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**From:** Graeme Bissett [graeme.bissett@██████████]  
**Sent:** 28 July 2006 09:47  
**To:** Suzanne Waugh  
**Cc:** Andie Harper; Stewart McGarrity; Willie Gallagher  
**Subject:** Publication of tram capital costs and affordability

Suzanne, your views on this would be appreciated. The first note below sets out how I am suggesting we handle the issue of capital cost information and affordability. I believe Andie is in agreement and his programming is working around the same principles. The second deals with a request I've made for advice to DLA on FOISA implications. These should be self-explanatory, but how the matters are handled at the sharp end – when the business case is in public view in December / January – needs some creative and proactive thought. For example, although you and colleagues would not normally have to get involved in the drafting of the business case, there are a number of key areas in the business case documents which are likely to be publically sensitive, including capital costs and affordability.

I look forward to your views.

*The purpose of this note is to suggest a coherent way to bring capital cost information into the TEL Business Plan and the Tram Draft Final Business Case documents (described collectively for shorthand in this note as the DFBC) within the desired timetable.*

#### *Background and objectives*

*We have three pressures :*

- 1. A desire to provide Councillors, CEC and TS officials and the Minister with robust capital cost information to inform their decisions on the DFBC on 21/12/06 and 1/2/07*
- 2. The work required prior to releasing the Infraco ITN documents to produce optimum tender results and the consequent effect on tender receipt timing*
- 3. The need to avoid disclosing information in the DFBC to the public (and therefore the bidders) which could weaken our commercial position*

*It is necessary to have the majority of the DFBC approved by the Council on 21/12/06 with potential for key issues (including capital cost) to be followed up 1/2/07 and then approval by officials at TS by the end of February at the latest. This is because 1) we require approval to commence the utility diversion work and the related funding ; and 2) the impending elections will create a purdah period until mid-May at least which will stall progress on all areas requiring CEC or Executive decisions. The probable consequence of delay will be increased cost through inflation, rolling project management cost and weakened bidder confidence driving risk premia upwards. With little headroom in current cost estimates, any further pressure could seriously damage affordability.*

*The objective is to ensure that the DFBC is approved within this timeframe and that the approval is based on robust information on all material aspects, including capital cost.*

#### *Likely scenario*

*The most likely scenario at present is as follows :*

- The Infraco ITN is released Sept / Oct, but no formal ITN returns are received in time for the papers to be submitted to the Council for the 21/12/06 meeting.*

- *All other aspects of the DFBC are currently scheduled to be ready for inclusion in the papers for 21/12/06, with acknowledgement of the extremely tight timetable and the major risk factors such as approval of design and output from the JRC modelling work*
- *A good quality Infracost cost and risk estimate will be available for 21/12/06 meeting, using Bill of Quantity application against Preliminary (and in some areas Detailed) design, value engineering results and third party review*
- *No interim cost information will be sought from bidders prior to their formal submission, since to do so would invite higher bids while detailed costs and risk premia are being assessed*
- *ITN returns are received in time to inform the 1/2/07 meeting*

*This would allow us to prepare the DFBC for 21/12/06 in all material respects, demonstrating definitively 1) financial viability 2) anticipated modal shift and 3) the planned integrated service pattern and consequent benefits to the travelling public. Using prudent, high quality but undisclosed capital cost information will enable the DFBC to conclude on 1) affordability relative to stated maximum funding availability (as agreed with TS) ; and 2) economic viability, where the calculation of Benefit / Cost ratios includes capital costs. Anecdotal feedback from bidders may further inform these conclusions, but this should not be relied upon at this stage.*

*It should be noted that reasonably definitive costs will be available for approaching 50% of the total capital costs. This includes utilities, vehicles, land & property, design and project management costs through to operational commencement. In other words, the programme should deliver firm cost estimates for all costs except Infracost in time for the 21/12/06 meeting.*

*If the overall process goes to plan – again emphasising that this is by no means guaranteed – the DFBC documentation for the 21/12/06 meeting will therefore include all the information required by the key parties to support approval of the DFBC. There is an obvious risk that critics will highlight the lack of capital costs informed by tender returns in the 21/12/06 DFBC and seek to undermine the validity of the overall approval process on 21/12/06. This can be mitigated by :*

- *Documenting in detail in the DFBC the rigorous process undertaken by tie to prepare the undisclosed capital cost estimates, the scrutiny by the project governance process, the third party validation of ITN content (ie the gateway review), and the level of contingency the estimates contain*
- *Ensuring that the cost estimates have been scrutinised by officials in CEC and TS who conclude they represent fit-for-purpose estimates and that they concur with the conclusions in the DFBC*
- *Outlining the extent of the costs which are firm (most areas except Infracost)*
- *Emphasising that the investment of time earlier in producing robust Infracost bid documents gives the best chance of achieving the optimum cost*
- *Setting out the process by which the 1/2/07 meeting will be informed by bid returns*
- *Confirming that the ultimate decision on Financial Close will be based on definitive final committed bids and remains subject to approval by new administrations in Edinburgh and Holyrood*

*Should the internal cost estimates point to a failure to achieve affordability (or economic viability) we will have to deal with it when this becomes a likely outcome. In principle this would be no different a problem than an emerging issue with financial viability or indeed any other important matter within the business case. For the present, we need to proceed on the assumption that the tests can be passed.*

#### *Process to 1/2/07 meeting*

*The bid preparation period is currently estimated at 14 weeks. To permit at least two weeks scrutiny of bids prior to the papers being submitted for the 1/2/07 meeting, the return date will need to be on or before 11 January 2007, implying an ITN release date of early October at the latest. The two weeks scrutiny will not remotely produce a definitive conclusion on any bid, but if the documents are well-designed they should permit a clear view as to whether the bids are likely to end up in a range which supports the conclusions from our internal estimates. The review in January 2007 will require to be carefully executed to ensure that risk assessments are made properly and that both CEC and TS officials have a full opportunity to assess the results. The evidence from the bids will require to be kept under very strict confidentiality to avoid corrupting the bid process.*

*Assuming this can be executed, the 1/2/07 meeting will not receive detailed capital cost information from the bid documents but will receive a paper which confirms that bid returns point to confirmation of the conclusions in the 21/12/06 documents. Both the Council and TS retain full control over the ultimate commitment to the project because the contractual commitment will not take place until late 2007. The approvals at this stage are therefore qualified by the need to ensure that ultimate capital costs in the final form of the financial close documents remains within the affordability envelope. The actual costs in the contracts would be disclosed publically at that time, but not before.*

*Should the bid returns point to a threat to affordability or economic viability, the paper for the 1/2/07 meeting will reflect the risk and the actions being taken to mitigate the risk. See below on planning for this scenario.*

#### *Optimistic timetable – bid returns precede 21/12/06 meeting*

*If we want to deliver a level of comfort on received bids in time for the 21/12/06 meeting, the ITN issue date will require to be early September. This may be achievable and the detailed document production programme is now well underway, but this must be regarded as unlikely at this point. Our planning therefore needs to allow for the likelihood that the 1/2/07 meeting will be informed by bid returns, but not the 21/12/06 meeting. We should consider at an early stage how best to ensure that expectations are properly managed.*

#### *Pessimistic timetable – bid returns after 1/2/07 meeting*

*A possible scenario would appear to be one which results in both the 21/12/06 and the 1/2/07 meetings being asked to approve the DFBC with no comfort that bid returns support the estimated costs. The critical date would be ITN issue after early-October. This scenario must be unacceptable and every effort is being made to ensure that it does not arise. At worst, there may need to be some compromise on the detailed definition which goes into the ITN documents, which will create the risk that bid returns are risk-loaded. This is undesirable but not lethal, as the bids are all subject to negotiation after receipt. Accordingly it is not anticipated that this scenario will arise.*

#### *Suggested actions*

*If the likely scenario described above is acceptable, the following actions are recommended :*

- 1. Early agreement by all key parties that this is the process we are following – the Tram Project Board on 24 July may want to address this matter*
- 2. Preparation and agreement of the Infraco document production programme and critical related programme elements (including detailed CEC and TS engagement and approval processes) become a priority. This process is well underway and needs to be concluded. The programme needs to reflect the decisions on timing outlined above, especially ITN release by early October at the latest.*
- 3. The programme to produce the internal capital cost estimates needs to be scrutinised and a programme risk assessment performed.*
- 4. The draft content of the DFBC with respect to the capital costs should be prepared at an early point to facilitate thorough assessment of the ultimate presentation well before the submission date for the 21/12/6 meeting. This should incorporate the points noted above which support the validity of the process being followed.*
- 5. Development of a Q&A script on this area at an early stage might also be beneficial to prepare for critical comment.*
- 6. Consideration needs to be given to the possibility of bid returns emerging in January 2007 which threaten the affordability and viability conclusions reached in December based on internal capital cost estimates*

7. *Consideration needs to be given to managing the expectations of stakeholders, press and other interested parties in advance of the December / January approval process*
8. *Extreme care will require to be taken in the period from end-2006 to Financial Close (mid-late 2007) in responding to FOISA requests which relate to the basis for Benefit / Cost ratios, affordability and specific capital costs. We will be in the midst of the bid negotiation process and must avoid releasing information which could benefit bidders. This includes specific pieces of information, but also information which – when combined with other information released, or by deduction – could provide bidders with useful guidance on competitive or acceptable cost bids. The application of a blanket release embargo on such information should be investigated as a priority.*

*I look forward to your views.*

*Regards  
Graeme*

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*Graeme Bissett*

*m : [REDACTED]*

*FOISA exempt and strictly confidential not for distribution*

*Graeme*

*All noted. I am away in the States as from cob tomorrow. This is one for our public administrative law specialists. My view would be that FOISA conditions for non-disclosure are readily met.*

*It would be disastrous to the competitive if the PTE was inadvertently disclosed during pre-tender period, or for that matter during negotiations.*

*Will revert tomorrow.*

*kind regards*

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**From:** *Graeme Bissett [mailto:graeme.bissett@[REDACTED]]*  
**Sent:** *25 July 2006 16:11*  
**To:** *Fitchie, Andrew*  
**Subject:** *Capital cost estimates and confidentiality*

**STRICTLY CONFIDENTIAL – FOISA EXEMPT**

*Andrew, at the Tram Project Board yesterday, we discussed the issue of protecting the confidentiality of capital cost information including that emerging from tender returns. The purpose of this note is to get your views on how we can best and legitimately achieve this. For the avoidance of doubt, tie does not intend to breach any law or regulation but we also have other obligations :*

- 1) *Commercial – we must ensure that any information which reaches bidders does so in order to optimise their bids from our perspective. Contrariwise, we want to restrict the flow of any information which could prejudice the optimisation of bids.*
- 2) *Procurement regulation compliance – which I believe would prevent us disclosing publically in any meaningful way the information contained in tender returns.*

*At present, the capital cost numbers in the public domain which have been verified by us all emanate from the OBC document prepared earlier this year. Other numbers are bandied around in the press but there is little we can or should do to challenge or validate these. Tactically, the OBC numbers suit our position, because they demonstrate that the anticipated aggregate cost of Line 1a and Line 1b, including full contingency (and optimism bias) exceeds the aggregate of disclosed funding sources (being £545m, the upper bound of the published grant estimate allowing for indexation plus the CEC published contribution of £45m). This is a coincidence since the costs were derived largely independently from the funding sources, but the picture is helpful in setting bidders expectations about available*

*funding. Bidders would not of course know the current detailed composition of the aggregate cost, but the tone for Tramco and Infraco bids is at least set.*

*Tie is preparing a detailed "Pre-tender estimate" (PTE) to support the bid evaluation process. This estimate is likely to be reflected in the Draft Final Business Case prepared for Council approval in December 2006. The precise disclosure will be worked on in due course, but is likely to be either the actual PTE, a range based on the PTE work or not specifically disclosed at all. In the latter two cases, the argument would be that we do not want to release the information publically, but we will confirm that the process of preparation has been fit for purpose and that CEC / TS officials agree with the conclusion.*

*In January 2007, we expect to have tender returns and similar confidentiality concerns arise. The desire is to have CEC officials prepare a paper for the 1.2.07 Council which confirms that the tender returns have produced results within the range or the affordability envelope, but with little further evaluation. Of course, if the returns are materially different we have an issue to manage. The final figures will presumably be disclosed when the final business case is signed off and financial close achieved.*

*The confidentiality questions here are :*

- 1) Is there any legal difficulty with the proposition that the DFBC and the January paper do not specify the PTE numbers or information from the tender returns ? We obviously require to explain the rationale to CEC officials and Councillors.*
- 2) Are we on firm ground in resisting any FOISA requests for updated capital cost information 1) prior to tender returns and 2) including tender returns ? In relation to 1, the harm test would seem to be passed because disclosure would "prejudice substantially" some particular interest, namely tie's ability to optimise tender returns. The term is not defined, but the Code of Practice refers to "real, actual and of significant substance". A further briefing note implies harm must be near-term and must be evidence based. Again, these conditions seem to be met. I would also think that the public interest test is met because the public interest in withholding the information is greater than the public interest in disclosing it, given the scale of cost involved. I don't believe this is compromised by any of the considerations which the Act requires be applied such as scrutiny of the use of public money. S30(C) and S33 (1) (b) would seem to offer defensible qualified exemptions. The S36(2) absolute test may well apply to tender return information, if tough confidentiality terms are incorporated into the tender return documents.*

*Your advice is to tie and TEL, but will be made available to CEC and TS. Please call if you want to discuss prior to going into print. There is no immediate hurry, but I am away from next Wednesday, so a response before then would be helpful.*

*Regards  
Graeme*

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*Graeme Bissett  
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*Regards  
Graeme*

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