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**From:** Colin MacKenzie  
**Sent:** 29 February 2008 16:23  
**To:** Alan Squair; Nick Smith  
**Subject:** FW: EDINBURGH TRAM: CHIEF EXECUTIVE'S DELEGATED AUTHORITY

Gentlemen,

For information.

Regards,

Colin

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**From:** Colin MacKenzie  
**Sent:** 29 February 2008 16:22  
**To:** Gill Lindsay  
**Subject:** RE: EDINBURGH TRAM: CHIEF EXECUTIVE'S DELEGATED AUTHORITY

Gill,

Thanks for your message.

In addition to the update at today's IPG I have also received a briefing from Alan Coyle on the meeting with **tie** last night.

I am pressing for confirmation about the meeting to discuss the updated QRA and will let you know once I have any details.

I fully agree with you on the difficulty regarding dates, and I believe this has now been exacerbated by the news from last night's meeting. Are you attending the LAC meeting on Monday 3 March ?

We do appear to be having difficulties with nailing down the SDS novation and fixing the price and risks flowing from that. All of that, combined with my views expressed to you yesterday, rather confirm my recommendation about the Chief Executive requiring a fresh authority from Council. I remain of the view that if we are in a position to report to Council on 13 March, with sufficient comfort that **tie** have satisfied Chief Officers, the Contract Award Notice should not be issued until Council has met. On the other hand there may be different scenarios, and we will have to react as appropriate.

One factor that we must have regard to is the position of Transport Scotland. Rebecca was very clear that there is an expectation from TS that Financial Close must take place before 31 March.

As you say, stay in touch and await developments.

Regards,

Colin MacKenzie  
for Council Solicitor

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**From:** Gill Lindsay  
**Sent:** 29 February 2008 11:59  
**To:** Colin MacKenzie  
**Subject:** RE: EDINBURGH TRAM: CHIEF EXECUTIVE'S DELEGATED AUTHORITY

Thanks Colin

Appreciate the update. I was expecting a call from Graeme Bisset last night which became a meeting as discussed this morning at IPG. Essentially matters are unresolved re SDS and novation and other matters are unresolved such as PCG's on which we understood there was agreement. On the positive side, I understand Tie are presenting an update to Finance colleagues on Monday on QRA which we are all agreed is an essential in determining whether or not we are within the Business Case. Can you pl arrange to join this meeting and have constant engagement with relevant parties over the period next week. Can you also let me know pl as I would like to join QRA discussion if I can. As discussed this am the difficulty with current dates is that we are likely not to have a settled position (in any way) in time for Report distribution. This would have an impact on negotiating positions, confidence and internal and external PR issues. Can you raise all issues at LAG Monday for awareness and discussion, if possible we can discuss with Andrew following this. If we have the latest QRA by then this will assist in some way.

Today agreed to proceed with brief report if matters were settled. Can you liaise with Rebecca and Duncan early next week to reach a view on progress and differing positions between now and next IPG Wednesday.

My concerns are around the robustness of risk and contingency as although I accept there are movements from risk to price and closing of some risks, I believe that the residual risk re SDS may be very significant and I understand we still have no figures to assess this. (my comments to Graeme Bissett on SDS paper refer). The previous level of around £3m is appearing to me grossly undervalued depending on final position. I agree fully with Donald that we need the best contract and if more money is required for the contract sum that is more easily dealt with as it is a defined figure. I am also concerned re timetable to close and whether we can close to an award of notice stage by 10 March in current circumstances.

Lets keep in close contact between now and next IPG, meeting before to discuss and evaluate the position including the very important issue of Council approval and delegated authority. We may wish to agree with Andrew on Monday pm a close of day contact between Tie and CEC each day commencing Monday. Can you let me have a version of the final Business Case which you have pl to let me also review this.

Thank you again for all your help with matters prior to Budget Council which was very helpful and much appreciated.

Gill

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**From:** Colin MacKenzie  
**Sent:** 28 February 2008 15:36  
**To:** Gill Lindsay  
**Cc:** Nick Smith; Alan Squair; Duncan Fraser; Rebecca Andrew; Alan Coyle  
**Subject:** EDINBURGH TRAM: CHIEF EXECUTIVE'S DELEGATED AUTHORITY  
**Importance:** High

Gill,

Following our discussion earlier this week, I have considered whether the Chief Executive is still able to validly exercise the powers delegated to him by Council on 20 December 2007, given the developments since then.

For the record, the action was " (2) to authorise the Chief Executive to instruct **tie** to enter into contracts with the Infracore bidder...., providing the remaining issues were resolved to the satisfaction of the Chief Executive as detailed in the joint report by the Directors of City Development and Finance. (3) To delegate authority to the Chief Executive to exercise the role in terms of paragraph (2) above."

You will recall that the report in December 2007 was intentionally crafted to ensure that the approval process to contract award was staged, given the serious concerns expressed by officers about the many unresolved and unquantified issues then outstanding, which will have implications for the Council by virtue of the Guarantee. Staged approval was recommended, subject to price and terms being consistent with the Final Business Case, " and subject to the Chief Executive being satisfied that all remaining due diligence is resolved to his satisfaction."

The question that now falls to be answered is whether there has been any material change in what was reported to Council on 20 December 2007. My view is that there has been material change in a number of aspects, which I set out below for your consideration.

The most critical issues referred to in the December report were the novation of SDS contract to BBS; design matters; and price and risk allocation. The report went on to say that FBCv2 reflects no material changes since FBCv1 in respect of :- overall programme; risks retained by the public sector; estimated capital costs.. inclusive of risks retained by the public sector. Further on in the report it was stated that the fundamental approach to transfer risk to the private sector has been largely

achieved. Specifically at paragraph 8.19 construction is indicated as commencing in February 2008. Finally, at paragraph 9.2 it is stated that preferred bidder negotiations on inter alia risk apportionment is consistent with the Final Business Case.

I have also considered relevant provisions of FBCv2, namely paragraphs 7.50, 7.53 and 11.57 respectively. The first states " the anticipated novation of the SDS contract to the Infraco will mean that responsibility for the design and all risks arising are transferred to the private sector system integrator ( Infraco ), without the normal disadvantage of an increased risk premium, that bidders would apply to uncertainty, if they had to carry out all of the design work post contract award. Paragraph 7.53 is in the following terms: "The original assumption was that overall design work to Detailed Design would be 100 % complete when the Infraco contract is signed. Due to a number of delays, largely outwith **tie's** control, this is not now achievable." The next reference is to the effect " the public sector is exposed to significant, but diminishing and manageable, risks during the remaining period of scheme development."

The LAC has received a number of update reports from **tie** since the turn of the year which have caused, and continue to, cause concern for Council officers. I think it is fair to say that the number one risk for the Council now is the SDS novation, and the costs of dealing with that. It is still not clear ( because the Council is not kept fully advised of ongoing discussions between **tie**, SDS and BBS ) what the implications are for the Council legally and financially. The suggestion of buying out the risk and imposing a cap have not been clearly evaluated for the Council. As you know, the Council has no direct input or instruction to these negotiations, notwithstanding the fact that the buck stops financially and reputation wise with the local authority.

Much emphasis has been put by **tie** on the £498 million figure, insisting for weeks that will not change as a result of the SDS novation. **tie** have conceded that there is a mis-match between their SDS and Infraco contracts. On 4th February they informed LAC that " participation of both Consortia conditional on not taking liability for discretionary aspects of consents " ( otherwise there would have been no bidders). Mixed messages were given out at LAC on 25 February to the effect that **tie** cannot say if the Infraco price will rise again, and that the totality at £498 million is not under threat. The fact of the matter is that **tie** are not being transparent with LAC attendees from the Council. It is highly improbable that the figure of £498 million can be held against the changes arising from SDS novation, the continuing delay to reach financial close, inflation and other factors. As a matter of fact, the base cost has changed by about £20 million.

The consequences flowing from the facts above lead me to recommend to you that the Chief Executive should report to Council on 13 March 2008 updating members on the material changes to the FBC and seeking a fresh instruction to permit ( or instruct ) **tie** to issue the Contract Award Notice and thereafter enter into the various contracts set out in the December 2007 report and minute. That, of course, would be subject to the earlier caveat that the Chief Executive is satisfied that all remaining due diligence is resolved. At the time of transmitting this report to you there has been no further update from **tie** on the various discussions with SDS and BBS, and we have still to receive the first revised QRA since late last year. I have held this paper back to see if there are any more hard facts from **tie**; alas, no update.

From a solicitor's perspective one has a duty to be honest and transparent with the Council as client, which is why I recommend that members receive a further report explaining the material changes in the FBC since December 2007, before a final decision can be taken on award of the contracts by **tie**. It is difficult to see any down side to making a fresh report, particularly given the latest timeline predicted by **tie**.

Regards,

Colin MacKenzie  
for Council Solicitor