

10.00am, Thursday, 20 August 2015

Edinburgh Tram Inquiry

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| Item number | 8.1 |
| Report number | |
| Executive/routine | |
| Wards | All |

Executive summary

This report asks Council to note the action taken under the urgency procedures set out at paragraph A4.1 of the Committee Terms of Reference and Delegated Functions, in relation to issues concerning participation and representation at the Edinburgh Tram Inquiry and to delegate authority to the Chief Executive or the Deputy Chief Executive to take decisions and actions in relation to the Inquiry.

Links

Coalition pledges

Council outcomes

CO24 – The Council communicates effectively internally and externally and has an excellent reputation for customer care.

CO25 – The Council has efficient and effective services that deliver on objectives.

Single Outcome Agreement

Edinburgh Tram Inquiry

Recommendations

- 1.1 The Council is recommended:
 - 1.1.1 to note the action taken under the urgency procedures set out at paragraph A4.1 of the Committee Terms of Reference and Delegated Functions;
 - 1.1.2 to delegate authority to the Chief Executive and/or the Deputy Chief Executive to take all decisions or actions in relation to the Council's involvement in the Edinburgh Tram Inquiry provided that the financial consequences of such decisions or actions do not exceed £2 million in aggregate (to be funded from the Council's reserves) and subject to regular reporting of updates to group leaders' meetings; and
 - 1.1.3 to note that where in the opinion of the Chief Executive or the Deputy Chief Executive (as the case may be) any such decision or action is particularly sensitive or controversial, the Chief Executive and/or the Deputy Chief Executive will where practical, consult in advance with group leaders and will report such decision or action taken to the next meeting of the full Council.

Background

- 2.1 The Edinburgh Tram Inquiry (the "Inquiry") has been set up with the aim of establishing "why the Edinburgh Trams project incurred delays, cost more than originally budgeted and through reductions in scope delivered significantly less than projected".
- 2.2 Following an invitation from the Inquiry, the Council has applied for and been granted Core Participant status in the Inquiry.
- 2.3 A preliminary hearing has been convened by the Chairman of the Inquiry, Lord Hardie, to take place on 19 August 2015.
- 2.4 The Council has been in discussion with members of the Inquiry team, including the Chairman, in relation to the participation of tie Limited (now CEC Recovery Limited) ("tie"), and the representation of individuals at the Inquiry, and has been asked to consider and confirm its position in relation to those issues.

- 2.5 There was an urgent requirement for the Council to deal with this request, in order to confirm its position to the Inquiry prior the hearing on 19 August 2015.

Main report

Decisions taken under the Council's urgency procedure

- 3.1 Paragraph A4 of the Council's Committee Terms of Reference and Delegated Functions provides that if a decision which would normally be made by the Council requires to be made urgently between meetings of the Council, the Chief Executive or appropriate Director, in consultation with the Convener or Vice-Convener, may take action, subject to the matter being reported to the next meeting of the Council.
- 3.2 Appendix 1 sets out the terms of the decision made on 12 August 2015 by the Chief Executive, in consultation with the Lord Provost, as the Convener of the City of Edinburgh Council (CEC). Given the importance of this decision, there has also been consultation with the Leader and Deputy Leader of the Council, the Conveners of Transport and Finance and the leaders of the Conservative, Green and Liberal Democrat groups. Further details of the background to and basis for the decisions are set out in this report.

Delegated authority to officers

- 3.3 As the Inquiry progresses, further decisions will need to be made on the Council's position on various issues. The Council is requested to delegate authority to the Chief Executive and/or the Deputy Chief Executive to take all decisions or actions in relation to the Council's involvement in the Inquiry provided that the financial consequences of such decisions or actions do not exceed £2 million in aggregate. The financial cost of the Council's participation in the Inquiry will require to be funded from the Council's reserves.
- 3.4 There will be regular updates by the Chief Executive and/or the Deputy Chief Executive to the group leaders, and in any case where the Chief Executive or Deputy Chief Executive considers a decision or action to be particularly sensitive or controversial, group leaders will be consulted in advance where it is practical to do so and any such decision or action taken will be reported to the next meeting of the full Council.

Funding/participation of tie in the Inquiry

- 3.5 In 2002, CEC set up tie as a wholly owned subsidiary in order to investigate, amongst other aspects of a local transport strategy, the possibility of one or more tram lines in Edinburgh.
- 3.6 The Edinburgh Tram Acts passed in 2006 gave the necessary statutory powers to CEC to delegate to tie responsibility for entering into the relevant contracts. Through resolutions and Operating Agreements, CEC authorised tie to enter into

the contracts required for the design, construction and maintenance of the tram project. CEC as ultimate shareholder entered into a parent guarantee with the construction consortium, Infraco, guaranteeing the financial obligations of tie to Infraco.

- 3.7 Until September 2011, tie was managed by a board of directors which included executive directors, independent non-executive directors and representatives of CEC as shareholder. The board of directors operated under the corporate governance regime of the Companies Act 2006 like any other private limited company and independent of its shareholder.
- 3.8 Following the mediation process of 2011 when agreement was reached in relation to various disputes concerning the project, CEC determined that its direct involvement in the project was necessary and accepted the business, assets and certain liabilities of both tie and tie's holding company Transport Edinburgh Limited ("TEL") through a hive up agreement entered into in September 2011.
- 3.9 Since the hive up, tie has been a dormant non-trading company ultimately owned by CEC, which has appointed a senior officer of CEC to act as sole director. tie has no assets, and does not trade.
- 3.10 In the circumstances, CEC's position has been that tie should not participate as a separate entity in the Inquiry, or have separate representation. CEC and tie and TEL are distinct legal entities having their own legal rights and obligations arising out of their status respectively as a local authority and limited companies. CEC, whilst taking care not to undermine this legal distinction with regard to the role that it performed in relation to the project with that performed by tie and TEL, has used and will continue to use all proper endeavours to assist the Inquiry and provide information to it in relation to the role of tie and TEL. This will not preclude the Council from taking a position in the Inquiry which is critical of any person or organisation.
- 3.11 The Chairman of the Inquiry has invited CEC to reconsider its decision not to fund tie to enable it to apply for core participant status and to participate fully in the Inquiry.
- 3.12 If tie were to participate in the Inquiry as proposed, it would require to be legally represented. The nature of tie's role in the project makes it likely that it would be involved in most, if not all, chapters of evidence to the Inquiry.
- 3.13 tie would require to be "revived" with the appointment of further officers in order for it to issue instructions as a core participant in the Inquiry. There would be undoubted challenges in finding individuals who would be willing to be appointed to tie. Even if such individuals could be found, they would not have any first hand knowledge of the project. Those imbued with this knowledge are the former officers and employees of tie.
- 3.14 Instructions on behalf of tie would require to be issued to legal representatives appointed on its behalf. For tie in its current form to provide instructions would require, as indicated above, individuals to be appointed to it, and for those individuals to immerse themselves into an extensive factual matrix in order to be in a position to provide instructions to legal representatives. Similarly, those legal

representatives would require to carry out their own factual investigation and legal analysis which would be both time consuming and costly.

- 3.15 The foregoing costs associated with reviving tie in order for it to be in a position to provide instructions and the legal costs involved with regard to representation at the Inquiry would be substantial. tie has no income or assets to meet any costs and they would have to be borne by the public purse.
- 3.16 It is the case that former officials and employees of tie can be called to give evidence to the Inquiry about the actions of tie. tie as a legal entity does not require to be present at the Inquiry for those individuals to give their evidence and those individuals will be able to give evidence on all matters which are considered by the Inquiry to be relevant.
- 3.17 On the basis of the foregoing, the decision has been taken pursuant to the Council's urgency provisions that the proper and proportionate approach, having regard to avoiding the unnecessary expenditure of public funds, is that CEC's position should remain as previously communicated to the Inquiry, and as referred to above in paragraph 3.10.

Legal representation for current and former Council members and employees

- 3.18 The Inquiry will seek to take statements from individuals involved in the Edinburgh Tram Project, some of whom may also be called to give oral evidence to the Inquiry at hearings. Some of these individuals will be current or former Council employees or elected members.
- 3.19 The decision has been taken under urgency procedures that CEC will fund legal advice from an independent law firm to those current and former employees or elected members of CEC who are asked by the Inquiry to provide a statement and who wish to have advice in relation to the provision of that statement.
- 3.20 The Inquiry has asked CEC to consider its position on legal representation for existing and former members and employees of CEC who may be the subject of criticism at the Inquiry.
- 3.21 No decision has been taken by CEC about the extent to or circumstances in which current or former elected members and employees may be subject to criticism by CEC.
- 3.22 No decision has yet been taken by CEC to fund representation for those called to give evidence at Inquiry hearings. Any further decisions which might come to be necessary in this respect will be taken on a case by case basis, to be considered further as the Inquiry progresses.

Legal representation for current and former tie employees

- 3.23 The Inquiry has invited CEC to provide representation for employees of tie liable to be criticised by CEC.
- 3.24 There are no current employees of tie, which is a dormant company.
- 3.25 No decision has been taken about the extent to or circumstances in which former tie employees are liable to be criticised by CEC.
- 3.26 The former tie employees, particularly in the period after 2006, were almost solely focused on the delivery of the Tram project, and had been recruited

specifically for that purpose because of their particular expertise and professional background, some of them as consultants via service companies. They ought to be well equipped to explain their position in relation to the decisions and actions that were taken. If any of them consider it appropriate to have legal representation, they will be able to appoint their own lawyers.

- 3.27 Under the Inquiries Act, there is provision for the Chairman to make an award of expenses for legal representation to those who give evidence, irrespective of whether they have core participant status, subject to any conditions or qualifications imposed by the Minister. Both the public interest and the financial resources of the applicant are to be taken into account in deciding whether to make an award of expenses.
- 3.28 The decision has been taken under urgency procedures that CEC should not fund or provide legal representation for former employees or consultants of tie (or TEL).

Measures of success

- 4.1 The City of Edinburgh Council participates in the Edinburgh Tram Inquiry in an open and transparent manner whilst avoiding the unnecessary expenditure of public funds.

Financial impact

- 5.1 There is a requirement to allocate up to £2 million of funding from the Council's reserves.

Risk, policy, compliance and governance impact

- 6.1 The decision complies with the Council's governance procedures as set out in the Council's Committee Terms of Reference and Delegated Functions.

Equalities impact

- 7.1 There are no direct equalities impacts as a result of this report.

Sustainability impact

- 8.1 There is no direct sustainability impact as a result of this report.

Consultation and engagement

- 9.1 In addition to the required consultation with the Lord Provost in accordance with the Council's Committee Terms of Reference and Delegated Functions, the decision was made in consultation with the Leader and Deputy Leader of the

Council, the Transport and Finance Conveners and the leaders of the Conservative, Green and Liberal Democrat groups.

Background reading/external references

[Minutes of the City of Edinburgh Council, 26 June 2014](#)

Andrew Kerr

Chief Executive

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Links

Coalition pledges

Council outcomes CO24 – The Council communicates effectively internally and externally and has an excellent reputation for customer care.
CO25 – The Council has efficient and effective services that deliver on objectives.

Single Outcome Agreement

Appendix Appendix 1 - Decision of the City of Edinburgh Council taken under urgency procedure on 12 August 2015.

THE CITY OF EDINBURGH COUNCIL

DECISION UNDER PARAGRAPH A4 OF THE COUNCIL'S COMMITTEE TERMS OF REFERENCE AND DELEGATED FUNCTIONS

Considering that:

- a) On 22 July 2015 the Edinburgh Tram Inquiry (Inquiry) requested that the Council confirms its position in relation to certain issues concerning participation of tie Limited (now CEC Recovery Limited) (tie) in the Inquiry and concerning representation at the Inquiry.
- b) The Preliminary Hearing in the Inquiry is taking place on 19 August 2015. At that hearing, the Chairman, Lord Hardie will give the details of individuals and organisations who have been designated as 'core participants'.
- c) In light of the fact that that the next meeting of the Council does not take place until 20 August 2015, the day after the Preliminary Hearing, there is an urgent requirement for the Council to confirm its position in relation to the role of tie in the Inquiry and in relation to the extent of representation for Council and tie individuals.
- d) tie is a dormant non-trading company with a sole director appointed by the Council. It would require to be "revived" with the appointment of further officers in order for it to issue instructions as a core participant in the Inquiry. The costs associated with reviving tie in order for it to be in a position to provide instructions and the legal costs involved with regard to representation at the Inquiry would be substantial. tie has no income or assets to meet any costs and they would have to be borne by the public purse, in addition to the costs already being borne by CEC in relation to the Inquiry.
- e) It is proposed that the tie should not participate as a separate entity in the Inquiry or have separate representation and that the Council should use all proper endeavours to assist the Inquiry and provide information to it in relation to the role of tie, and also of Transport Edinburgh Limited (TEL), tie's holding company, which is also dormant.
- f) The Council has agreed to fund legal advice from an independent legal firm for all current and former Council employees and elected members who are asked to provide a statement to the Inquiry and who wish to have advice in relation to the provision of that statement. The Council does not propose at this stage to make a decision to fund representation for current and former employees and elected members who are called to give evidence at the Inquiry hearings, but to decide this on a case by case basis as the Inquiry progresses.
- g) It is not proposed that the Council will fund legal advice or representation for the former employees and consultants of tie or TEL.
- h) The Council's position on these matters has been formulated with the benefit of legal advice from senior counsel, taking into account that the Council has an aim of acting objectively, with an obligation to safeguard public funds.
- i) In addition, given the importance of this decision, there has been consultation with the Leader and Deputy Leader of the Council, the Convener of the Transport and Environment Committee, the Convener of the Finance and Resources Committee

and with the leaders of the Conservative, Liberal Democrat and Green groups, as well as consultation with the Lord Provost, as the Convener of the City of Edinburgh Council.

- j) Paragraph A4 of the Council's Committee Terms of Reference and Delegated Functions provides that if a decision which would normally be made by the Council requires to be made urgently between meetings of the Council, the Chief Executive or appropriate Director, in consultation with the Convener or Vice-Convener, may take action, subject to the matter being reported to the next meeting of the Council.
- k) Given the considerations noted above, the Chief Executive in consultation with the Lord Provost, as the Convener of the City of Edinburgh Council, agrees that:
- i. tie will not participate as a separate entity in the Inquiry or have separate representation. The Council, tie and TEL are distinct legal entities having their own legal rights and obligations arising out of their status respectively as a local authority and limited companies. The Council, whilst taking care not to undermine this legal distinction with regard to the role that it performed in relation to the project with that performed by tie and TEL, has used and will continue to use all proper endeavours to assist the Inquiry and provide information to it in relation to the role of tie and TEL. This will not preclude the Council from taking a position in the Inquiry which is critical of any person or organisation;
 - ii. The Council will fund legal advice from an independent law firm to all those current and former Council employees and elected members who are asked by the Inquiry to provide a statement and who wish to have that advice in relation to the provision of their statement. The question of funding of any further legal advice or representation for current and former Council employees and elected members will be considered on a case by case basis as the Inquiry progresses; and
 - iii. Any funding by the Council of legal advice or representation will not extend to legal advice or representation to former employees or consultants of tie or TEL.

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Andrew Kerr, Chief Executive

12th August 2015 /

Donald Wilson, Lord Provost

12 August 2015