

**Edinburgh Tram - Critical Issues to be discussed at the Special IPG on 27 July 2009**

**Decision required to be taken for the finalisation of the Council Report for 20<sup>th</sup> August 2009**

	<b>Issue</b>	<b>Implications</b>	<b>Options/Comment</b>	<b>Decision</b>
1.	Whether August committee to report on extent of potential cost overruns and delay?	<p>Public perception of delay and cost overruns.</p> <p>tie argue that making figures public may give upper hand to BSC. CEC officers feel that this may have been the case in the past but given present circumstances this is now largely irrelevant. BSC seeking costs well in excess of £545m anyway and appear to be ignoring fact that CEC has no funding beyond £545m.</p> <p>Option of a moratorium would have cost implications, notably through a request for an extension of time by BSC. However, the project is (and has been since March 2009) limping along on a basis of poor relationship and arguably bad faith by BSC. There may be merit in high level discussions among tie, BSC, CEC and Transport Scotland about the future affordability of the project. The alternative is to proceed in a culture of DRP and ever-rising costs and uncertainty.</p>	<p>Already publicly stated by RJ that project is suffering from delay and overspends. Appears unlikely to be acceptable to Councillors that a further report is presented without definitive financial detail.</p> <p>Three broad options appear to be (i) get the maximum that can be achieved for £545m through curtailment, or (ii) cancel project now (costs to be calculated and views of Transport Scotland regarding repayment of grant crucial). This would need to be supported by a clear statement from DLAP that BSC in breach of contract; (iii) complete 1A regardless of final cost (unlikely to be feasible), or (iv) impose a moratorium on the project pending resolution of a guaranteed way forward. In hindsight this may have been appropriate in March 2009 at the first sign of the breakdown between tie and BSC.</p> <p>Question of whether these options should be presented to Council for a decision or whether officers make a recommendation. There is also the public perception regarding control of the project that will need to be carefully managed.</p>	

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2.	If cost and delay to be reported, then to what extent?	Likely to be a range of figures for presentation given current state of knowledge and lack of certainty. Top end of range is not certain but is likely to be “well north of £600m” according to tie.	Given comments above, unlikely to be acceptable not to provide at least some indication of outturn costs. Not providing a range may look like we are not in control.	
3.	Curtailment	<p>Reducing scope of project may bring it within funding envelope. Potential for huge public and political backlash if eg works on Leith Walk for the last 2 years do not even deliver a tram to this area.</p> <p>Issue of programming in that if curtailment is to take place, this may impact on when works take place. This in turn will impact cost.</p> <p>May be costs involved in buying out BSC’s rights as they bid for whole of line 1A and will expect profits from this. This may be especially difficult if relationships are further strained by DRP etc.</p>	<p>Advising Council of possible curtailment before discussions of implications with BSC may cause issues as it may signal an intention by tie to trigger breach of Infracore agreement as to terms of build scope.</p> <p>Nevertheless, curtailment appears to be one of the only sensible choices at this juncture.</p> <p>Tie in response should be arguing that any notional profits by BSC should only be within the original bid price, as accepted.</p>	
4.	<p>Operating Agreements:</p> <ul style="list-style-type: none"> <li>• Whether 1B to be included in TEL scope</li> <li>• Is FBC still valid</li> </ul>	<ul style="list-style-type: none"> <li>• Line 1B is delayed at present so potentially no need for TEL to have powers for this at present.</li> <li>• [TBC]</li> </ul>		

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5.	tie and TEL bonuses	Potential for greater control of tie through bonus arrangements (very little other effective de facto “control” incentive as tie fully CEC funded).	<p>Question of whether any bonus should be payable at all now funding envelope likely to be exceeded for completion of 1A in full and there is now significant delay to completion? ie. on one view tie has failed to deliver as promised (on their own admission tie admit that 40-80% of changes and delay are down to them, not BSC) and accordingly further bonus payments are therefore inappropriate. Need for clarity as to whether these bonus payments are a contractual entitlement which could be pursued by employees through Court action or Employment Tribunal claim.</p> <p>However, there will also be a difference between responsibility and culpability of different employee grades and functions within tie.</p>	
6.	Claims process	TEL wish to have full control up to the appropriate Council approved budget figure. CEC officers wish to have greater control over movements in the QRA to ensure tighter governance in relation to claims/payment settlement	If TEL is allowed greater control then there is potential for movement of figures to suit presentational requirements. If CEC retains control they will have greater oversight and visibility of any potential issues.	
7.	Whether 45m CEC contribution feasible	Any shortfall in the planned £45m, particularly in the £25m element earmarked to come from developer contributions, would require an alternative funding source to be identified by CEC.	<p>DTZ report backs up view that fundamental assumptions remain sound. Planning committee allowed for developers contributions to be collected until the Council reached the value required. Risks continue to remain, including likelihood of certain large scale contributions (e.g. Forth Ports) in the current market.</p> <p>Alternative funding sources should developer contributions fail to materialise would be same as options below for funding of overspend.</p>	

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8.	Alternative funding strategies	As it is likely that £545m will be exceeded, how will any overspend be funded?	<ul style="list-style-type: none"> <li>• Borrow against future TEL revenues</li> <li>• Divert spending from other CEC capital projects to fund tram completion</li> <li>• Project termination (costs to be considered here)</li> <li>• Prudential borrowing with interests costs paid from Council revenue budgets.</li> </ul>	
9.	Who is to be appointed to TEL board		Jl commencing discussions to clarify the proposals here.	
10.	Assuming stage 1 transfer is completed, who is proposed to be on tie satellite board			

#### Other Key Issues

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11.	Whether tie should engage in formal DRP on disputed issues	Could further sour relationship and BSC could commence “go slow” to frustrate works and maximise Council problems re Christmas embargo etc and increase general discomfort to assist BSC negotiations.	<p>Realistically very little option but to go through process. DLAP advise not enough evidence to invoke breach proceedings thus far and appears little prospect of BB being ejected by other consortium members. Still a pressing need to flush out the legal basis (if any) for BSC’s inflated claims for continuing with the contract.</p> <p>Question of whether the possible further delay and consequential impact on e.g. Christmas embargo should be highlighted in the August report, even if in a vague “may be further timetable changes and impact” way.</p>	

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12.	Infraco	Question of whether increase in Infraco contract cost has procurement implications. It was stated to be 95% fixed by tie. However, fresh demands may mean than original bid will significantly increase. This raises the prospect of “material change”.	<p>Potential risk of challenge to original contract pricing and acceptance.</p> <p>tie need to produce information to ensure that any subsequent comparison to original Tramlines bid is not unfavourable. tie may also be required to show how far removed the current works/specification is from that tendered and priced up to Financial Close.</p>	
13.	Reporting to Transport Scotland	TS are demanding updated written reports on the current position.	<p>TS have been advised that CEC do not have relevant information from tie to allow formal reporting of the position.</p> <p>Question of how much of the informal information which CEC <i>does</i> hold should be reported?</p>	
14.	Formal letter to tie	Question of whether CEC culpable if it fails to address tie faults to date. Question of whether CEC should send formal letter of warning to tie in relation to failures to date to deliver on time and within budget. In essence, tie should be treated as any other firm of external consultants/agents who are not performing to the Council’s expectations and contractual requirements. Whilst some fault lies with BSC, tie are, by their own (albeit informal) admission, not entirely blame free. Further question as to whether tie is supplying information immediately as and when it becomes known or are CEC getting info “behind the curve” (e.g. financials have moved significantly over the last	<p>Question of whether this is desirable. This may offend the one family approach, but external scrutiny would expect the Council to hold tie to account. Any failure to do so, and also be seen to do so, will inevitably expose the Council to criticism, with accusations that the Council is as culpable as tie for client failures.</p> <p>From a Comms perspective this would be desirable – would also show that the new Transport Convener is switched on to issues and if presented to him he would be keen to do this. In media terms, this would go some way to showing the Council taking a proactive approach and is on top of the situation and is managing tie.</p>	

		3 months yet little change in DRP headings).		
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15.	Possible cost saving options	Possibility of dispensing with selected tie functions now (eg HR, Finance, Comms etc) and taking advantage of potential accommodation efficiencies.	TUPE issues to consider. However, may be opportunity to reduce overheads.	
16.	tie wind-down	Intention is that tram operations will be carried out by TEL. tie have no other major projects so consideration should be given to what happens to employees and the company post-construction. Question of whether tie employees were put on permanent or time limited contracts?	Cost of wind-up of tie re employees is circa £1m. Unlikely to be acceptable to TS as a project cost. Where will this be funded from?	