agreement by Council officers the following issues have emerged.

- 3.7 The Council report of 20<sup>th</sup> December 2007, the tie Operating Agreement and the Close Report governance paper highlight the role of TMO and that this should be the Director of City Development or his nominated deputy. ***It has been assumed that Marshall Poulton has been nominated as the TMO, however, this arrangement should be formalised by way of a letter from the Council to tie.***
- 3.8 Clause 2.2 of the operating agreement states that tie must ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms that are acceptable to the Council prior to carrying out any work in relation to the project, failing which the appointment of any such third party will require that written approval of the TMO. ***Clarification should be sought from tie that this procedure is being followed by way of a report of all third party advisers/contractors and whether the duty of care is in place.***
- 3.9 Clause 2.15 of the operating agreement states that the TMO shall be provided with a full report on insurances, upon request but not less than annually. ***A list of these should have been provided by tie on signing of Infraco. tie to provide this list if CEC.***
- 3.10 Clause 2.22 of the operating agreement states; Immediately that tie becomes aware of the likelihood of delay to, or overspend in, the Project it shall notify the Tram Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend. ***The sensitivity of the date in commencement of revenue generating services has formed part of the report to Transport Scotland and the TPB. This potential delay should have been reported to the TMO at the earliest opportunity. Furthermore, as part of tie's period 7 review circa £3.6m has been documented as a variation submitted by Infraco. While this figure has not been approved by tie there is potential for further claims.***
- 3.11 Clause 2.25 of the operating agreement states that tie should confirm to the TMO that bonuses are linked to project milestones. ***Clarification should be sought that this process should/will happen. It is suggested that this should happen at least annually from the date of signing the operating agreement.***
- 3.12 Clause 2.30 of the operating agreement states that tie must have a communications protocol and that it should be approved quarterly in writing by the TMO. ***This report seeks to establish if such a protocol is in place and whether this is approved in writing by the TMO.***
- 3.13 Clause 2.31 of the operating agreement states that tie will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and will implement all reasonable recommendations of the panel once approved under the governance arrangements set out on schedule 2 of the operating agreement. ***A peer***

*review group has been set up chaired by the Head of Transport with representation from tie and TEL. tie also produced a paper for the TPB on 7<sup>th</sup> December 2007 on a suggested peer review which included members of the OGC review team to monitor from an external perspective. Guidance is sought as to whether Clause 2.31 is addressed by the newly formed peer review group.*

- 3.14 Clause 3.4 of the operating agreement states that the Council must appoint a liaison officer. *It is assumed that this role is currently filled by Duncan Fraser, however, this arrangement should be formalised in writing to tie.*
- 3.15 Clause 3.5 of the operating agreement states that the Council shall use all reasonable endeavours to procure that the TMO is a Director of TEL. *Guidance is sought on this matter and whether this will be established.*
- 3.16 Clause 3.8 of the operating agreement states that the TMO must authorise tie to work on any other project. *Given the current preparatory work being undertaken on Tram Line 3 it would be appropriate that this arrangement is formalised.*

#### **Legal Affairs Committee**

- 3.17 In the lead up to Financial Close the Legal Affairs Committee (LAC) played an important part in ensuring the Council's interests in the project throughout the procurement process and formed part of the governance framework in the pre-construction phase of the project.
- 3.18 An email from Graeme Bissett to establish the constitution of LAC post contract close was circulated on 1<sup>st</sup> June 2008 with a view of re-establishing LAC, meeting 4 weekly to fit with the project reporting cycle.
- 3.19 The aim was to review LAC operation pre Financial Close and assess what worked and what could be improved.
- 3.20 There would also be a review of the benefit of LAC in the construction period regarding purpose, membership, agenda and frequency of meetings. It was thought that LAC's successor would be the Financial, Commercial and Legal Committee (FCL).
- 3.21 The recent issue of objections to Building Fixings which will require court action is a good example of the need for LAC. *Establishment of LAC or its successor is required.*

#### **Further Committees/Sub-Committees in Governance Framework**

- 3.22 The Governance and Management Framework for the construction phase of the project highlights TPB sub-committees for Engineering and Delivery (E&D), Financial, Commercial and Legal (FCL), Benefits Realisation and Operations (BRO) and Communications Committee.

- 3.23 It was anticipated that the BRO and Communications committees would not meet early in the construction period in the absence of any material issues.
- 3.24 **Confirmation from tie that these committees are in existence is required. The confirmation could be in the form of a letter from tie or sight of minutes of the sub-committee meetings.**

#### **General Governance**

- 3.25 Appendix 2 of the Close Report highlights the governance arrangements and roles of the various committees and sub-committees. There is also reference to the various companies and their roles and responsibilities.
- 3.26 The report states that the tie board maintain its Audit (AC) and Remuneration (RC) committees, the membership of which is restricted to Non Executive Directors. This statement is contradictory to the contents of the tie business plan, approved by Council that states that Willie Gallagher, Executive Chairman of tie, sits on both the AC and RC. **It is recommended that clarification from tie is sought on this issue and if the Executive Chairman sits on the AC and RC then this practice should cease.**

#### **Code of Construction Practice**

- 3.27 The Code of Construction Practice sets out the minimum standards of construction practice and the effect on the environment, amenity and safety of local residents. The following issues have been highlighted.
- 3.28 Paragraph 1.2 Purpose of Code of Construction Practice

There is a contractual requirement to audit compliance with the Code and to rectify any breaches. The level and frequency of audits are unknown by CEC and there is no feedback on the results of any audits or the subsequent actions taken.

The Code requires CEC to appoint a Nominated City Officer to monitor compliance with the Code.

CEC do not have the resources or the authority under the contract to supervise the contractor's work on site, although through the Traffic Management Review Panel CEC are made aware of works out with normal working hours and any subsequent measures to address noise issues.

**It is assumed that Duncan Fraser would be Nominated City Officer, but a formal appointment should be undertaken by letter.**

- 3.29 Paragraph 1.6 The Role of the City of Edinburgh Council

CEC are not resourced to undertake a regular inspection regime so the Council cannot have full knowledge of all of the day to day breaches to the Code.

The Nominated Officer will however address breaches of legislation where this is brought to his attention and where it is evident that tie have failed to ensure that the contractor has taken appropriate remedial action.

It is only practical for tie to publish breaches of the Code on their web site as they have this data. A hyper link can be provided on the Council web site to tie's web site thus giving the public access to the database of the breaches to the Code.

### 3.30 Paragraph 2 Liaison and public information

tie has been undertaking all public relations, information and press matters for the MUDFA contract.

Steps are however being taken for this work to be undertaken directly by BCS for the INFRACO contract.

The Nominated City Officer and his team should be the single point of contact between the Council and the contractor's liaison officer as set down on the Code.

### 3.31 Paragraph 2.1 Information Centre and Website

An information centre has not been set up as required.

The website has been set up and is being maintained by tie and not by the contractor as required under the Code.

### 3.32 Paragraph 2.2 Weekly Newsletter

tie publishes a monthly news sheet which gives an update on the progress of the works and the details of the forthcoming works. The temporary traffic arrangements are not included but these are on the website albeit that the website is not updated as quickly as necessary. This is being reviewed by tie.

### 3.33 Paragraph 2.3 Complaints Hotline

tie has set up a Freephone hotline to deal with complaints. The hours of operation are 9.00am to 5.00pm. Out with these times an automated call recording service is provided.

The telephone number, e-mail address and website details are published in the monthly newsletter.

### 3.34 Paragraph 2.4 Contacts Log

The complaints log is maintained by tie. A monthly report of the breaches to the Code are not provided monthly to the Nominated Officer as required

The Information Centre has not been set up but tie is taking steps to maintain a data base of breaches of the Code which will be published on their website.  
***tie and the contractor need to provide this information.***

### 3.35 Paragraph 6.1 Noise

A protocol has been prepared setting out the process to be followed by the contractor where approval is being sought to work out with the permitted hours.

This is followed where the completion of the works is essential but it is acknowledged that on occasion works are carried out on Sundays or evenings without formal approval and on the understanding that if complaints are received then the works will be abandoned.

### 3.36 Paragraph 7.2 Inspection of Buildings and other Structures

To date the contractor has not prepared a schedule of buildings or other structures which may be at risk of physical damage or damage caused by vibrations generated during the construction works.

***tie need to pursue this with their contractors as a matter of urgency as this exposes the Council to additional risk should future claims be submitted and we do not have the records to confirm the condition of the existing situation (as required by the CoCP)***

### 3.37 Paragraph 7.3 Maintenance and Repair of the Road

The Contractor is required to undertake a pre-construction inspection and keep appropriate records for the condition of the road and footways. This has not been undertaken for Mudfa and is essential for the Infracore works.

***tie need to pursue this with their contractors as a matter of urgency as this exposes the Council to future additional works and associated costs which should be attributable to the contractors.***

### 3.38 Summary

It is assumed that all other requirements detailed in the Code are being met by the contractor but it must be noted that CEC are not supervising the works and cannot therefore confirm that the specified requirements are being followed at all times.

### Change Control

- 3.39 Throughout the project tie have maintained a Change Control process to assess, authorise, monitor and record changes within the project. It is acknowledged that this is something the Council should adopt as we proceed through the project to record changes in design or budget for example. This procedure should tie in with a review of tie's change control procedure to ensure best practice.
- 3.40 ***A change control process should be established as soon as possible with an officer identified to oversee the process.***

### Grant Award Letter

- 3.41 Clause 18.2 of the Grant Agreement states; The Council shall maintain and shall procure that tie and or TEL shall maintain register or registers of Funded Assets and the Scottish Ministers shall be entitled to inspect, and take copies of such registers of Funded Assets at any time. ***tie do not maintain an asset register. The issue of asset registers was raised when discussing the possibility of leasing tram assets to TEL. At that point tie did not maintain an asset register.***
- 3.42 A further point to note is permission must be granted by TS to use the grant award funding for other tramlines. ***tie have now initiated the feasibility work of Tram Line 3 (TL3). This work is at the point where quotes are being received from the traffic modelers. This work will not be taken any further unless there is a positive response from the Minister for Finance and Sustainable Growth at a meeting with Dave McKay and Willie Gallagher regarding the feasibility study for TL3.***

### Project Assurance – Board Members

- 3.43 The TPB have a duty to carry out their own project assurance rather than rely on tie to tell them that the project is being delivered to the satisfaction of board members.
- 3.44 The role of the board could be helped by focusing on establishing the vision, mission and values of the company, by setting strategy and structure, delegation to management and exercise accountability and be responsible to the relevant stakeholders.
- 3.45 Board members should determine the values to be promoted throughout tie and actively monitor and review company goals and policies.
- 3.46 In particular the board members have a duty to review and evaluate present and future opportunities, threats and risks to the project and assess the weaknesses and strengths of tie and the project as a whole.
- 3.47 The board members also have a role to ensure and assess tie's organisational structure and their capability to deliver the project.



3.48 Board members also have a duty to ensure, through delegation if necessary, that the internal controls within the project are appropriate and effective.

3.49 Board members should ensure that communications from the project to stakeholders are effective. They must also ensure that they take into account the interests of various stakeholders of the project and that they monitor relationships with key stakeholders.

#### **4 Conclusions**

4.1 The information above highlights a number of key areas of governance that Council officers have assessed and believe need to be addressed to ensure the sound governance of the project going forward.

#### **5 Recommendations**

5.1 It is recommended that the above areas are recognised by Senior Officers and provide guidance to Council Officers where appropriate. If any of the papers referred to in this report are required for reference please contact Alan Coyle, Financial Services.

#### **List of Appendices**

##### **Appendix 1 – Action Plan**



## Appendix 1 Edinburgh Tram Governance Action Plan, October 2008

Report Paragraph	Action Plan Tasks	Time-scale (By End)	Responsible Person	Progress & Outcomes
3.7	<ul style="list-style-type: none"> <li>Letter from the Director of City Development to Willie Gallagher, Executive Chairman of tie, confirming the appointment of the Tram Monitoring Officer</li> </ul>	30 <sup>th</sup> November 2008	Dave Anderson	
3.8	<ul style="list-style-type: none"> <li>Report of third party advisers/contractors required from tie with confirmation that a direct duty of care to the Council is in place.</li> </ul>	30 <sup>th</sup> November 2008	Nick Smith/Graeme Bissett	
3.9	<ul style="list-style-type: none"> <li>Full report on insurances required from Mark Hamill, tie Insurance Manager to the Tram Monitoring Officer</li> </ul>	30 <sup>th</sup> November 2008	TMO/Mark Hamill	
3.10	<ul style="list-style-type: none"> <li>Letter from tie to the TMO detailing the delay to the project together with cost implications and mitigations required.</li> </ul>	30 <sup>th</sup> November 2008	tie	
3.11	<ul style="list-style-type: none"> <li>TMO requires confirmation from tie Board that tie's incentivisation packages are linked to project milestones on an annual basis from the date of financial close.</li> </ul>	12 <sup>th</sup> May 2009	tie Board	
3.12	<ul style="list-style-type: none"> <li>Communications protocol to be provided by tie. Quarterly approval required in writing by the TMO</li> </ul>	30 <sup>th</sup> November 2008	TMO/Mike Connelly (tie)	
3.13	<ul style="list-style-type: none"> <li>Clarification required from City Development/CEC Legal as to whether the newly established peer review addresses Clause 2.31 of the tie operating agreement.</li> </ul>	30 <sup>th</sup> November 2008	Dave Anderson/Gill Lindsay/tie	
3.14	<ul style="list-style-type: none"> <li>Letter from Dave Anderson to Willie Gallagher confirming the appointment of Duncan Fraser as the liaison officer.</li> </ul>	30 <sup>th</sup> November 2008	Dave Anderson	
3.15	<ul style="list-style-type: none"> <li>Decision required on the TMO's membership of the TEL Board with a report to Council required.</li> </ul>	30 <sup>th</sup> November 2008	Tom Aitchison	
3.21	<ul style="list-style-type: none"> <li>Establishment of LAC or its successor required.</li> </ul>	30 <sup>th</sup> November 2008	Gill Lindsay/Graeme Bissett	
3.24	<ul style="list-style-type: none"> <li>Confirmation required from tie in the form of committee minutes that the Engineering and Delivery Committee exist and clarification on the role of the Finance, Commercial and Legal Committee required.</li> </ul>	30 <sup>th</sup> November 2008	Alan Coyle/Graeme Bissett	
3.26	<ul style="list-style-type: none"> <li>Cessation of the Executive Chairman's role on the AC and RC, letter from the Councils Director of Finance to that effect as it is not in line with the Councils Corporate Governance Framework.</li> </ul>	30 <sup>th</sup> November 2008	Tom Aitchison	

## Appendix 1 Edinburgh Tram Governance Action Plan, October 2008

3.27-3.38	<ul style="list-style-type: none"> <li>Paragraphs 3.27-3.38 address a number of issues on the Code of Construction Practice. These issues will be addressed by officers from the Council and tie.</li> </ul>	30 <sup>th</sup> November 2008	Andy Conway	
3.39	<ul style="list-style-type: none"> <li>The Council must implement a change control process for the project under recommended CIPFA practice.</li> </ul>	30 <sup>th</sup> November 2008	Duncan Fraser	
3.41	<ul style="list-style-type: none"> <li>Establishment of Asset registers for the project.</li> </ul>	30 <sup>th</sup> November 2008	Alan Coyle/Stewart McGarrity	