

**Sandra Elgin**

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**From:** Sue Bruce (Chief Executive)  
**Sent:** 20 April 2011 23:00  
**To:** Alastair Maclean  
**Subject:** Re: MoV 4 - STRICTLY PRIVATE AND CONFIDENTIAL

Noted

Thanks Alastair

I will have to find out whether this has the blessing of the board or whether RJ is acting unilaterally.  
Sue

Sent from my phone.

On 20 Apr 2011, at 20:18, "Alastair Maclean" <[Alastair.Maclean@edinburgh.gov.uk](mailto:Alastair.Maclean@edinburgh.gov.uk)> wrote:

FYI

Begin forwarded message:

**From:** Richard Jeffrey <[Richard.Jeffrey@tie.ltd.uk](mailto:Richard.Jeffrey@tie.ltd.uk)>  
**Date:** 20 April 2011 20:08:46 GMT+01:00  
**To:** "dave.anderson@edinburgh.gov.uk" <[dave.anderson@edinburgh.gov.uk](mailto:dave.anderson@edinburgh.gov.uk)>  
**Cc:** Alastair Maclean <[Alastair.Maclean@edinburgh.gov.uk](mailto:Alastair.Maclean@edinburgh.gov.uk)>  
**Subject:** MoV 4 - STRICTLY PRIVATE AND CONFIDENTIAL

Dave, I write to you in your capacity as the senior officer at CEC responsible for the tram project.

I understand that, following much hard work and commitment by the CEC negotiating team led by Colin Smith, that we now have an agreed form for MoV4.

I understand that in due course as Chief Executive of tie, the contracting party, it will fall to me to sign this document. I believe that this MoV represents a significant change to the Infraco contract and to ensure a proper audit trail CEC will need to issue me with an instruction (via the TEL Board who in turn will instruct the TPB to instruct me) to sign this document.

I appreciate that the document is now agreed, and no changes are contemplated, however I have a number of comments on the document which I would like confirmation that CEC are fully aware of before we sign.

21/04/2011

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I will send under a separate cover a detailed report, and appendices prepared by tie which capture the chronological development of our comments on the MoV through its different iterations. I send this report for completeness so that we are all clear how we arrived at the final version of the document. I appreciate that many of the comments could be considered to be minor, and that some of the comments relate to commercial principles already agreed between CEC and Infraco, however I suggest you consider this report as it pulls together all of our comments.

For ease of reference, I have extracted what I consider to be the main points. I would emphasise that this extract of the main points is not a comprehensive review of all our comments.

1. **Valuation of Entitlement under this MOV.** The value of the payment schedule included in the MOV (£49m scheduled over certificates 1, 2 and 3 as detailed in clauses 6.1, 6.2 and 6.3) is not supported by our analysis. Our analysis suggests a payment of £19m. Our position on this has previously been communicated to CEC and your advisors. I understand and accept that this is a commercial decision for CEC, and I assume you will have your own audit trail to back this up.
2. **Certifier Agreement.** This needs to be prepared and in agreed form, including mechanics of operation, and be compatible with responsibilities and accountabilities (and necessary insurances). If this is not done prior to signing the MoV the risk exists that the parties may have different understanding of their respective roles and responsibilities.
3. **Payment.** I will need a very clear instruction from CEC to make the payments envisaged under this MoV. Over and above the quantum of such payments highlighted at 1 above, I have concerns based on my understanding which is;
  - I. The plan is to make the first payment under the MoV (£27m) prior to the MoV being signed.
  - II. The payment mechanics in Clause 6 prescribe no vesting of materials until cash has been received by Infraco;
  - III. The payment provisions (clause 9.6) allows for preliminaries to be solely time based, regardless of physical progress
  - IV. There is no Certifier Agreement in place (see 2 above), and I have not yet seen the valuation certificate referred to at clause 6.1
  - V. Tie's current delegated authority from CEC does not allow for this payment to be made as tie considers that a significant element of these payments include commitments beyond the £545m limit. (This issue of delegated authority has been flagged to CEC since January, will very shortly start to affect the day to day running of the project and the company, and is the subject of a separate new letter to be issued by my Chairman imminently.)



VI. All payments are now classified as final and binding (Clause 9.4), allowing no changes to these amounts at a final account stage, or if MoV 5 is never signed this money is gone forever.

4. **Removal of Design approval rights and Infraco Obligations / ROGS duty holder risks.** The proposed changes to utilising only the Infraco IDC procedure, deleting obligations under Clause 10 and removing **tie** rights of approval under Schedule Part 14. If the transparency of the "self certification" being undertaken by Infraco is not suitable and timely, it increases the risk of **tie** (and potentially the ICP) being unable to discharge their duties under ROGS. This could result in the city being unable to operate the tram system for revenue services. Recent correspondence (in the last 24 hrs) highlights this risk.
5. **Design obligations** The MOV does not require Infraco to achieve any completed design. Despite this I understand that part of the justification for the payments includes design.
6. **Outstanding Consents.** The MOV transfers the risk of all Outstanding Consents to **tie**, without listing what these outstanding consents are, or what status they have. The risk exists that **tie** will not be able to procure these outstanding consents in time, or indeed at all. (I can illustrate specific examples if you require). It is also noted that this is a transfer of risk from Infraco to **tie** compared to the current contract.
7. **HSQE rights regarding subcontractors.** The MoV removes all rights of **tie** to impose any restrictions on Key Sub-Contractors including Health and Safety performance measures. In effect, **tie** will have no specific contractual rights to address this for the Prioritised Works. Given Infraco's poor (and documented) track record on this matter to date this is a cause of some concern and may create the risk whereby **tie** is hindered in the proper exercise of its obligations.
8. **Programme amends Section A completion irrevocably.** By agreeing to MOV4 it is accepted that Infraco are entitled to EOT to December 2011 to complete a reduced scope of works and that no LDs will be levied before then. If MOV5 is never signed this cannot be taken back.
9. **MOV4 sets a number of precedents.** MoV 4 contains a number of issues, which we understand CEC consider to be acceptable given the limited duration and scope of works to be carried out under MoV4, but which would not be acceptable for the more extensive scope expected to be covered by MoV5. I am concerned that precedents agreed under MoV 4 will be very difficult to water down for MoV 5, and it is best to resolve these before signing MoV4.
10. **Schedules** The MoV refers to a number of schedules and other documents. I am not yet certain that I have seen all the schedules and have been unable to verify that they are all consistent with each other and with the body of the MoV. Examples would be the valuation certificate number 1 referred to in clause 6.1, the Certifier Agreement (mentioned at 2 above) and the Prioritised Works Programme (Schedule 1). In the case of this last example, is the programme agreed and realistic, in particular in relation to Princes Street? If not this may create a risk of a claim for additional payment under clause 5.4 of the MoV.
11. **Formal Advice Note from McGrigors.** The **tie** advice incorporated in this note and the separate report should be read in conjunction with the legal advice note being prepared by McGrigors under the instruction of alastair Maclean on the impact of



MOV4.

I await your instruction (via my board) as to how you wish to proceed in relation to MoV 4.

Regards

Richard

**Richard Jeffrey**

*Chief Executive*

**Edinburgh Trams**

*Citypoint*

*65 Haymarket Terrace*

*Edinburgh*

*EH12 5HD*

**Tel:** [REDACTED]

**Email:** [richard.jeffrey@tie.ltd.uk](mailto:richard.jeffrey@tie.ltd.uk)

**Find us online (click below):**

<ETLogo.jpg>

<1806347785.png>

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