

FINANCE

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**Our Ref:** DMcG/RA/DR  
BReeve001

**Your Ref:**

**Date:** 20 November 2007

Bill

Thank you for sending the most recent draft grant award letter for Phase 1 of the Edinburgh Tram Network. Council and tie staff have now reviewed this draft in detail and comments are included in an appendix to this letter.

As you will see, the majority of the comments are relatively minor and can be resolved by further dialogue between our respective staff and legal teams. However, the following issues continue to be of concern to the Council and need to be addressed at a senior level:

- The Council requires more flexibility in the funding arrangements between financial years to allow for potential slippage and/or acceleration of expenditure. Should the grant in any financial year be insufficient to meet payments to contractors, the Council will have to undertake substantial borrowing and pay interest on this borrowing in order to honour contractual commitments. This level of risk and potential cost in the current drafting of the letter is unacceptable to the Council.
- The Council is concerned at the lack of reciprocity from Transport Scotland in the draft letter. The Council and tie will, on the strength of this agreement, take on major financial obligations. In order to do so, the Council requires certainty that Transport Scotland will meet its payment obligations within stated timescales and not withhold or refuse to pay any instalment of the grant except in case of material breach by the Council. The current drafting of the letter provides insufficient protection for the Council.
- The grant letter currently states that if the Council is successful in gaining additional public sector contributions, Scottish Ministers may chose to reduce the grant by the amount of the contributions. Given that the Council is currently taking the cost overrun risk, it is important that all funding options remain open, to reduce financial risks to the Council.

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In view of the necessity to conclude the Grant Letter early next month, I suggest we set up a meeting to discuss these concerns at the earliest opportunity. Please contact my secretary Donna [REDACTED] to set this up.

Yours sincerely

DONALD McGOUGAN  
Director of Finance

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## APPENDIX – DETAILED COMMENTS ON DRAFT GRANT LETTER AND SCHEDULES

### Main Letter

#### Paragraph 1

CEC percentage contribution (500/545) should equal 91.74% as opposed to 91.2% (unless TS want to alter the percentage to allow CEC to catch up in terms of overall contribution more gradually rather than by an adjustment immediately after financial close, as envisaged)

Clarification is required over whether current year award will still be effective post financial close, or whether it will be rolled up into the new award.

Clarification is required over whether the amount deducted will relate to grant paid (cash), accrued (COWD) or awarded (grant letters issued)

#### Paragraph 3

##### 3.1a

This should read “an affordability assessment for the Project within available grant funding of £500m and funding from the Council of at least £45m”. This gives more flexibility to increase funding to fund 1b.

##### 3.2.3

This should read Annex 2

#### Paragraph 4

##### 4.1

What is meant by this clause?

##### 4.2

CEC requires more comfort in terms of carry over of grant from one year to the next. It also should be noted that annual requirements cannot be fixed until closer to financial close.

### Schedule 1

#### 3.1

End date for grant needs to be extended to allow for eligible expenditure being incurred after this period (eg disturbance compensation claims)

#### 3.2.1

Should read Princes St (not Princess St)

#### 3.3

CEC would like to leave open the option for an earlier decision date for Phase 1b. tie is checking the contract conditions

### 3.4.1

More clarity is required on these conditions. CEC requires assurance that minor variations from budget or programme would not affect the 1b decision. Can there be an independent arbiter in the case of disagreement between CEC and TS.

### 3.6

Delete "a subsidy only and". This is to protect CEC/TEL's tax position.

### 4.2.2

Could we clarify the impact of these deadlines being missed?

### 4.3

Change percentage to 45/545 which is 8.26%. What evidence is required?

### 4.4

Under what circumstances do TS envisage that payment might be reduced or held back? Can TS timescales be speeded up? Current 35 day payment cycle is too long. In general, greater clarity is required over what is required in the application for payment in Annex 2. Is the claim for COWD or cashflow? Can TS be required to pay interest in respect of late payments?

### 12.1.2

This is unworkable.

### 12.2

This should be acceptable, provided it applies only to this Funding Agreement, and not the wider project.

### 13

Default clauses need to be adjusted so that they exclude immaterial items, to reduce the risk that payments to CEC are withheld unreasonably.

The term "Operator" needs to be defined in the context of this agreement

### 18.1

There is a requirement from Network Rail and British Airport Authority for the Council to lease rather than acquire some of the land required for the tram. This paragraph needs to be changed to allow tram assets to be constructed on this land.

Can assets be restricted to those "funded in whole or in part from the Grant" as in 18.3?

### 18.3

TS percentage is 91.74%

### 20.1

This clause is unacceptable as it reduces funding options open to the Council.

### 23

Can this be translated into Plain English?

## Dispute Resolution

Remove stages 2 and 3. CEC have no equivalent managers to cover these stages. The draft includes managers from tie and TEL, but this does not reflect project reporting lines. There should also be provisions for mediation/arbitration.

Some wording suggested by legal is as follows:

" The parties will attempt to resolve in good faith any dispute arising out of this Agreement within twenty-one days by negotiations between themselves. If the matter is not resolved through negotiations, both parties will attempt to resolve the dispute through a procedure ( "the ADR Procedure") such as mediation or conciliation, or other dispute resolution procedure technique recommended from time to time by the Centex for Dispute Resolution (CEDR) (Scotland). Such procedure will take place in Scotland. If the matter has not been resolved by an ADR Procedure or if either party will not participate in an ADR Procedure the dispute may be referred to the Court of Session in Edinburgh in accordance with Clause [ ] below.."

" In the event of any dispute as to the interpretation of the terms of this Agreement matters shall be referred to an Arbiter appointed by the parties by mutual agreement and failing such agreement the Arbiter will be appointed by the Law Society of Scotland."