

Briefing for Cabinet Secretary's meeting with Tram Contractor (Bilfinger and Seimens) on Monday 8 November at 2pm in SAH

Project Carlisle

- Project Carlisle would curtail the current contractual arrangements with BSC to the completion of the tram project between the airport and St Andrew's Square.
- BSC submitted an initial offer of around £660m earlier this month. TIE's valuation is some £120m less. Earlier this week TIE issued a counter offer to BSC of £540m. TIE consider £540m as being the most they could recommend at this stage to their Board.
- Richard Jeffrey is not optimistic that the gap will be fully closed, although he would expect to bring the £660m figure down. There have been no further substantive negotiations on reaching a mutually agreeable deal on Project Carlisle, but we would expect these to follow once BSC have considered the terms of TIE's counter offer.

Project Notice

- Project Notice would terminate the tram contract on the grounds of breach of contract by BSC. Failure to reach agreement on Project Carlisle would not be grounds for termination. However, Project Notice is being twin tracked to bring pressure to bear on BSC to reach a deal on Project Carlisle.
- TIE have now taken the first steps towards terminating the contract by issuing BSC with the first 4 (of 8) formal notices where they believe the contractor is in breach and seeking BSC's proposals for remedial action.
- BSC have 30 working days to respond to these notices. Thereafter, TIE have a further 10 working days to either accept or reject BSC's proposed remedies. If TIE reject BSC's proposals then the contract can be terminated. There is no specific time constraint on when the termination notice should be served but to be credible it would need to be within a matter of weeks.

Possible Ways Forward

- The cost of a deal on Project Carlisle, if agreed, looks at this stage to be somewhere between £540m to £660m. If a final figure was agreed we would expect that to be a fixed price so there would be high degree of certainty on the outturn cost. The tram would also be expected to be operational by the end of 2012.
- If there is no agreement on Project Carlisle then TIE and the City of Edinburgh Council (CEC) have essentially 2 choices. Either they continue with the current contract to build the whole tram from the airport to Newhaven, or they terminate the contract on the grounds of breach by the contractor.

- If the contract continues then TIE's current estimate is that the outturn cost is likely to lie the range £615m to £690m. This is not fixed, however, and there is at this stage a relatively low level of confidence in those figures. The operational date of this option is as yet unknown but is likely to be beyond 2012, although it might be possible to have sections of the track running earlier.
- If the contract is terminated then a decision would have to be made on whether or not to bring in another contractor to complete the project while any legal action with BSC ran in parallel. The cost of this course of action is the most difficult to estimate and depends largely on whether or not TIE were ultimately successful in defending the decision to terminate.
- We do not have any estimates from TIE for termination, but if this was to be recommended we would expect TIE to present the possible cost range (from the best possible outcome to the worst case scenario). It would then be for CEC to judge how those costs compared with the best they could expect from either Project Carlisle or continuing with the contract.
- As TIE have now initiated the termination process, the timetable for that process will to a large extent drive a decision by the autumn on how the project should proceed. TIE will also have to present progress to a full Council meeting in mid October.

Finance and expenditure to date

- Total project spend to date is £381m of which the Transport Scotland contribution is £349m.
- The original funding for this project was to be a capped contribution of £500m from SG and £45m from CEC. It is clear that the £545m budget will be exceeded. CEC and TIE have been unsuccessful with their negotiations around consideration of a truncated network and options for terminating the current infrastructure contract seems the most likely outcome.
- CEC has identified means to fund up to £600m, but expenditure beyond this would be problematic.

Contract termination

- TIE are of the view that termination of the contract is now all but inevitable. Negotiations around Project Carlisle have halted and the contractor has to all intents and purposes stopped work in anticipation of the contract being terminated. What little communication there is between TIE and the contractor is concentrating on the potential for a negotiated settlement to avoid both sides in protracted legal action following termination.

- In order for TIE to be in as strong a contractual position as possible before issuing the termination notice it first has to wait until 11 November for the contractor to respond to the last in a series of breach notices. Following that, TIE will consult with its legal advisers and Counsel to agree the final terms of the formal termination notice. TIE doesn't expect that to be in place until early December. We anticipate that the notice will be issued to the contractor almost immediately following the Council meeting on 16 December but TIE have still to confirm the final details.
- As TIE and CEC will not be able to confirm the grounds for termination until early December, CEC have asked us to waive the requirement under the terms of the Grant conditions to give Ministers 30 days notice before exercising any rights to terminate the contract. This is not a requirement to seek agreement to terminate, that is a decision solely for CEC. It is simply to give adequate notice. As Ministers and Transport Scotland have been in close touch in recent weeks over developments in this long running contractual dispute **we would recommend that Ministers waive the notice period requirement.**