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to Andrew Holmes 15/11/06
Gill Lindsay 16/11/06
Rebecca Andrews 20/11/06
Ain Mackenzie 21/11/06

From Jenny Drummond
Senior Solicitor
Legal Services
To Keith Rimmer
Head of Transport
City Development
Date 14th November 2006

MEMORANDUM

Our Ref AC2617 jd

Your Ref

TEL OPERATING AGREEMENT

Keith

I see that Graeme Bissett has copied you in to the e-mail that he sent to me on 5th November regarding the Operating Agreement. As you know this e-mail is in response to the e-mail I sent him on the 3rd of November with the draft Operating Agreement. This was sent to both him and you on your instructions and follows the meeting we had with him to discuss the Operating Agreement.

His points are noted, however, it must be remembered that Graeme is employed by TIE and is not a Council officer whereas you are.

Accordingly we must be clear about what the Council's interests are and how these are accommodated taking account of any competition law issues.

May I repeat that I am uncomfortable that no TEL representative was present at the meeting with Graeme or included in the latest circulation of the draft. However I understand that you are keen to have Graeme's input as he has been asked by the TEL Board to prepare a governance paper which is presented to the TEL Board on a regular basis.

Turning to the points Graeme raises, with regard to his reluctance to have an Operating Agreement I must make it clear that having an Operating Agreement is standard practice and the Council has Operating Agreements with both Lothian Buses and TIE. There is no reason why TEL should not have an Operating Agreement. This is a matter of corporate governance which is required by Audit Scotland and this requirement is reflected in the updated Code on Corporate Governance which I understand Lothian Buses has recently accepted. I think TIE and TEL are about to adopt the updated Code.

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Having an Operating Agreement has no negative bearing on the single economic entity.

The Operating Agreement is a mechanism for control and this would enforce any argument that there is a single economic entity as it shows that the three arm-length entities are all under the umbrella and control of the Council, which is the owner.

A Memorandum of Understanding is not sufficient control for a company. This company is tasked with a very important matter for the Council and it should be clear what is expected of them. This safeguards not only TEL but also the Council in any future discussions.

I do not know who TEL's legal advisers are currently. It is for TEL to tell us who their legal advisers are and what they think of the draft Operating Agreement.

While Graeme's views are noted it is now time to discuss the matter with TEL directly. Therefore I would urge you to include, at minimum, both the Chief Executive, Neil Renilson, and the Chair, David Mackay, in future discussions of the draft.

I think it is appropriate that all Directors of TEL are given a copy of the current draft at this stage so an informed discussion within TEL can take place.

I would also say that the current draft should be circulated to Finance and your colleague, Lex Harrison.

You will see from the draft Operating Agreement that I have referred to Reserved Matters in a schedule. I note that Transport Scotland have detailed their Reserved Matters concerning the TPB as indicated in the paper on corporate governance produced by Graeme Bissett and presented to the TEL Board. I would be obliged if you would pass to me the list of Reserved Matters which the Council wish to have.

I also refer to our meeting in early October where you indicated that the delegated powers to TEL to act on the TPB had been formally given by the Council. However you were to check with Andrew Holmes that all matters had been covered and that there was no need for further delegated powers to be given by the Council to TEL.

Please confirm the position for me. I would be obliged if you would indicate which reports have identified the delegated powers given to TEL by the Council. It must be clear what power/authority has been delegated by the Council to TEL and any delegation of power/authority has been properly given. Further depending on what the powers/authority are it may be that TEL is not a competent entity to receive such powers/authority.

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Dubiety in this area must be avoided. Accordingly, as a matter of urgency can you or one of your staff get in touch with me so that we may go through the various reports and be clear as to what has, so far, been delegated to TEL and if there are any gaps and to ensure TEL is able to accept the delegated powers/authority.

In the paper on corporate governance produced by Graeme (referred to earlier) it states that the TEL Board by accepting the paper confers the delegated powers to TEL from the Council. This is not the case. Any delegation of competent matters is done by Council and once given by the Council TEL is then empowered to do those things which it has been properly delegated to do.

The adoption of the paper on corporate governance by TEL is not the trigger for the delegation of power from the Council. The adoption should merely reflect what has been delegated. If there are greater powers detailed in the corporate governance paper these "additional" powers are void.

Any matter properly delegated to TEL should not be undertaken by the Council. Accordingly any Council Officer on the TPB should not be acting in any matter where there has been properly delegated power given to TEL to act for the Council. There should be no duplication of roles.

A key activity for TEL is to take part in the TPB. Accordingly I would be obliged if you could clarify the status of the TPB. Graeme states in the governance paper that it is "an established independent body with full delegated powers from CEC (through TEL) and T[ransport] S[cotland]".

As far as I was aware, and I appreciate I may not have had all the facts, when I looked into this matter before there was no formally constituted Joint Board, Joint Committee or even a constituted unincorporated body with a Board. All I could find was a set of individuals representing various bodies who met together to work on things pertaining to the Edinburgh trams. I think this had developed from the Liaison Group which met with the Scottish Executive. Is this how the TPB was set up. Has there been a Report to Council on the TPB outlining its membership, remit and detailing how it is controlled.

I need to know this so the Operating Agreement can reflect what the Council wants from TEL vis-à-vis the TPB.

I understand that the TPB has been given an outline scope. I assume this was approved by the Council and then the Council have asked the TPB to work to this outline scope. I assume the outline scope would have been approved by the Scottish

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Executive as funders. If the Council has not approved the scope how was the scope decided upon.

It may be that Graeme's document on Corporate Governance is seen as the document formalising the set up, remit and powers of the Tram Project Board. If that is the case, please let me know.

If the Tram Project Board is not a Joint Committee but is merely a group of individuals representing other bodies in a transport endeavour I have serious concerns of the competency of any local authority statutory transport functions being delegated either to TEL or through TEL to the TPB. All such matters must be reserved to the Council.

Graeme states in his corporate governance paper that the TPB is independent. I understand that TEL receives reports from the TPB with TIE project managing the Trams Project. Please correct me if I am wrong. However is TEL seen as the body who has final say within the TPB or attends as an adviser or an observer. As TEL attends the TPB why is the TPB also reporting to TEL. I appreciate that the reporting procedure may have changed so your more up to date knowledge is appreciated.

This takes me on to the Prince 2 names used by Graeme to describe the roles of the various attenders of the TPB.

As explained in Graeme's corporate governance paper he indicated that the make up of the TPB follows in part the Prince 2 terminology. If the Price 2 methodology is being used then it would be accepted that the TPB is not a democracy controlled by votes. The "Project Executive" is the key decision maker on the Board with advice and commitments from others represented on the Board.

I have lifted a flow chart of the Prince 2 structure for project managing and attach it at the end of the memo. You can access on the Council's intranet information on Prince 2 such as guidance for roles by searching under Prince 2, then Project Role Remits.

As you will see the Senior Responsible Owner stands in the background and is not on the project board. The project board is made up of three basic elements: (1) the Project Executive (the decision maker who owns the business case); (2) the Senior User Representative; and (3) Senior Supplier Representative. The Project Manager reports to the Board but sits outside the Board. The Project Manager will manage the Project on a day to day basis within tolerances allowed by the Project Executive. The Prince 2 methodology has descriptions of each role given to each body. You can see this on the intranet as indicated above.

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I would suggest on the information currently in my possession the roles should be as follows:-

"Senior Responsible Owner": CEC

"Project Executive": TEL

"Senior Supplier Representative": Transdev

"Senior User Representative": CEC

Out with Board

"Project Manager": TIE

Each role to have a description of their responsibilities and TS as part funder would have to be fitted in as appropriate following the Prince 2 methodology.

Assuming Price 2 is intended to be followed I would make the following comments:

I note that Graeme has indicated in his Corporate Governance paper that TEL, are the "Senior Representative Owner". I do not think that this is correct as that would cast TEL as the ultimate decision maker over the TPB. For example, can TEL decide that the project is not to proceed without reference to any other party. If the answer is no, TEL is not the "Senior Representative Owner". It would be more appropriate for the Council to be the Senior Representative Owner. As the Scottish Executive are part funders their interest would have to be recognised.

I think TEL could be the Project Executive. This is the decision maker on the Board. If TEL own the Business Case it would then be appropriate for them to be the decision maker within the Project Board. If TEL do not own the Business Case who does as that body should be the decision maker.

The Senior Supplier Representative would be Transdev and the Council can have a role on the Board as Senior User Representative.

I note that Graeme has Senior Supplier Representatives as TIE's Executive Chairman and TEL Operations Director. I do not understand this. An Executive Chair for TIE is an interim measure and therefore this position should not be mentioned in the paper. In any event TIE are to novate the DEPoFA and MUDFA contracts to TEL. This would make TIE/TEL more akin to users than suppliers. Transdev are the suppliers. I note that the senior Transport Scotland representative has no designation. If TS are not to have a designated role on the TPB is this acceptable to

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you. I assume TS's role is to ensure the funding from the Scottish Executive is used properly.

I also note that the governance paper indicates that there is to be an independent Chair. Is that person to be independent of TEL, TIE, CEC, TS and Transdev. I think this should be checked against the Prince 2 rationale.

I await your clarification as to what the TPB is, how TEL are expected to participate on the TPB and if the Price 2 system of project management is being adopted.

On a separate matter is there a Service Contract for the Chief Executive of TEL in place. I have been told by our Chief Executive that he considers the time is now right for such a Service Contract to be in place. Please keep me posted on this front or indicate who I should correspond with if you are not the relevant person dealing with matter.

I appreciate that this has been an extremely long memo, therefore, I summarise the main points as follows:

1. An Operating Agreement is required by the Council and this does not cause a difficulty with competition law. ✓
2. TEL and other officers within the Council should now get the Draft Operating Agreement so that the terms can be agreed. You to provide list of CEC Reserved Matters for Schedule. ✓
3. Delegated powers/authority to TEL – what you want TEL to have and what TEL all ready has must be cross checked. If there are any gaps they must be closed and a check done all delegation properly given and can be received. ✓
4. TPB - does it have a constitution, how was the outline scope agreed and given to the TPB and is it a project board following Prince 2. If not, please advise what the reporting structure/roles is/are to be. ✓
5. Service Contract for Chief Executive of TEL to be put in place. ✓

I look forward to hearing from you and should you wish to meet with me to go through these issues, please ask Dorothy to arrange a suitable time.

Regards.

Cc Robert Millar, Principal Solicitor, Commercial Practice

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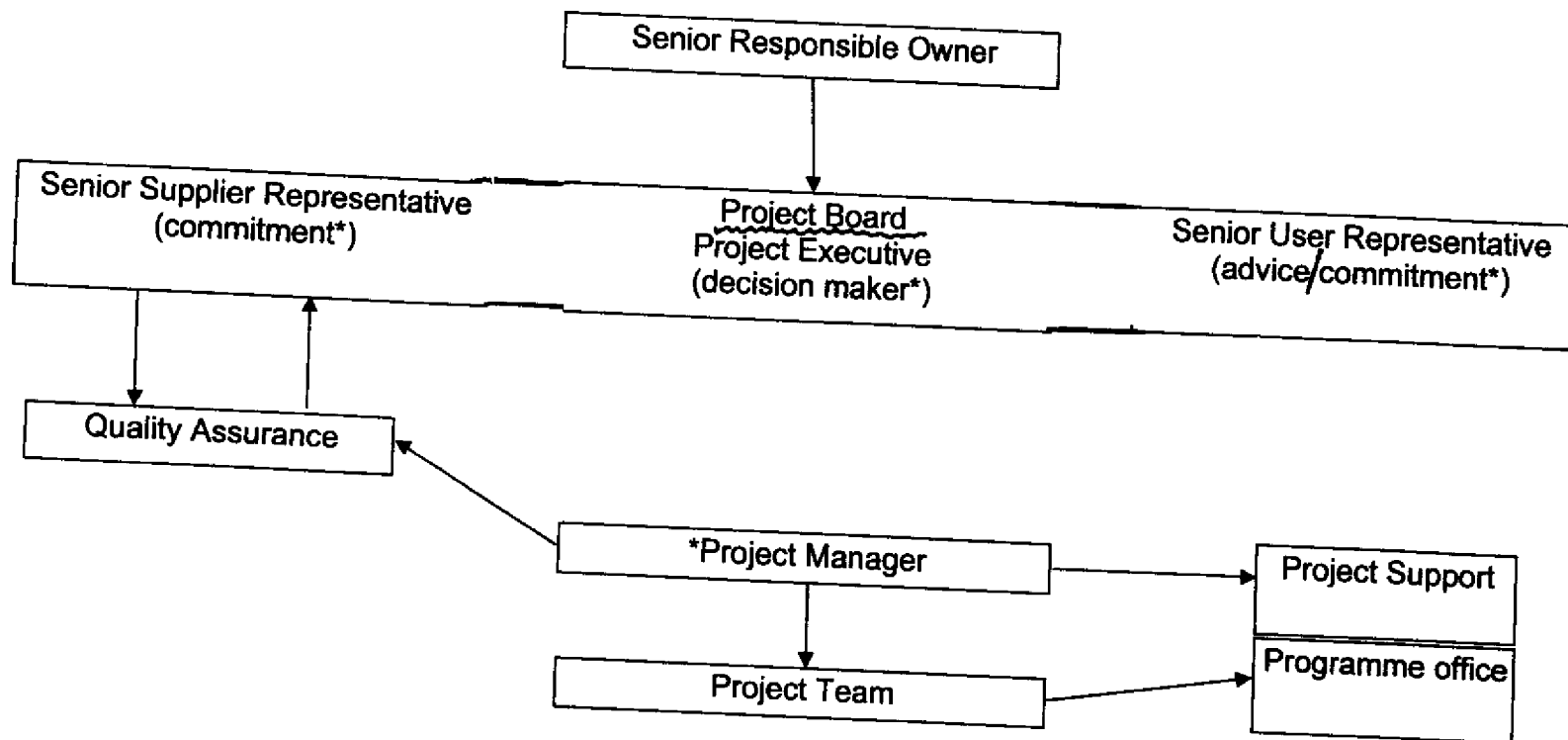
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Jenny Drummond

To: Kirsty Robertson

Subject: RE: JD Email Flowchart 101106

Prince 2
Project Organisation and Structure



* Roles to be described & agreed
see CEC intranet:
Prince 2, Project Roles Runit

14/11/2006

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[External consultancy resource costs]

5.2.2. Resource.

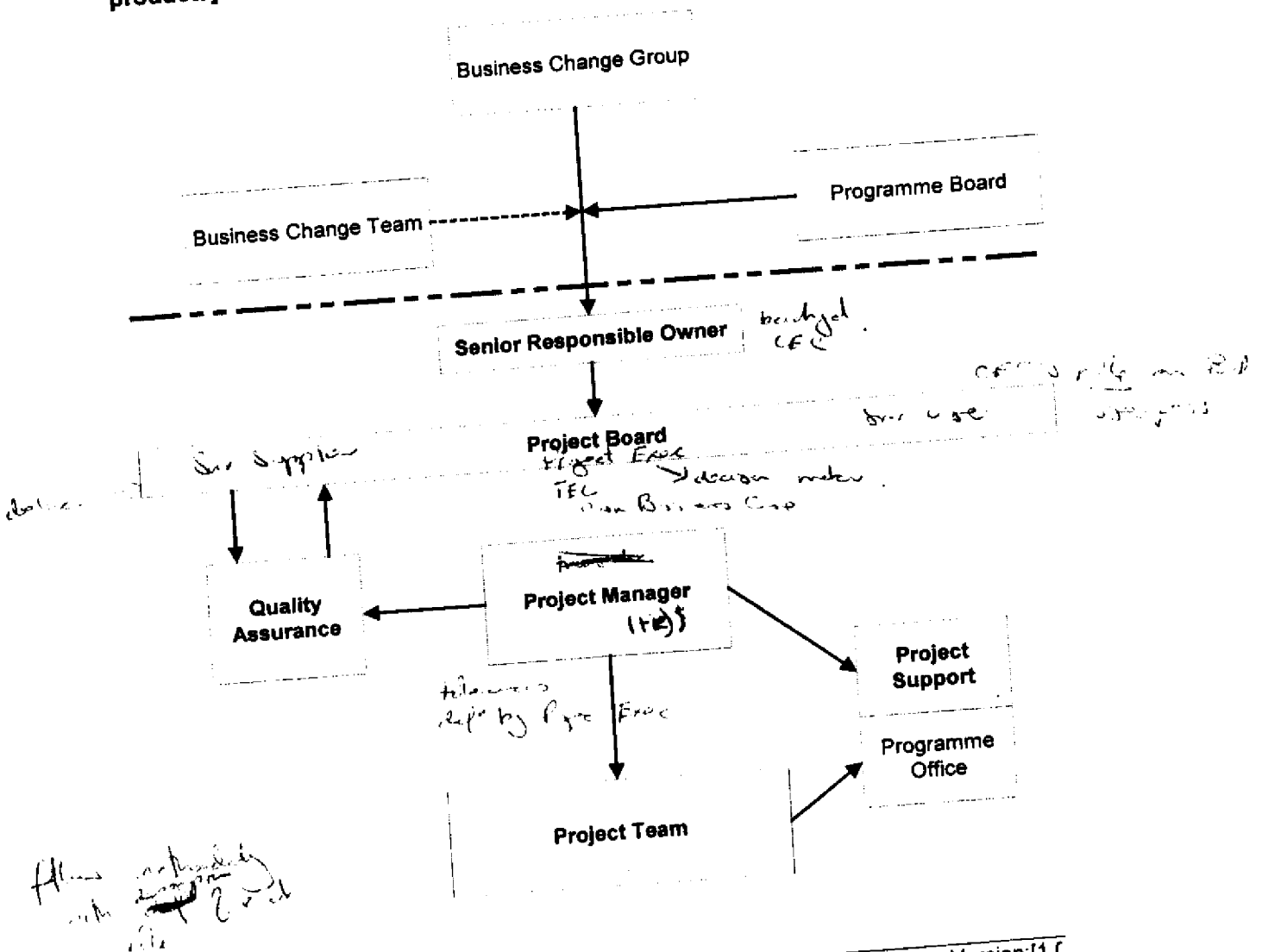
[Internal Agency resource costs]

5.3 Benefits

[Statement covering perceived benefits]

6. Project Organisation and Structure

[Statement outlining where the project fits into the overarching Programme structure, who will provide steering for the project (usually the project Board) and responsibilities for monitoring and Quality Assurance of the project products]



Phase 2 RFP
[Project Name]
Project Executive - Acceptance of Role Remit

City of Edinburgh Council

'The Executive is ultimately responsible for the project, supported by the Senior User and Senior Supplier. The Executive's role is to ensure that the project is focused throughout its life cycle on achieving its objectives and delivering a product that will achieve the projected benefits. The Executive has to ensure that the project gives value for money, ensuring a cost-conscious approach to the project, balancing the demands of business, user and supplier'

1. Executive Responsibilities

- to oversee the development of the Project Brief and Business Case (the Executive 'owns' the Business Case throughout the project)
- to ensure that there is a coherent project organisation structure and logical set of plans
- to authorise customer expenditure and set stage tolerances
- to monitor and control the progress of the project at a strategic level, in particular reviewing the Business Case continually
- to ensure that any proposed changes of scope, cost or time-scale are checked against their possible effects on the Business Case
- to ensure that risks are being tracked and mitigated as effectively as possible
- to deal with all aspects of dealing with corporate management about project progress
- to organise and chair project board meetings
- to approve the End Project Report and Lessons Learned Report
- to hold a post project review
- to ensure alignment with Customer/Business Strategies

'The Project Board is not a democracy controlled by votes. The Executive is the key decision-maker with advice and commitments from others'

2. Project Specific Responsibilities

- etc
 - etc
 - etc
- (will relate to specifics contained within the Brief / Mandate)

3. Estimated Level of Commitment Required

Due to the nature of the project, the products and the time-scales involved, it is estimated that the following minimum commitment, with regards to

File: Project Executive - Acceptance of Role Remit

Version: [Version No]

Printed: [Draft/Issued]
Status: [Draft/Issued]