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**From:** Alan Coyle  
**Sent:** 29 November 2007 08:45  
**To:** Colin MacKenzie; Nick Smith  
**Subject:** RE: Tram issues

Colin/Nick

Thanks for comments. Will forward a draft for you perusal this afternoon.

Regards

Alan

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**From:** Colin MacKenzie  
**Sent:** 28 November 2007 16:43  
**To:** Alan Coyle  
**Cc:** Rebecca Andrew; Alan Squair; Nick Smith; Duncan Fraser  
**Subject:** FW: Tram issues

Alan,

Nick, as you will see below has done a very comprehensive note of the issues. I agree with his paper. Time has run out for me to add much, if indeed there are any issues which have been omitted.

Just a couple of points from me to mull over before submitting the paper to Donald, Andrew and Gill.

Are there any concerns about the reported allegation of corruption being investigated in the US against Siemens. Is this a point which **tie** should satisfy the Council on ?

Scottish Power and Telewest agreements despite being urgent five months ago, have still to be signed. I do wonder whether the Council could yet be exposed under the MUDFA contract ?

Carillion were about to take over Alfred McCalpine: any issues there for the Council through MUDFA ?

TRO process is also affected by lack of completed design drawings.

When your first draft is ready, could you let us see it please.

Kind regards,

Colin MacKenzie  
for Council Solicitor

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**From:** Nick Smith  
**Sent:** 28 November 2007 14:39  
**To:** Colin MacKenzie  
**Cc:** Alan Squair  
**Subject:** Tram issues

Colin

As discussed, here are the key issues which I think would be useful for Directors to be aware of to inform their decision making process. These are clearly my own views, so will need to be checked to ensure that I am not simply misinformed on the issues.

## **Consents/Prior Approvals**

As I understand matters, BBS are presently unhappy with accepting the novation of the SDS contract as effectively SDS are not bound to process the designs within specific timescales, whereas BBS are timebound in terms of project delivery. Their concern seems to be that they will carry the financial risk of delay if SDS fail to deliver approved drawings on time. They have therefore asked tie whether there are any approvals etc which the Council would be willing to take back the risk on. Duncan and Alasdair are discussing this.

My own view is that the Council should not do this. The Council has always sought tie to procure a fixed price contract. Inevitably, the absolute fixing of the price by BBS would require finalised approved drawings. For whatever reason, tie and SDS have failed to obtain approvals for the drawings to date. Accordingly, the present price must be based on unapproved drawings. If the Council accepts the risk re the approvals rather than BBS this will likely lead to (i) inappropriate pressure being put onto planning colleagues to approve drawings simply to stop an delay and added expense to the project; and (ii) the Council being left to foot the bill for any consequent delays.

My concern is that between now and 13 December, I really cannot see much changing in terms of approvals. Accordingly, if I were advising BBS, I would advise that the risk was substantial and likely unacceptable. One option, should BBS remain concerned, would be to ask them to increase their costs by adding a "risk premium". Whilst making the project delivery perhaps more expensive, it would at least assure the members that the risk has been passed to BBS as originally intended.

My main concern is that tie/BBS may raise this as a showstopper at the last minute, forcing the Council to accept risk which in my view should not be adopted. This matter should be carefully monitored and assessed.

## **Third Party Agreements**

We need to be absolutely certain that tie have disclosed all relevant third party agreements to BBS and that BBS accept the terms of them.

## **First Scotrail**

I am not close to this issue, but understand that FS have 45 days to respond to a request for a depot/station change which is what is required here. Network Rail are not willing to approach FS without finalised drawings and full details to allow FS to take a decision. Without FS consent, there is a concern that CEC/tie will not be able to give BBS access to the land. My advice would be to ensure that the 45 day period expires well before the 28 January signing date. If there is a real concern at that point (eg an ORR referral) then at least the Council will not be formally contractually bound to BBS. Whilst the issue may turn out to be easy to solve, it is nevertheless a risk which I would not advise the Council takes on (ie signing up without guaranteed land access). To resolve this issue, tie and SDS need to provide the relevant documentation to NR to allow FS to start the 45 day period asap and in any event no later than say 12 December.

## **Governance**

Further to the email to Duncan today and Rebecca's response, we still appear to be missing parts of the delegated authority chain giving TPB its mandate from CEC. Unless documentation can be located which shows TPB have the relevant powers from CEC, TPB may not presently have valid decision making powers. Duncan is to respond on this issue.

## **PI Cover/Guarantee**

It appears that no PI cover is available to tie to allow CEC to be indemnified. In short, this means that CEC will effectively have no recourse to tie, even if there is an operating agreement in place. Indeed, CEC will have no recourse even if tie are entirely negligent. This gives me real concern if eg tie were to negligently put the Council in breach of the Funding Agreement, TS pull the funding, but CEC has given a payment guarantee to BBS with no funds to cover the fees due. It may be an unlikely scenario, but in my view the December report should reflect this risk.

This is linked to the guarantee issue. We were originally provided with sample guarantee letters by DLA some months ago. They contained wording that the guarantee was subject to TS funding being provided. The proposed new guarantee does not have this caveat. I understand this from a commercial perspective (ie BBS should not have to rely on TS's actions when they have done their job correctly), but leaves the Council at further risk. Again this risk needs explained.

## **Contingency**

The Council was advised that the project was at £498m in October. It is proposed that the same figure is still realistic for the December report. From a PR point of view I would think that the members would require to know the most realistic figure for turnout costs. Given that a number of commercial goalposts have moved since October (eg further lack of approved drawings etc), it is surprising that this has not affected the £498m figure. Perhaps the report needs to be clear on the risks which may increase project costs, giving estimates of any overage where possible. eg BBS may accept the approvals risk if they can charge an extra £2m.

## **Operating Agreements**

Whilst the tie agreement is certainly useful as a guide to what they should be doing, given they have no assets or PI cover, there is little protection being provided in practice. This should perhaps be highlighted to members as previous reports have noted that the operating agreement would provide solutions to some issues.

## **TRO strategy**

I know there is an issue here, but don't have details.

Colin, finally there is the matter of legal signoff by the Council. You are aware of the issues here.

Hope this assists for your note to Alan.

Kind regards

Nick

Nick Smith  
Senior Solicitor  
Legal Services Division  
City of Edinburgh Council  
City Chambers  
High Street  
Edinburgh EH1 1YJ

