

**Tram Mediation Programme - CEC/tie Briefing Workshop**  
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Mediation Preparatory Workshop

Location: Citypoint, Haymarket Terrace  
Date: 29 January 2011  
Present: Richard Jeffrey, tie (RJ); Steven Bell, tie (StB); Brandon Nolan, McGrigors (BN); Anthony Rush, construction advisor (AR); Nigel Robson, QC, mediation specialist (NR); Dave Anderson, City of Edinburgh Council (DA); Donald McGougan, City of Edinburgh Council (DMcG); Alastair MacLean, City of Edinburgh Council (AMacL); Sue Bruce, City of Edinburgh Council (SB); Colin Smith, independent advisor to City of Edinburgh Council (CS); Ritchie Somerville, City of Edinburgh Council (RGS).

**Meeting Note**

Introductions

Following a welcome from RJ, SB provided an explanation as to why she had called the meeting:

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- Wanted to feel the 'team' was ready collectively.
- Critical stage in the project: for all parties involved.
- Wanted to understand how to seek to resolve a number of issues.
- Accept that some can be dealt with now, but some will need to be addressed in the future.
- £ ½ B in the ground: need to make good this investment.

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SB also raised the issue that, having come in and attempted to get up to speed in the 3 weeks it has become clear to her that governance arrangements going forward need to be refreshed, but that this was for outside this meeting. The focus of the session was the mediation meeting in March. SB also noted that there is a need to start promoting confident messages about the project at the correct time. There is a clear need to build assurance in the project and regain 'reputational' ground. As already noted, it was further discussed that the roles and responsibilities of the client - the Council - and the commissioning contractor - tie Ltd - needed to be made crystal clear.

All present then introduced themselves and their roles in relation to the project.

Objectives for the Day

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DA outlined the draft objectives for the day:

1. To provide an overview of the background and key issues of the Tram Project, in preparing for mediation;
2. To clarify key roles and contributions of team members;
3. To review strengths and weaknesses of tie's position and the BSC consortia;

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4. To confirm the scope of, timing and arrangements for information exchange with BSC in the interim period and before we meet to mediate;
  5. To discuss strategy and tactics for mediation;
  6. To identify the key workstreams and milestones in the mediation project plan; and,
  7. To clarify the mediation timetable and process issues.

*SB added an objective on the need to understand and know the consortia:*

8. *To understand the 'opposition'.*

### Morning Briefings

50 Four briefings were provided during the morning session, to facilitate a shared understanding of the project as it currently stands for all present.

RJ explained, in overview, the recent project history and the background to mediation.

This was followed by a legal briefing from BN, summarising the key legal issues and disputed contractual clauses and the milestones and logistics normally associated with the run up to mediation.

NR then provided a detailed summary of the Mediation as a process, in which he examined the key risks and benefits for the Tram Project associated with this approach.

60 Throughout the briefings questions were asked and issues raised as those resent sought to gain a full understandings of the issues as currently understood. The questions or points raised for further action or note were as follows:

### **Contract**

- Are we clear as to the role of the 'Gentleman's Agreement' in the contract approach and how each party has acted following contract signature?
  - Supplemental to this is the question, are we clear as to what it was tie Ltd/the Council were signing up to?
- Have tie Ltd/the Council been consistent in our interpretation of the contract and its performance?
- In relation to the adjudications that stand, what impact do they have on the interpretation of the contract? Binding, or informative?
- In relation to changes, as defined by the contract, the process has no 'de minimus' level.
- If tie Ltd/the Council were to seek to revise the contract for Phoenix or separation, are we clear as to the procurement competency of seeking such a revised contract?
  - What form of risk curve for performance of the works would we be prepared to tolerate in relation to the risk of challenge/fines?
- In relation to the Contract culture, language and approach: It is clear that the British and European approaches are inconsistently similar. When working with European

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contractors we need to be clear what their 'drivers' are? What do they want? It is always worth remembering that they are significantly risk averse.

Future Contract(s):

- In relation to a future Contract the approach has to be to keep it simple in contract ethos and philosophy and work towards an '*industry standard*' approach
- NEC3 contract partnership approach mooted.

**Relationships**

- Trust, or lack of it, is at heart of this problem.
- Who is the Consortia? Not clear who they are, often seem a mirage.
  - We understand the constituent parts, but what type of collective are they?
  - What are their relationship 'strain' points?
  - Who is the leader?
- Consortia do not appear to engage in a '*modern*' manner. Could be a classic case of mis-direction, or that there are personalities who are, or have become by association, barriers rather than connectors?
- Have we emolliated their behaviour by our own?
- As noted above the contract culture, language, approach and mindset is not shared.

Mediation:

- What/who is the conduit for engagement going forward?
- We need to be clear who Mike Shane is? How does he operate? What will he be looking for in a competent party to a mediation?
- Ideally we would be able to agree a 'Lock down' on press (both parties).
  - If this is not likely we need to have a consistent line in anticipation of a leak.

**Mitigation**

- Have we agreed the scope?
- How do we set up a meeting to confirm terms and process?
- Do we need to agree who the representatives are who meet the mediator (Both parties)
- What/who is the conduit for the mitigation?
- How do we get the 'right people' in mediation? This relates to both parties.
- Need to be clear that adjudications will inform the mitigation. What comfort can be drawn, by either party?
- It is the contract in law that will be/is at the core of the conflict.
  - We cannot lose sight of the fact that the '*Gentleman's Agreement*' is likely to be used to inform the ethos of their approach, but fundamentally it will rest on the contract.
- The focus for the mediation needs to be on the future and delivery
- We need to be clear what they want: what is their "backstop" position or minimum agreement position? Is it to grind-on or do they want to do a deal?
- In relation to this, what is the scope of the discussion we want to have at mediation?
  - Project Phoenix,

- Separation, or
- both?
- Do we understand the strengths and weaknesses of our arguments?
- We need to ensure that we make the case in their mindset and using their language: talk about how it has been poorly managed, the poor quality of the workmanship, their lack of control of the design process since they took it over, etc. Discuss their responsibility for performance. Fundamentally how do we play their pride?

#### **Governance**

- We need to be clear about the governance relationship:
  - CEC is client for a TRAM, funded by Scottish Government.
  - tie Ltd is responsible for delivery of TRAM.
- Roles, responsibilities and accountability need to be clear and is vital.

#### **Information Sharing**

- McGrigors Report 2010: "Wiesbaden"
- Helen Davis paper

*At this point the meeting broke for lunch.*

After lunch there were two further brief presentations to round out the information sharing stage. RJ and SB provided an overview of the programme and budget status to date. This was followed by a discussion on the option appraisal relating to the risks and benefits of Project Phoenix versus Project Separation as solutions, led by RJ/AR.

A range of issues were identified throughout these discussions. In appraising the options, Project Phoenix and Project Separation, it was identified that a series of review filters needed to be applied:

- Overall Project Scope – remembering that the current agreed scope is to Newhaven.
- Cost/Value – Breakeven operational levels
- Price – what is our position?
- Trust – we need to re-establish this. What would this require?
- Timescales – remembering the bonds and guarantees expiry date
- Contractual Risk Allocation – given where we are do we ever really transfer risk?

There was also a discussion on what success might look like. This would relate to the above, but also focus on reputation, behaviour change, trust and delivery.

It was accepted that the delivery mechanism for management of the contract may have to change, or that there was a possibility that the funder, TRANSPORTScotland, may seek alternative arrangements.

For the project to progress there were, therefore, two options other than the current stalemate:

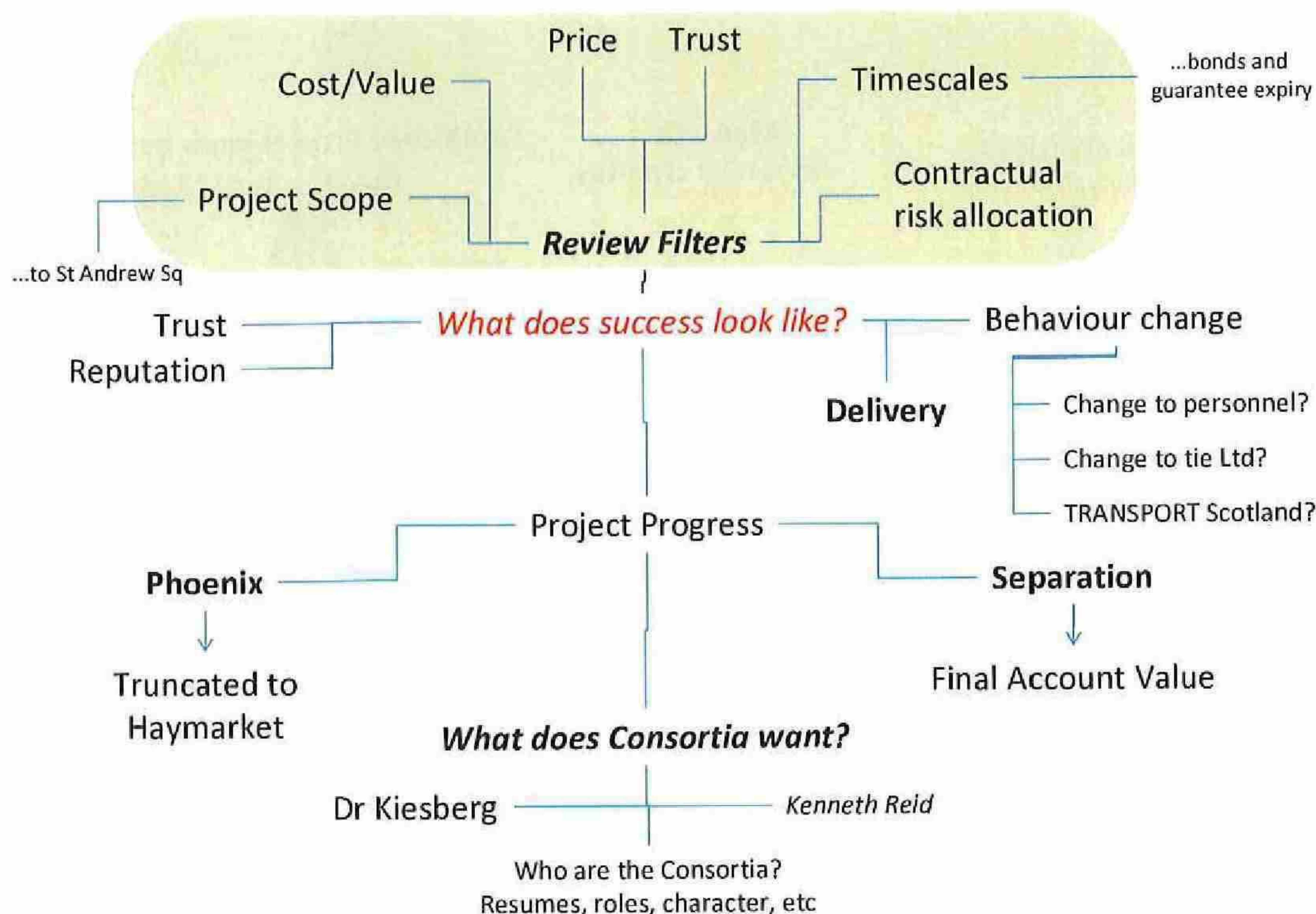
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- Phoenix: a truncated line to Haymarket, and then separate implementation to St Andrew Square, or;
- Separation: Final account value based mature separation, where, in the simplest terms possible, that: current works would be 'made good', a separation payment would be agreed, and then the contract could be re-specified to complete to St Andrew Square, most likely in 300 metre sections.

This was capture as diagram 1, below:

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Diagram 1

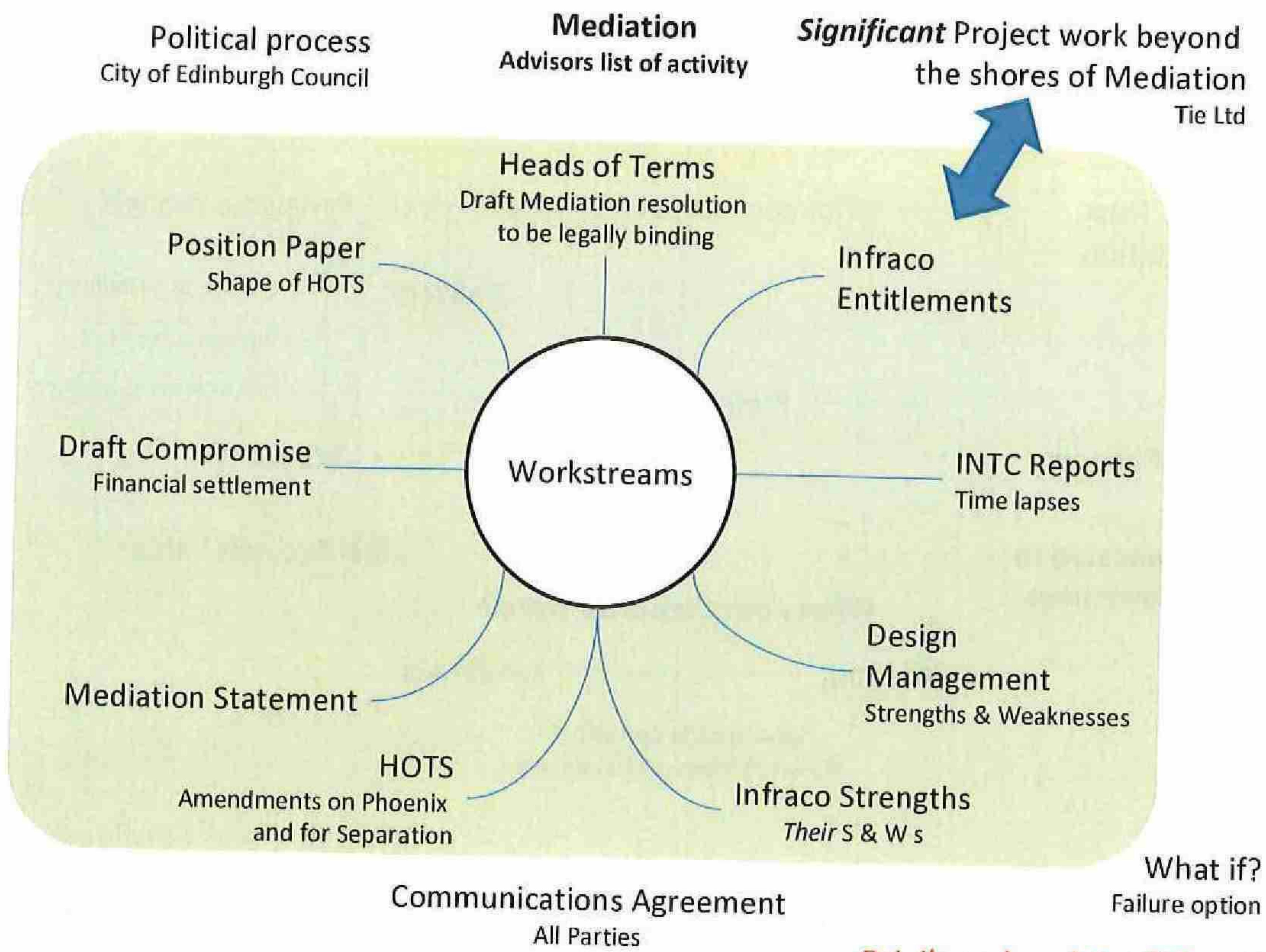
The next item for discussion was the key mediation workstreams required for the mediation. AR provided a draft summary of these.

There were a number of other workstreams that were identified through the discussion:

- Tie Ltd has a **significant number of project related workstreams** beyond the shores of Mediation. These all inform the mediation in some way, shape or other.

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- The City of Edinburgh Council officers have the task of ensuring that the '**political temperature**' is understood and there is a unified approach in bringing elected representatives 'up to speed' when necessary.
- **Communications Agreement:** In an ideal world there would be a communications agreement with the Consortia regarding the Mediation. If this cannot be established we need to have a clear communications strategy, as discussed in the morning session, to ensure that a more positive, client image is projected.
- **What if:** Whilst not something to be dwelt upon it is important that due consideration is given to what if there is failure in mitigation delivering any real progress.



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Diagram 2

The discussion then turned toward who would be involved. Whilst it was accepted that all those present would have to be involved, roles and responsibilities were not fully bottomed out.

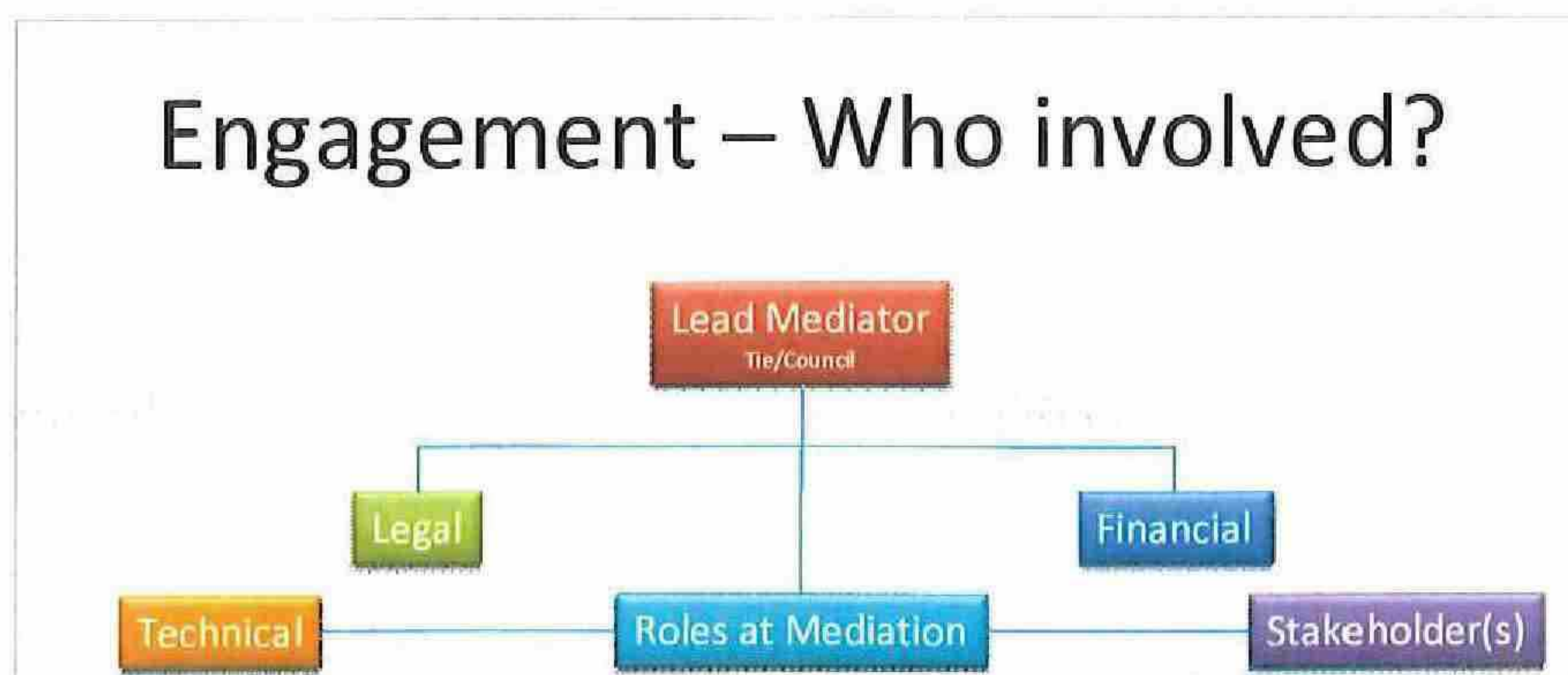


Diagram 3

We had a discussion about the Mediation Negotiation strategy(s). SB put forward a 'strawman':

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- Specification
  - Airport to Haymarket
  - Method
- Project Phoenix
  - Programme
  - What is achievable?
  - How to optimise?
- Price
- T&Cs

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It was also raised that we needed to consider what the gaps are? If we are to seek to move towards a partnership approach, what should it be?

By this point the timetable for the day had discarded to allow for the discussion to continue flow.

There was a more detailed discussion about the potential programme towards the 8<sup>th</sup> March. This is summarised in diagram 4.

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SB was keen that she be provided with a briefing paper on the Impact on the City of the disruptions to the TRAM programme as it was generally believed it should have progressed. This should focus on economic impacts, the reputational damage, etc. DA was asked to provide this.

There was a discussion around the next contact with the Consortia about the mediation. It was agreed that BN would seek to make contact with the Consortia's lawyers. If this is not successful then Sue will use here previous contact with the Consortia as an opportunity to make contact to confirm the details of the mediation meeting – details need to be provided to her along with additional questions we may want posed through this channel.

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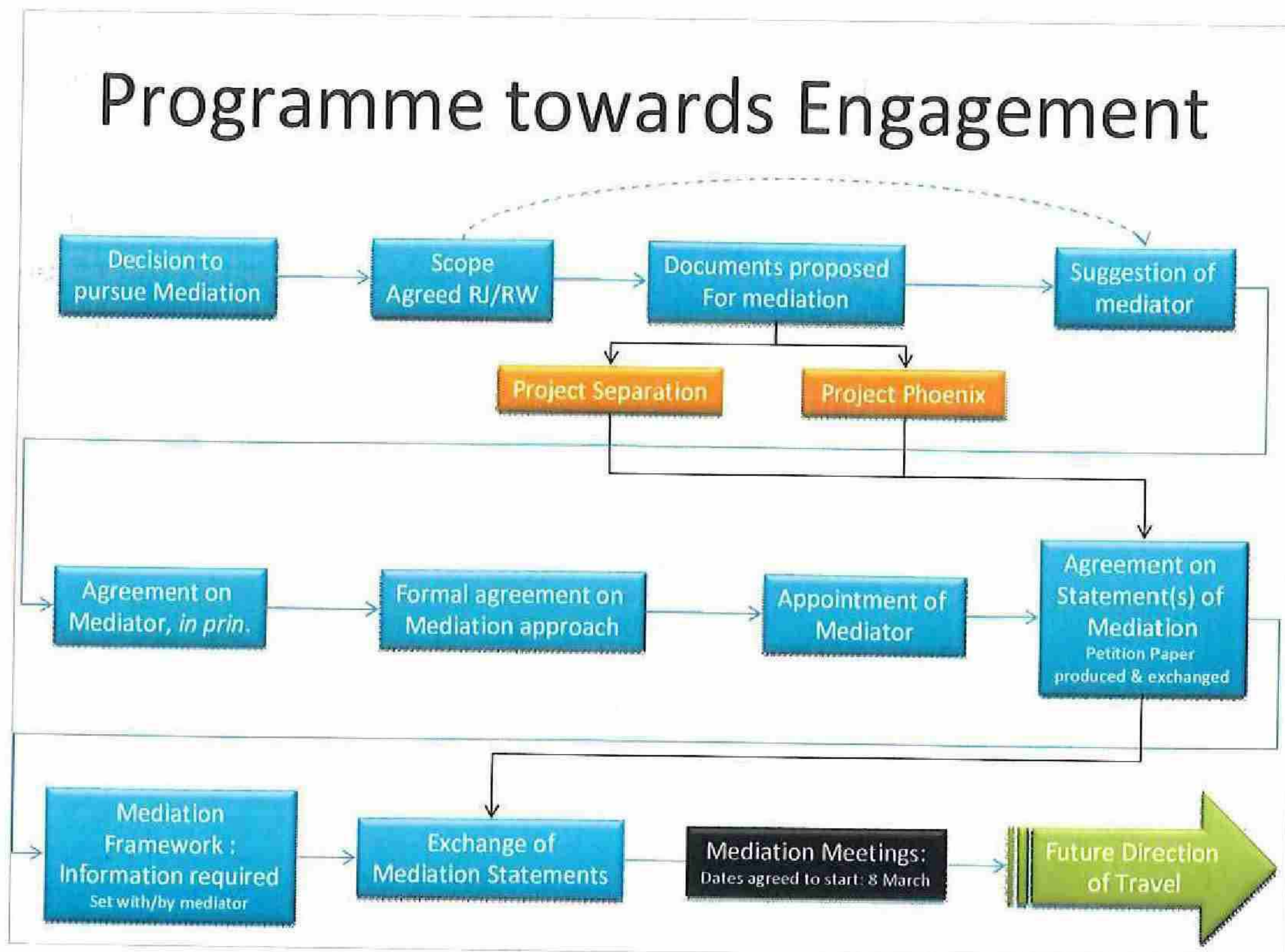


Diagram 4

By this point it was 5:15 and it was agreed that the meeting should be brought toward a close. All present were asked to comment on issues or concerns that remained. These are summarised below:

- Roles: we need to be clear about who does what as we progress
- Arrangements: need to finalise the arrangements for the Mediation, particularly the exchange of information
- The engagement of the Council was welcomed, and the new conduit SB was providing was seen as extremely helpful, but as one of last resort.
- Governance: how are judgements on figures/scope going to be authorised through the mediation?
- Need for additional sessions: at least two. Potentially, the 12/13<sup>th</sup> Feb and the 5/6<sup>th</sup> March.
- How do we finalise the recommendations: gauging cost and risk
- Clarity over the governance of the project going forward: Council/tie roles and responsibilities, authority levels, etc.
- Effective engagement with the Consortia: is it possible?
- Detailed work required is significant in a short period of time to give change of success
- Timescales are very tight for the 8<sup>th</sup> March deadline
- Need to ensure that Vic Emery is brought up to speed and engaged in this process.



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Specific actions to follow, which were established in the meeting and not already part of programme:

- Information Sharing – copies of McGrigors Report 2010: “Wiesbaden” and Helen Davis paper to be provided for SB
- CS to contact StB at tie Ltd for additional (pre-existing) papers to support his workstream
- DA to provide SB with a briefing paper Impact on the City of the disruptions to the TRAM programme
- Contact with the Consortia regarding Mediation: BN to attempt first contact. SB to be next option.
- Additional meetings to be arranged.

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