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**Cabinet Secretary for Finance and Sustainable Development
Minister for Transport, Infrastructure and Climate Change**

EDINBURGH TRAM: DEVELOPMENTS

Purpose

To advise of developments and seek Ministers' views on further funding of this project

Priority : Routine. Ministers have agreed to the next meeting with Edinburgh Trams, CEC and tie.Ltd on 26 August 2010

Background

For the past year, Transport Scotland has been continuing to advise Ministers that it was doubtful that the full scope of this project, Edinburgh Airport to Newhaven could be delivered by CEC within the overall affordability agreed in June 2007 - £545m and it was probable that overall costs could be around £660m. Over the period however, the Council have had no certainty on final costs and has continued to report final cost estimates to Transport Scotland within the agreed affordability of £545m.

On 10 June 2010, CEC provided formal confirmation to Transport Scotland that it was "unlikely that the full scope of Phase 1a will be completed within the available funding envelope of £545m and that costs are likely to be significantly in excess of £600m and a final cost in excess of £100m more than the previous £545m target is possible". CEC's report to the full City Council on 24 June 2010, advised that contingency planning work undertaken by the Council and tie.Ltd has identified funding options which could require a 10 % uplift project costs up to £600m.

Since then, the Cabinet Secretary and Minister have met senior officials from Transport Scotland together with Edinburgh Trams, tie.Ltd and City of Edinburgh Council to discuss the current state of the Edinburgh Tram Project. At these meetings the Cabinet Secretary has made clear to tie.Ltd that the current position remains unsatisfactory.

Negotiations have been ongoing to clear the significant differences in understanding of the operation of the main "civils" construction contract that exists between tie and BBS (Bilfinger Berger – Siemens) element of the overall BSC consortium towards completion of the project. The compromise that tie.Ltd has been working towards, favours a fixed price for the completion of the remaining "on-street" sections and if possible, an orderly exit of Bilfinger Berger.

Bilfinger Berger has now submitted their 'offer' to complete the Airport to St Andrew Square sections and the Chief Executive of tie.Ltd has indicated to Transport Scotland that this is considerably more than anticipated - £660m for the Airport to St Andrews Square.- approximately £100m more than tie.Ltd considers reasonable.

While they believe there is some scope for negotiation, tie.Ltd doesn't feel that Bilfinger Berger have embraced the heads of agreement discussed in "Project Carlisle" accordingly they are not optimistic about the outcome of any negotiation and now consider that they have no alternative but to begin issuing remedial termination notices. This doesn't mean termination - strictly it requires Bilfinger Berger to produce remediation plans within a time limit but it may produce further dispute and also the risk of heightening tension, however, tie.Ltd considers this step unavoidable, partly for negotiation but on substance too. CEC would have to agree termination.

Issue:

CEC's remedial plans are no longer capable of being delivered within the agreed / overall affordability of £545m and the full scope of Phase 1a, both of which are key conditions of the Grant Agreement. In such circumstances it is debatable that it would represent continued value for money and Ministers will now wish to consider whether it is appropriate to continue financial support now that there is clarity on final costs

Legal advice confirms that as it stands the Scottish Ministers may exercise certain remedies in the event of a default by CEC. Such defaults would include the Council "ceasing or threatening to cease to deliver the full scope of the Project, or the cost of the project exceeding £545m" The remedies include "terminating the grant agreement and varying, withholding or requiring repayment of the grant or any part thereof". Transport Scotland advised Ministers on 17 June 2010 that there was a third option, issuing a Cure Notice. However, by formally advising Transport Scotland on 10 June that it will effectively fail to meet the affordability and scope criteria of the funding agreement, CEC has effectively already served its own Cure Notice.

CEC's report to full Council on 24 June 2010; advised their "remedy" would be to conclude negotiations with Bilfinger Berger and require a further 10% increase on the current £545m funding, providing CEC with an revised affordability of £600m. However, this is now clearly short of any realistically achievable cost agreement with Bilfinger Berger, even for the truncated route Airport to St Andrews Square rather than Airport to Newhaven.

Recommendation

That Ministers note the contents of this briefing particularly;

- a) the latest cost advice from Bilfinger Berger indicates that CEC's remedial plans for completing the project within the terms of the agreement with Ministers are no longer capable of being delivered; and,
- b) that Ministers may now wish to consider whether it is appropriate to continue to provide grant support in such circumstances.