

***Private and Confidential***

**Tram Meeting – Monday 13 December 2010  
Council Leader's Office, City Chambers, Edinburgh**

**Present**

Councillor Jenny Dawe, Council Leader, City of Edinburgh Council  
Tom Aitchison, Chief Executive, City of Edinburgh Council  
Donald McGougan, Director of Finance, City of Edinburgh Council  
Andy Nichol, Business Manager to the Council Leader, City of Edinburgh Council  
Jörg Schnependahl, CEO Siemens Mobility Complete Transportation Business Unit  
David Darcy, UK Head, Bilfinger Berger.

Councillor Dawe welcomed Dr Scheppendahl and Mr Darcy and advised that Dr Keysberg's office had indicated that he could not make the meeting. David Darcy explained that Dr Keysberg had made every effort to attend. Poor visibility had delayed his flight from landing in London. He then got stuck in a traffic jam when attempting to cross London for his connecting flight. Dr Keysberg apologised profusely and had asked Mr Darcy, as Bilfinger Berger's most senior person in the UK, to attend in his place.

Councillor Dawe indicated that this was not intended to be a decision-making meeting. She envisaged Chatham House Rules applying. She also advised that Tom Aitchison was soon to retire, to be succeeded by Sue Bruce, and that Donald McGougan was therefore present to provide officer continuity.

Councillor Dawe set out the background to the meeting. She had properly not been involved in the detailed discussions between the Council and the consortium. She restated the Council's desire to have trams operational in Edinburgh as quickly and as economically as possible. David Darcy indicated that the consortium too remained committed to those objectives.

Councillor Dawe explained the background to her tabling an Emergency Motion at November's Full Meeting of the City of Edinburgh Council. Despite dispute resolution procedures being followed and lawyers being in dialogue, she had increasingly come to view that mediation might be of assistance. She indicated that she would welcome the consortium's assessment of where matters rested and their views on the benefits of independent mediation. She was keen to establish whether there was a genuine desire on the part of the consortium to resolve the Tram project and stressed such a desire for her own, and the Council's, part.

David Darcy indicated that Bilfinger and Siemens were fully committed to delivering the tram project for the Council. They had understood that the Council was gearing up to decide on 16 December 2010 to terminate the contract. In response to a question from Tom Aitchison he indicated that they had now read the report to be considered by Council later this week and noted that termination was not being discussed.

David Darcy suggested that there were two main issues from the consortium's side. They disagreed with comments that they had heard that the tram could be built from the Airport to St Andrew Square within the envelope of funding available. He advised that the consortium believed that this would cost between £100m and £150m more than was currently available. He also stated that he did not see how the consortium could continue to work with **tie**.

When asked by Councillor Dawe to elaborate on their relationship with **tie**, David Darcy indicated that though there were no personal issues there was an underlying mistrust (which he accepted would be mutual). He considered the administration of the contract to be lacking and that the adjudication process was hugely demanding and also necessitated additional costs all round.

Dr Schnependahl supported David Darcy's contentions and advised that it was clear from the outset that David Mackay's interpretation of the contract differed from that of the consortium. He suggested that David Mackay believed that the contract was entirely fixed price and that the consortium was contractually required to build the tram irrespective of the financial cost to the consortium partners. Dr Schnependahl indicated that such a contract would not be standard practice in the industry. The consortium were clear that at contract sign-off many matters remained unresolved and were therefore included within Schedule 4 for future resolution. He advised that whilst the Council would naturally seek to minimise their exposure to risk neither could the consortium accept the risk of all unknown factors (particularly within a historic city).

Tom Aitchison accepted in principle the broad points that Dr Schnependahl had made that certain aspects such as infrastructure and ground conditions sat outside the contract and agreed that the unresolved issues required to be worked through mutually. He commented that completion of the design work would assist in minimising risk and queried where this rested.

Councillor Dawe suggested that it might be a role for the mediator to establish which party should carry the different elements of risk. She advised that Council, in agreeing to the contract, had been advised that the Council was paying a premium in order to minimise future risk by having a greater proportion of the contract fixed. Donald McGougan confirmed Councillor Dawe's recollection of the advice to Council. He advised that Richard Walker had conceded that some of the design risk was to transfer to the consortium. Despite that concession, it was not clear what elements of risk had moved to the consortium.

David Darcy advised that SDS had provided an assurance that the design work would be 100% complete by Christmas (subject to any approvals required by Council). He confirmed that the completed design would cover the entire route from the Airport to Newhaven. He also advised that, to assist partnership working, a weekly working group had been operating and which involved the consortium, **tie**, SDS and the Council. He contrasted the extremes of the design process by highlighting a smaller issue such as the logo for ticket machines not having been agreed.

Tom Aitchison stated that the Council's position had always been that it was not about settling on the price alone, the associated conditions were as important. Whilst the Council and **tie** required to manage the financial and technical aspects of the

contract they also required to be extremely sensitive to the political dimensions which would be drawn more sharply into focus as we moved toward the Scottish Parliament elections in May 2011.

David Darcy advised that the completion of the design work would limit risk. That said, following on from the conclusion of mediation, an effective relationship between the client and the contractor would be essential. He cited reservations that “behaviours won’t change” as the rationale for seeking to deal with someone other than tie. He did accept that the feeling may well be mutual.

Dr Schneppendahl agreed with Mr Darcy. The consortium would support mediation and adhere to its outcome. Thereafter, however, a change in how the relationship operated between tie and the consortium was still required. He indicated that the consortium would require greater experience within tie. He observed that there was a lack of technical how and practical experience of administering a contract of this nature and magnitude within tie. He suggested that a consultant should be hired by tie to take over the lead for managing the project.

Tom Aitchison mentioned that there were some good people within tie that the Council would be reluctant to lose. He indicated that, to his credit, Richard Jeffrey had, however, raised with him tie’s personnel and expertise with him. He also mentioned that the notion of mediation crystallised following a meeting with John Swinney, Cabinet-Secretary for Finance and Sustainable Growth. Mr Swinney offered Transport Scotland to perform a role if that would be welcomed. David Darcy advised that he would have no objection to Transport Scotland being involved as they were enjoying a constructive relationship with them with regard to the M8.

Tom Aitchison advised that thoughts were beginning to be given as to who should take part in mediation and their seniority within the respective organisations. David Darcy stated that the consortium would insist on the Council participating. Tom Aitchison indicated that clarity was required on the framework for mediation and an assurance that the participants from the respective organisations would be drawn from a senior level. David Darcy agreed that it required to be a high level group and that, in view of the likely media attention, it would perhaps be best convened away from Edinburgh. He also suggested that it would be important to secure agreement on a realistic programme for delivery. He referenced difficulty in achieving such a resolution with tie, citing the experience and expertise that the consortium possess in this regard and querying whether that was matched by tie.

Donald McGougan explored whether the consortium were seeking to have the entire contract remunerated on a ‘cost-plus’ basis. Dr Schneppendahl stated that this was not the consortium’s intention. He advised that this had only been pursued for Princes Street given its strategic importance, visibility and the time imperative for completion of that section. He did, however, highlight the frustration of every minor change requiring work to stop, an estimate of cost to be prepared, submitted, assessed and approved or rejected. David Darcy continued that perhaps the contract might need to be changed to facilitate a solution. Tom Aitchison agreed that this might prove necessary.

Tom Aitchison explored whether it was a deliberate tactic of Bilfinger to bid low and then seek to inflate the price through protracted wrangling and cited other instances of the company being involved in contentious projects such as Vancouver, Oslo and Doha. David Darcy rejected the suggestion and mentioned that the company had

completed hundreds of contracts. There were always two sides to the disputes referenced. It was not, however, their style or approach to operate in the manner suggested. Dr Schneppendahl agreed with Mr Darcy. Siemens would not support such a strategy as it would not be sustainable in corporate reputational terms.

David Darcy expressed the consortium's dislike for the current situation. It was completely alien to them. The situation had developed into something that neither party could have imagined. He accepted, however, that Bilfinger were not without fault. He expressed appreciation for being able to meet at the most senior political and officer level. He indicated that the consortium had, hitherto, felt hamstrung from engaging directly at such a level.

Tom Aitchison expressed his hope that a framework for mediation could be agreed before Christmas. He understood that discussions were already underway between Richard Jeffrey and Richard Walker regarding 3 potential mediators. David Darcy acknowledged that exchange and indicated that the consortium was comfortable with the 3 suggested names. He advised that he would now be permanently based in the UK.