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PROJECT PITCHFORK – PHASE 2

Incorporating

PROJECT CARLISLE & PROJECT NOTICE

0.9	9 th Draft	17 th Sep 2010	Susan Clark		
0.8	8 th Draft	23 rd Aug 2010	Susan Clark		
0.7	7 th Draft	23 rd July 2010	Susan Clark		
0.6	6 th Draft	9 th July 2010	Susan Clark		
0.5	5 th Draft	25 June 2010	Susan Clark		
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0.2	2 nd Draft – includes Notice	10 June 2010	Susan Clark	Graeme Bissett	

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0.1	Initial Draft	9 June 2010	Susan Clark		
Version	Summary	Date	Modified	Checked	Approved

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- **Deloitte**
- Possible peer group review

Background

In view of the continuing dispute with the Infraco Consortium, a review of the options available to tie / TEL / CEC (“the Client-side parties” or “the Client”) was performed in early 2010, codenamed Pitchfork. This culminated in a report to the TPB on 10th March 2010. The recommendations and approved approach are described in this Report.

Since that time, negotiations have continued and the purpose of this Report is to summarise the results of those negotiations and the options

which now appear available to the Client-side parties as of ~~25th 17th~~ September June 2010.

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Executive Summary

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1.0 Introduction

Project Pitchfork was the name given to the scope of works which took place from January 2010 until March 2010 which investigated options available to tie and CEC in respect of the ongoing Infraco Contract and relationships with the consortium partners who were party to that agreement. The Pitchfork Report was presented to the Tram Project Board (TPB) on 10th March 2010 and the following options outlined:

- Option 1 – Termination of Infraco Contract
- Option 2 – Exit BB
- Option 3 – As is
- Option 4 – Enforced adherence

At the TPB meeting on 10th March 2010 the following recommendations were agreed:

- Eliminate the option of continuing “as is” ;
- Continue to pursue tie’s rights under the existing contract with vigour and seek acceptable resolution to the main disputes ;
- Rigorously monitor the opportunity to achieve a partial or full exit of BB from the primary contract role they currently play, on acceptable cost and risk transfer terms ;
- Retain the termination option – Option 1, not as an option to be pursued currently [at that time] but kept under review for serious consideration if evidence emerges which merits this ;
- Assess affordability and re-phasing options, including operational and financial viability ;
- Reach a resolution on these matters with BSC in the form of a revised version of the existing contract which remains compliant with procurement regulation ;
- Confirm a new way of working with BSC which mitigates against further dispute risk ;
- Report regularly to the TPB, and
- Formally reassess the revised arrangements as soon as practical.

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This report outlines the progress made since March 2010 and in particular explains in detail the 2 parallel projects which emerged from Project Pitchfork – these being Project Carlisle (Option 2) and Project Notice (Option 1).

Further it makes recommendations to TPB in respect of how the Edinburgh Tram Project can be completed and the solutions proposed for the Infraco Contract.

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2.0 Process

2.1 Team

Project Pitchfork had adopted a project management approach to ensure that proper governance was in place for the process. This had worked well and so the same process was adopted for Phase 2 of the project. **tie** had engaged Deloitte's to carry out a review of this process which was carried out in April 2010. This concluded that the process had been robust.

This process was lead overall by Richard Jeffrey (**tie** CEO) with a project manager to manage the process against an outline plan put in place following the March 2010 TPB. The core project team was as follows:

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- Richard Jeffrey (Lead)
- Tony Rush
- Andrew Fitchie
- Steven Bell
- Susan Clark (Project Management)
- Mark Hamill (Project support and risk)
- Dennis Murray
- Mandy Haeburn-Little
- Stewart McGarrity
- Alastair Richards
- Frank McFadden
- Jim Molyneux
- Blair Anderson
- Bill Mowatt

Programme support was provided by Acutus.

A governance process was put in place and this is described fully in Section 8.

As this next stage of the process was likely to be intense with the need for detailed negotiations with BSC a decision was made to retain the services of independent dispute specialist, Tony Rush, for this phase

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along with a number of resources from Gordon Harris Partnerships. This team was used to demonstrate to BSC that **tie** were prepared to put “independent” resource into this effort and in particular, people who had not been immersed in some of the historic difficulties with the Infraco Contract. This team included cost consultants, contract, programme and construction specialists. Tony Rush was therefore given delegated authority on behalf of **tie** to discuss and negotiate with BSC. Can we evidence this?

2.2 Additional Controls

Additionally, since the number of external advisors had grown and there was a need to control the transparency of discussions between all parties and keep the **tie** core team up to date, a number of additional control measures were put in place for this phase. This included:

- Events log – this recorded all meetings and key discussions with BSC and the key decisions made at these meetings/discussions
- Issues log – this was a list of the questions/queries that the team had as the discussions progressed and was kept to ensure that the questions were answered and impacts understood
- Risk – this process was enhanced so that a risk register identified all the risk, a risk allocation matrix then showed how these risks were been transferred between the parties as part of the negotiations and finally a QRA was run to quantify the risk left with **tie**/CEC. Details of risks are found later on in chapters 5 & 6 of the report.
- FOG – a Funder’s Operating Group was set which included CEC, Transport Scotland and **tie**. The first meeting of this ~~is~~ was to be held on 17th June 2010.
- During June, the Level 1 and Level 2 meetings were replaced with conference calls. This was due to the increasing speed of the ongoing discussions and the need to keep all parties briefed.
- Close process – this was a process which had been put in place for the closure of the Infraco ~~Contract~~. A similar process was agreed for Project Carlisle/Notice. This is documented elsewhere.

2.3 Security of Information

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A dedicated room was set up for the duration of the project and access controlled by limiting key holders to the room. A dedicated area on the **tie** extranet was set up to hold all the information associated with this project. This was to ensure that sensitive information was kept confidential and access to this site was limited to the project team only. Additionally, it allowed sensitive information to be posted here. Our Intranet/Extranet is based on SharePoint. Access to SharePoint is only possible if the user has a **tie** created account with user id and password. The account **is granted access privileges to authorised designated areas within SharePoint.** The content owner for the area within question requests access for a user granting them either read only or edit rights to the area in question.

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Hard copy only of this report will only be circulated as required and each copy will be numbered and identified to individuals.

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3.0 Progress with Recommendations made @ March 2010 TPB

3.1 At the TPB in March 2010, a number of recommendations were endorsed with the aim of delivering clarity and certainty in respect of the Infraco Contract. This section of the report details progress with these and leads to how the recommended options for resolution are being realised. Each recommendation is dealt with in turn.

3.1.1 Eliminate the option of continuing “as is” - **tie** has continued with the contractually assertive approach and so has eliminated the “as is” option – complete

3.1.2 Continue to pursue **tie**'s rights under the existing contract with vigour and seek acceptable resolution to the main disputes - an update on DRP's is given in Section 4 of the report. **tie** has continued to increase the assertiveness of all contract correspondence. This correspondence has included:

- Instructions to proceed with work under Clause 80.13/34.1 of the contract – in many locations BSC has failed to comply with this instruction and has advised that they do not believe that **tie** have the authority to issue such instructions
- Correspondence advising that **tie** will not certify milestone payments associated with works not started/ongoing
- Rejection of non-compliant programmes
- Increased correspondence on programme delays events
- Insistence on proper deliverables being in place before further on-street work commenced
- Robust challenge of the Princes Street costs and defects management
- Correspondence in respect of lack of design management

Additionally, a further design management ~~audit~~ ~~audit~~ ~~has had~~ ~~been~~ ~~undertaken~~ ~~started~~ and several senior level meetings have been held with the Infraco consortium since the March TPB.

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- 3.1.3 Rigorously monitor the opportunity to achieve a partial or full exit of BB from the primary contract role they currently play, on acceptable cost and risk transfer terms - discussions have been held and are ongoing at time of writing and full details of this are contained in Section 5 of the report. This is now known as Project Carlisle.
- 3.1.4 Retain the Termination Option – Option 1, not as an option to be pursued currently but kept under review for serious consideration if evidence emerges which merits this – a dedicated workstream is underway for this option and full details are reported in Section 6 of the report. This is now known as Project Notice.
- 3.1.5 Assess affordability and rephrasing options, including operational and financial viability - further analysis on the TEL business case has been undertaken since the March TPB. This is reported in Section 7 of the report.
- 3.1.6 Reach a resolution on these matters with BSC in the form of a revised version of the existing contract which remains compliant with procurement regulation – full details are reported in Section 5 of the report
- 3.1.7 Confirm a new way of working with BSC which mitigates against further dispute risk - there has been no improvement in the working relationship between both parties. There is evidence of BSC starting to proceed work at some locations but in others they have refused. BB's position appeared to be hardening overall however at the time of this draft they are working with tie and Siemens to try and find an acceptable solution but on a day to day basis work is still not proceeding without any increased sense of motivation or increased rate of production reported each period.
- 3.1.8 Report regularly to the TPB – reports provided each month.
- 3.1.9 Formally reassess the revised arrangements as soon as practical.

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In summary, the “as is” approach was regarded as futile in the face of BSC's continued failure to fulfil the Consortium's obligations under the Infraco Contract. The application of contractual rights to promote improved performance and deal with disputed matters which had been approved as an appropriate approach in mid-2009 is described in detail in the following section. However, while this approach had achieved success on specific

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issues relative to the claims submitted by BSC, there was no overall improvement in the Consortium's performance. The "enforced adherence" approach represented a ratcheting up of the application of ~~tie's~~ rights as described in 3.1.2, in an attempt to drive improved BSC performance, but it became clear during the Spring and early Summer that performance overall remained well below that required under the Contract. It therefore became necessary to address formally the more radical options of either revising the phasing of the project and the roles of the Consortium partners or ~~terminating~~ assertively enforcing the Infraco Contract. These two options – codenamed "Carlisle" and "Notice" respectively – are described in Sections 5 and 6.

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4.0 Application of contractual mechanisms

4.1 Dispute Resolution Process

In mid-2009, the TPB approved a recommendation from tie that the levers available to tie in the Infraco Contract should be used to engender better performance from BSC. The background to this is covered extensively in the Pitchfork Report. The actions were principally focussed on the Dispute Resolution Procedures (DRPs) set out in the Infraco contract and on a series of targeted audit processes.

This approach has brought a positive outcome for the project overall compared to the claims submitted by the Consortium. The specific matters subjected to DRP can be summarised as follows :

<u>Item</u>	<u>Issue/Value</u>	<u>Comments/Outcome</u>		
Refusal to commence on Princes Street.	BSC did not agree change item for Princes Street (Contingency bus lane) and also state there were other Notified departures which needed to be agreed before they would start unless they were to commence on a Cost Plus, no risk basis.	After a stalemate lasting 4 weeks the parties agreed to implement the Prince Street Supplemental Agreement (PSSA) which addressed compensation event related matters (ground conditions etc.) on a demonstrable cost basis whilst retaining the original prices for the original scope of works. Work commenced on Princes Street in late March 2009.		
Preliminaries for	BSC argued for	Agreed at mediation in		
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subcontractors in Princes St. Contingency Bus lane change	automatic inclusion of sub contractor prelim mark up, as summarised in Schedule Part 4 Appendix irrespective of actual requirement. (Values ranged from 15% - 60%)	May 2009 at 17.5%.
Hilton Car Park	BSC alleged a change (c£100k). tie considered included within Construction Works Price. Taken to adjudication Oct 09	Adjudicator held tie's view that no further instruction required. Works now completed. [£100k saving]
E.o.T. 1	Time agreed at 7.6 weeks for V26 – V31 design programme change. BSC Value at £7.099m tie considered ~£2.5m - £3.5m. Taken to mediation ion October 2009.	Mediation agreed process and valuation of £3.524m [£3.57m saving]
Gogarburn Bridge [BDDI-IFC] Design issue	BSC claimed change for Base Date Design to IFC beyond normal development and completion of design. Their Estimate was submitted @ >£300k. Taken to adjudication Nov 09	tie considered all differences were normal development and completion of design. Adjudicator ruled that most items were changes but with a contract interpretation which went beyond tie's or BSC's submissions. Not challenged legally but considered as an

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		<p>extreme decision.</p> <p>BSC revised Estimate £235k.</p> <p>Valuation expected to be agreed at £176k [net £125k saving]</p>
<p>Carricknowe Bridge</p> <p>[BDDI-IFC]</p> <p>Design issue</p>	<p>BSC claimed change for Base Date Design to IFC beyond normal development and completion of design. Their Estimate was submitted @ >£300k.</p> <p>Taken to adjudication Nov 09</p>	<p>tie had agreed elements of change on this item (c£75k) caused by CEC requirements.</p> <p>Adjudicator ruled that some other items were changes but with a contract interpretation beyond tie's or BSC's submissions.</p> <p>Not challenged legally but considered as extreme decision.</p> <p>Valuation agreed at £138k [net saving £200k]</p>
<p>Russell Road Retaining Wall 4</p> <p>BDDI-IFC + Contamination + Access</p> <p>Alleged changes</p>	<p>BSC alleged a change of c£4.8m in 3 parts</p> <p>BDDI+IFC (£1.8m) Contamination (c£2.0m) Access (c£1.0m)</p> <p>Adjudication Dec 09/Jan 10</p>	<p>DRP resulted in BSC withdrawing the access item, agreeing to address the contamination on an actual cost basis and taking the BDDI-IFC item to adjudication.</p> <p>The Adjudicator's decision was closely aligned to tie's contract interpretation.</p> <p>However, he did decide</p>

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		<p>that the change to the wall was a notified departure and valued at £1.46m.</p> <p>The updated view of this structure suggests that the actual costs are likely to be £2.6m (including c£1.1m for the contamination based on the adjudication), a reduction of £2.2m on the BSC estimate.</p>		
MUDFA Rev 8 Programme	BSC seek an EOT of 9 months based solely on MUDFA impacts	<p>Agreed to be put on hold pending the agreed timeline to define a new programme to complete.</p> <p>Adjudication complete and QC decision due by 16th July 2010. Adjudicators decision found substantially in tie's favour. BSC's Estimate being assessed.</p>		
Haymarket Viaduct [BDDI-IFC] Design issue and Ground conditions	<p>BSC claimed >£400k for changes</p> <p>Commenced the DRP process in October 09</p>	<p>tie agreed there was an element of change but disagreed with BSC Estimate. Resolved by agreement at £195k during the Internal stage of DRP. [saving of >£200k]</p>		
Baird Drive Retaining Wall [BDDI-IFC]	<p>BDDI-IFC design issues. BSC currently claim £1.5m (reduced from £3.9m to £2.5m to £1.9m through various</p>	<p>DRP process commenced on 15/1/10. tie agrees there is a change (as a result of NR requirements) but</p>		
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	previous iterations)	value this at ~£800k currently although this could increase dependent on information provision from BSC. Updated estimate received on 29/4/10 reducing claim to ~£1.25m. Agreed Without Prejudice at £915k on 18/05/10.
Balgreen Road Retaining Wall	BDDI-IFC design issues. BSC claimed £800k	DRP process commenced on 15/1/10. tie agrees there is a change (as a result of NR requirements) originally valued at £230k. Settled at final stage of Internal DRP at £298k. [saving of £500k]
Section 7 Drainage [BDDI-IFC]	BDDI-IFC design issues. Key principle in PA1 associated with amendment being tested. BSC claimed £1.35m	DRP process commenced 10/2/10. tie agrees there are changes but evaluates this at £25 - £50k. There is a difference in principle of items omitted. Adjudicator decision on 24/5/10 supports Infraco as to the existence of ND. Value being ascertained with final resolution expected ~ £650k - £750k generating ~£600k saving from Infraco's initial claim.

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<p>Depot Access Bridge [BDDI-IFC]</p>	<p>BDDI-IFC design issues BSC claim £2.5m change.</p>	<p>DRP process commenced 12/2/10. tie agrees there is a change but evaluates this (based on the issue raised by BSC) as a £4.8m saving. BSC referred to Adjudication on 9th June <u>2010 through August</u> <u>and decision expected</u> <u>by 31 August</u></p>		
<p>Tower Place Bridge [BDDI-IFC]</p>	<p>BDDI-IFC design issues BSC claim £450k change.</p>	<p>DRP process commenced 25/2/10. tie agrees there is a change but evaluates this (based on Pricing Assumption 19) as a £300k saving. There is a difference between the drawings used by tie and BSC. Adjudication Decision generally for tie on 18/5/10. Valuation is a £260k credit. Overall benefit / saving from BSC claim ~£750k.</p>		
<p>Murrayfield Underpass [PA1 & 34.1 / 80.13 instructions]</p>	<p>BDDI-IFC design issues BSC claim ~£145k change BSC challenge competence and tie's right to issue instructions under 80.13 & 34.1</p>	<p>DRP process commenced 21/5/10. tie has acknowledged there is a notified departure but fundamentally disputes Infraco's position on 34/80.13. CEO's meeting recommended that this proceed to Adjudication. This has now been referred to the legal panel and a</p>		
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		decision provided during August.
Landfill tax	Referred by BSC and is a difference of opinion about whether or not BSc should have applied for a landfill tax exemption	Representatives meeting held. Position paper to be exchanged by 27/08. CEO meeting to be held before 15/09.

Much has been made in the public domain about the success of the DRP process for **tie**. There are numerous reasons why it has been successful for **tie** to enter into these DRP processes as follows:

- 15-16 items have been submitted to DRP – 11 by **tie** and 4-5 by BSC;
- This has allowed work to commence at all those locations and so has progressed work on the ground where BSC were previously refusing to commence until an Estimate was agreed;
- Out of the DRP's which have been referred to DRP and the process has been concluded, £18.211m was claimed against a settlement cost of £7.586m. This equates to a saving of almost 60% of the original estimate, an amount that would have been paid by the public purse if agreed initially.
- Of those referred , 2 were referred in an attempt to get works progressing on Princes St in 2009 and the latest referred by BSC is in connection with one of the core differences between the parties – **tie**'s right to issue instructions to BSC in order to commence with works while an Estimate had not yet been agreed.

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Since the TPB in March 2010, we had not seen any real improvement in the attitude of BSC. Indeed, the opinion of **tie** and its advisors was that the stance of particularly BB was hardening. For example :

- No progress on On-Street works due to lack of deliverables from BSC
- Clear difference of opinion about **tie** being able to instruct BSC to commence works – failure to progress works on the instruction of **tie** (**Clauses 80.13/34.1**)
- Slow progress in resolving remedial works on Princes St
- Slow progress in resolving changes associated with the section between Airport and Edinburgh Park which was an initiative suggested by Siemens

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- Delays to the design management audit & subsequent refusal to engage in this audit
- Ongoing slow progress in agreeing Estimates
- No progress with a realistic programme, albeit submissions had dates moving closer to what ~~tie~~ believed could be delivered.
- ~~failure to act on instructions (Clause 80.13/34.1)~~

As noted at the end of Section 3, it was agreed that the two radical approaches to progressing the project identified in the Pitchfork Report required to be formally addressed. These were :

- revising the phasing of the project and the roles of the Consortium partners (Project “Carlisle”); or
- process of issuing Clause 90.1.2 notices to try and improve performance ~~terminating the Infraco Contract (“Project Notice”).~~

The following two sections describe these options.

5.0 Project Carlisle

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5.1 Initiation

At a senior level meeting held on 2nd March 2010, BSC made a proposal, followed up in writing, for a re-phasing of the project which envisaged completion between Airport and Princes St by April 2012. Senior level meetings were held with tie and the Infraco Consortium on 22nd March, 25th March and 14th April 2010. These meetings were led by Siemens who appeared to be trying to find a solution to the ongoing contractual differences, whilst the BB position seemed to be dysfunctional and hardening. On 23rd April, Siemens requested a meeting with Tony Rush. The purpose of this meeting, which was engineered by Tony Rush, was to discuss an initiative for the Edinburgh Tram Project to :

- re-scope/re-phase the works for the Infraco Contract
- develop revised delivery dates for the re-scope/re-phase the works
- develop a Guaranteed Maximum Price (GMP) for the revised scope and revised delivery dates
- ~~achieve a transfer of risk from tie to Infraco~~

Given the difficulties being encountered in discussions with BSC in relation to on-street works, starting works in relation to Clause 80 etc, it was decided that tie would engage in these discussions(which aligned with one of the key recommendations made at the TPB in March) to see if a successful outcome could be achieved.

5.2 MOU

This resulted in a draft MOU (draft 2) being sent to BSC on 4th May 2010 and the programme set out anticipated an agreement being reached by early July 2010.

The key principles of the MOU ~~are~~were that Infraco complete the scope of works as follows:

Includes:

- All work from the Terminal Point (to be agreed by expected to be at the East end of Princes Street) to the Airport. Enabling Works on or adjacent to the Forth Port's Estate;
- Provision of all Trams;
- Testing, Commissioning and Maintenance, and

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- Certification leading to full Service Commencement as provided under the Infraco Contract.

Excludes:

- All work from Terminal Point to Newhaven.
- Gogar Interchange.

A guaranteed maximum price (GMP) ~~is was~~ to be submitted for the included scope along with a programme with adjusted liquidated and ascertained damages attached to this programme.

Subject to a **tie** Change Order **tie** will have the following options:

- Purchase unused equipment from Siemens
- Provisional contract with Siemens to provide E&M from Terminal Point to Newhaven.
- Provisional contract with Siemens and CAF to Commission and Maintain from the Terminal Point to Newhaven.

Step-in rights for **tie**

Infraco will give **tie** an irrevocable price adjustment to the Contract Price which would be instigated by either **tie** or Infraco exercising step-in-rights [on terms to be agreed] for the following works:

- Civil Engineering Works from Haymarket Viaduct to the Terminal Point
- Remedial Work to Princes Street

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Note: Step-in will be subject to an agreed deduction in Contract Price and subject to agreement of a **tie** Completion Date.

~~Having considered the various options it is clear that there is was none which complies with EU Regulation better than varying the Infraco Contract for the remainder of the works to Newhaven. Therefore an essential condition is that the Infraco Contract remains extant with variations which:~~

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- Permit to omit Civil engineering Works from Haymarket to Newhaven
- Permit **tie** to instruct works from the Terminus on a "provisional" basis
- Retains Siemens as the provider of E&M works
- Retains CAF as the Tram Provider
- Retains SDS as the Design Provider

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- Satisfies the requirement of the ICP

It is intended that any work omitted from the Infraco Contract would be re-procured by **tie** under EU Regulations.

[Comment needed on procurement law advice]

5.3 Heads of Terms & Assignment Agreement

tie also developed a draft Heads of Terms(HoT's) & Assignment Agreement which was shared with BSC on 9th June 2010 to reflect the MOU. The purpose of this documents was to start the process of formalising what was outlined in the MOU in anticipation of the legal agreement being reached.

On the same day BSC formally wrote to **tie** confirming that their desire and commitment to complete the Infraco works under Project Carlisle, but also including a sting in the tail which documented their qualifications for such an agreement. These qualifications related to programme and LAD's, confidentiality agreements and finalisation of scope. This was followed up by a letter dated 11th June 2010 re-iterating that BSC could not meet **tie**'s desired completion dates for the project as set out in the HoT's. At this point, BSC had not engaged with their sub-contractors to start the pricing exercise for the GMP.

By mid-June 2010, the Carlisle negotiations were underway. Although there were signs of common ground BB did appear to be engaging reluctantly with all the driving being conducted by Siemens. It is fair to say that during the entire process, the negotiating team had consistently felt that BSC (or BB) saw this as an opportunity to re-price the revised scope. There is currently no documentary evidence for this, but this is seen as one of the main areas of risk. Additionally, the programme submitted by BSC in their letter of 9th June 2010 identified an OFRS date for Airport – Haymarket as 18th November 2012.

However, during June, BB introduced a new face into the equation – Ed Kitzman. By end of June, whilst the negotiation team still felt that BB Germany were in control of the process, they were reporting a very positive approach from Ed Kitzman.

The key elements of Carlisle which interact with each other are the GMP, programme and risk and these are reported below.

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5.4 Risk

A risk register with treatment plans has been put in place for Carlisle. However, as part of the process of negotiation a risk allocation matrix (RAM) will be put in place to ensure that everyone understands what risks remain with which party at the end of the negotiation. This also allows for a full QRA to be run as part of the final costs Estimates for Carlisle.

5.5 Programme

During May and June, work continued with numerous discussions with BSC to develop the GMP and programme. ~~tie~~ had advised BSC that they considered that the section between Airport and the “Terminal Point” could be open for passenger service by June 2012 and this was contained within the original scope. BSC’s letter of 9th June indicated that OFRS could not be achieved until November 2012. ~~This date was retained in the GMP offer made on 29th July.~~

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5.6 GMP

Whilst work had started on the GMP within ~~tie~~ with the creation of templates and sharing of information between the ~~tie~~ team and its advisors, as at 20th June BSC had still not started this pricing exercise by speaking to sub-contractors. It had been agreed that ~~tie~~ would have a seat at the table for the meetings with sub-contractors. Whilst the exercise hadn’t started, BSC had committed additional resources including resource from Asia to assist. ~~By late June/early July this process had started and a GMP was delivered to tie on 29/07/10.~~

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5.7 Progress on Negotiations

~~At a~~ meeting was held on 16th June 2010 involving David Mackay, Richard Jeffrey and ~~Kenneth Gordon Wakeford and David Darcy.~~ The meeting was direct but cordial and it was apparent that Siemens were in charge. Although the pricing exercise had still not started BSC did state that they were gearing up for it with additional resources being brought in from Asia for this exercise. ~~tie~~ raised concerns about design and BSC confirmed that they would have a fully assured design completed by mid July 2010. At this meeting, BB confirmed their intention to put the Carlisle proposal to a main board meeting on 20th July 2010 for a decision. ~~The next discussion involving this group was scheduled for 5th July.~~

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Tony Rush had discussions with BSC over the weekend of 19/20 June where a revised scope was shared and it appeared that as of 21 June there was a higher level of optimism about a deal being possible than the previous week.

tie responded to the 9th June letter and were advised during week of 22 June to expect a response by end June. However, the advice being given by Tony Rush at this point was to remain cautious.

By ~~9th July~~ 23rd August the following further updates were available:

- The response which was promised by 22nd June was actually received on 29th June. This contained an ongoing commitment to work on Carlisle. The letter also contained a number of “clarifications” to the GMP and a programme which only indicated delivery from Airport to Haymarket.
- David Mackay and Richard Jeffrey had a telephone conference with David Darcy and Gordon Wakeford on 5th July. Again, the tone of the meeting was positive. An integrated assured design was promised by 16th July & BB advised that they expected sub-contractor prices by the end of the week. A further meeting was arranged for 26th July 2010.
- As of 23rd July, tie had not seen the design but BSC assured us that it had been delivered to them from SDS. Meeting arranged with tie on 26th July to review the design. The first tranche of assured design was delivered to tie on 9th August - as of 23/08 tie are in the process of reviewing this set of Deliverables.
- tie had reviewed the GMP offer and planning to made a counter offer to BSC during week commencing 23/08 with further discussions held with BSC that week.
- During the next 2 weeks further discussions were held with BSC which culminated in a senior level meeting on 13/09/10 (Mackay, Jeffrey, Rush from tie, and Wakeford, Enekiel, Walker, Flynn from BSC. Just in advance of this tie received, without warning, a revised offer from BSC. It was clear at this meeting that any Carlisle agreement was still some way off.

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6.0 Project Notice

6.1 Preparation

On 10th March 2010, the TPB endorsed a recommendation that we retain termination of the Infraco Contract as an option, not to be pursued at that stage but kept under review for serious consideration if evidence emerged which merited action.

There was clear evidence of breach of contract in a number of areas, but since March, the team has been continuing to assemble, structure and refine the detailed evidence for use in any Remedial Termination Notice or Notices. Subsequent audits, the continued commercially assertive strategy and the lack of shift in behaviour, particularly of BB, has all provided additional evidence of breach in a number of areas.

Additionally, the behaviours being demonstrated in respect of the negotiations on Project Carlisle, indicated that Infraco might be seeing this as an opportunity to re-price the project, to complete only the off-street sections and to move risk back to tie.

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At the meeting on 16th June 2010, **tie** advised BSC at this meeting that the alternative for **tie** was to terminate/initiate Clause 90.1.2 letters of breach in accordance with the contract.

In parallel with the Project Carlisle negotiations, **tie** was receiving detailed legal advice on the basis on which the Contract could be terminated in view of BSC's failure to fulfil its obligations. It was necessary to run both the Carlisle and Notice processes simultaneously in order to avoid a lengthy hiatus should no acceptable result emerge from the Carlisle negotiations.

In response to these concerns **tie** and its advisors (principally DLA) has been preparing a Remediable Termination Notices (RTN) in accordance with Clause 90.1.2 of the Infraco Contract specifying Infraco Defaults (a) and (j). These defaults are:

- (a) a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works;
- (j) the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from **tie**'s Representative a written notice to proceed.

This RTN has been drafted based on the evidence produced to identify breaches and the core issues in this RTN are as follows: as issued as follows:

RTN's	Issued	Rectification Plans Due
1-3		
4		
5		

- Failure to comply with instructions – Clause 80.13/34;
- Failure to complete an assured and integrated design – Clauses 7.3 10 and 19;
- Failure to procure deliver the SDS services and to manage the SDS provider – Clause 11;
- Breach of obligation to comply with the Change procedure – Clause 80;
- Breach of obligations in respect of Compensation events – Clause 65;
- Breach of general obligations – Clause 6;
- Breach of core obligations – Clause 7;
- Breach of obligations in respect of sub contractors – Clause 28;

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- Breach of best value obligations – Clause 73, and
- Breach of confidentiality – Clauses 7.3.16 & 101.14.

There are many other examples of breach throughout the contract which albeit smaller in materiality all add to the overwhelming view that Infraco have consistently breached the obligations of the Infraco Contract, but the examples above are the areas of breach which are deemed to be most material to tie.

Two documents of the RTN were drafted. A short letter giving notice of the breaches and a longer version which outlines examples in relation to each of the clauses which are in breach – the notice. The short form was completed by 20 June 2010.

Senior Queens Counsel was instructed on 22 June 2010 and a consultation arranged for 8th July to discuss the strength of the case for Termination. This consultation session was useful in that Senior Counsel advised that there were a number of strong areas of evidence which support the issue of a Clause 90.1.2 letter leading to potential Termination if BSC did not remediate the breaches. QC advised that a number of RTN's should be issued rather than one covering a number of breaches and so this advice was taken and a number of RTN's identified and the drafting commenced.

Sitting behind these letters are a number of files of evidence which have been assembled by the team and these continue to be added to as further information becomes available.

QC also recommended that the process of issuing Underperformance Warning Notices (UWN's) as per Clause 56 of the Infraco Contract.

On 9th August, tie issued the first 3 RTN's and the 1st UWN. As at 23/08 the programme for these is as follows:

Issue	Date Issued	Plan due	Tie review	Possible Termination Date
RTN-1-3				
RTN-4				
RTN-5				
RTN-6				
RTN-7				
RTN-8				

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RTN-9				
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6.2 Delivery

As part of the Project Carlisle negotiations, the GMP is due to be delivered by Infraco by end July.

The TEL/tie Chairman, David Mackay Mackay met with senior members of the Infraco on 16th June 2010.

It was anticipated that any RTN would not be sent to Infraco until at least 16th June 2010 after this meeting and then based on the attitude being demonstrated by Infraco and the expectation of a successful/or otherwise negotiation on Carlisle. The discussions on Carlisle were continuing positively and do the issue of the Clause 90.1.2 letter would be based upon the output from the following events and TPB buy-in:

- Advice from Senior counsel in respect of the strength of the termination case
- Delivery of fully assured integrated design from BSC in mid July
- Delivery of the GMP by end July

• TPB on 28th July bought into the strategy presented which outlined that a commercial decision needed to be made in respect of the issue of RTN's. On 9th August, tie issued the first 3 RTN's and the 1st UWN. As at 23/08 the programme for these is as follows:

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These RTN's have been drafted as issued as follows:

RTN's	Issued	Rectification Plans Due
1-3	9/08/10	20/9/10
4	16/8/10	27/9/10
5	1/9/10	13/10/10
6	8/9/10	20/10/10

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RTN 6 is an “all encompassing RTN covering overall conduct and this will cover:

- Failure to comply with instructions – Clause 80.13/34;
- Failure to complete an assured and integrated design – Clauses 7.3 10 and 19;
- Failure to procure deliver the SDS services and to manage the SDS provider - Clause 11;
- Breach of obligation to comply with the Change procedure – Clause 80;
- Breach of obligations in respect of Compensation events – Clause 65;
- Breach of general obligations – Clause 6;
- Breach of core obligations – Clause 7;
- Breach of obligations in respect of sub-contractors – Clause 28;
- Breach of best value obligations – Clause 73, and
- Breach of confidentiality – Clauses 7.3.16 & 101.14.

There are many other examples of breach throughout the contract which albeit smaller in materiality all add to the overwhelming view that Infraco have consistently breached the obligations of the Infraco Contract, but the examples above are the areas of breach which are deemed to be most material to tie.

QC also recommended that the process of issuing Underperformance Warning Notices (UWN's) as per Clause 56 of the Infraco Contract. This advice has been acted upon as follows;

UWN	Issued	Plan due
1	9/8/10	23/8/10
2	8/9/10	22/9/10

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6.3 Consequences

6.3.1 The Infraco Contract stipulates what should happen in the event that tie issues a RTN which is as follows:

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- 1) Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default. This must be within 30 Business Days of the date of the RTN (or longer if **tie** agrees).
- 2) **tie** has 10 days to consider this plan and determine if it is acceptable or not.
- 3) If **tie** does not accept the rectification plan, or Infraco does not submit a rectification plan, **tie** may after giving 5 Business Days notice in writing to the Infraco terminate the agreement.
- 4) Following termination under the agreement, **tie** may enter upon the Infraco Works and any part of the site and expel Infraco
- 5) Where **tie** has entered upon the Infraco Works, **tie** may complete or carry out the Infraco Works itself or employ any other contractor to complete the Infraco Works.
- 6) Where **tie** has entered upon the Infraco Works, the Infraco shall, if instructed by **tie**, use reasonable endeavours to assign to **tie** any agreement as soon as practicable which the Infraco may have entered into and which are, in the reasonable opinion of **tie**, material to the completion of the Infraco Works.

6.3.2 Whilst this is what the contract is intended to deliver in the event of a termination by **tie** for Infraco default, it is possible that Infraco may elect to take legal action if served with such a termination notice. This could result in an interdict being taken out against **tie** preventing the operation of clause 90 as it was intended to allow completion of the Infraco Works. QC opinion is that this is low risk and it is unlikely given the way in which the Infraco contract is written.

6.4 Termination v's Cancellation

If a decision following issue of Clause 90.1.2 notices, BSC failed to remediate the breaches is made to Terminate this would lead to termination of the contract. In such a scenario the current Infraco contract, there are 2-3 options available:

- 1) ~~Re-procure the parts of the infrastructure works where tie cannot step into existing contracts~~
- 2) ~~Cancel the project~~

6.4.1 Termination

tie is actively preparing for a Termination scenario by investigating the following for re-procuring the tram infrastructure works:
i. Terminate and continue with the project

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- ii. Terminate and postpone the project
- iii. Terminate and cancel the project

-What the contract allows for following Termination
-Scope of re-procurement given the provisions of the Infraco contract in respect of Termination
-Procurement Strategy
-Contract types
-Procurement timetable
-Procurement Team
-Accommodation

It is anticipated that a full re-procurement plan will be available by xxx, however, it is likely that full re-procurement would take around xx months to complete.

Each of these options has a range of sub-options and consequences and a separate workstream was set up to review these in order that recommendations could be made and plans put in place in readiness for any potential Termination scenario.

There is a possibility that BSC may opt to take out an injunction interdict against tie preventing access to the site termination and preventing any immediate re-procurement however, Senior counsel has advised that given the construction of the Infraco Contract, this risk is very low. They have done this on previous projects including Quatar. tie has lodged caveats at the Court of Session so that it is informed immediately any court action is served. Overturning this court action would take xxx weeks.

6.4.2. Cancellation

If there was a decision to cancel the project following termination with BSC, there are a significant number of issues to be considered which all have cost time and PR implications. These considerations include:

-There are a number of structures which are completed or nearing completion – what should happen to them?
-What happens to the depot which is a purpose-built structure?
-What happens to the rails now imbedded on Princes St and the OLE poles in Princes St
-There will be 27 Trams either complete or nearing completion
-Significant volume of materials already purchased for Edinburgh Trams

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- ~~Traffic Management at a number of locations would need to be put back to pre trams. This includes a decision to be made on the redipave temporary kerbs.~~

7.0 Financial Analysis

7.1 Background

CEC required to address the affordability risks arising from the disputes with BSC and therefore further financial analysis work have has been carried out to assess the impact on capital costs and the TEL Business Plan of delivering the remaining on-street sections of the project in an incremental manner. This would permit delivery to continue with the 'escape valve' of a flexible timescale under CEC's control if this proves to be necessary. CEC would manage affordability constraints such that the infrastructure being delivered at any point in time is clearly deliverable within the funding available from either CECs own sources or from Scottish Ministers. The incremental delivery approach is being examined in the context of preserving the project scope as the entirety of the scope of Phase 1a as detailed in the Final Business Case.

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Incremental delivery options should focus on the north-eastern (ie on-street towards Leith) sections of Phase 1a because inter-alia:

- The tramway going west must at least reach the depot at Gogar
- Extending the tram to Edinburgh Airport was an integral part of Government and Parliamentary deliberations in 2007 which culminated in Grant support for tram and commitment to construction of a heavy rail/tram interchange at Gogar as the rail based connection to Edinburgh Airport.
- Construction of the Gogar depot, structures and other infrastructure in the off street sections has now progressed to the point where it would be uneconomic not complete these sections as part of the opening service on the tram.

7.2 Options evaluated

The following options have been addressed as the first stage of delivery:

- A Airport – Haymarket** (core off-street street works under construction)
- B = A plus Haymarket - St Andrew Square** (connects the Airport to the City Centre)
- C = B plus St Andrew Square - Foot of the Walk** (achieves integration with bus services on Leith walk and interchange at Foot of the Walk)
- D = C plus Foot of the Walk – Ocean Terminal** (serves the core of the Leith Docks development area)
- E = D plus Ocean Terminal - Newhaven** (ie completion of Ph 1a)

For the purposes of addressing the capital cost impacts of each it was assumed that if we committed to one of the five options above it would be delivered as one phase with a completion date in the second half of 2012.

There is no reason why a more granular staging of street delivery could not be adopted if there were compelling reasons to do so or if it was considered best value to extend construction as far as available funding permits.

7.3 Impact on Committed Capital Expenditure

We have conducted a detailed review of the outturn of cumulative capital costs for each Incremental Delivery option and the totals are presented in the table below.

The estimates have been prepared for each of the 4 incremental delivery options and for each of commercial options 2 (BB Exit) and 4 (Enforced adherence) as described in the Pitchfork report of March.

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A BB exit from remaining on street works most closely aligns with the boundaries of the discussions with BSC under Project Carlisle.

Capex Estimates	Incremental Delivery from Airport to.....				
	All of Ph1a E	Hay-market A	St A Sq B	Foot of Walk C	Ocean Term D
Enforced adherence – Assertive Application of the Infraco Contract in its present form but with disputes settled in the short term and a negotiated new way of working (Option 4)	639.9	501.4	543.8	601.8	628.1
BB exit – Infraco contract remains intact with BB exit from and reprourement of remaining on-street Civils (Option 2)	667.2	500.8	555.7	624.0	648.3
Delta from all of Phase 1a: Existing Consortium (Option 3C)		(138.5)	(96.1)	(38.1)	(11.8)
Re-procured on-street Civils (Option 2B2)		(166.4)	(111.5)	(43.2)	(18.9)

These estimates contain the attributable portion of allowances for the risks and uncertainties of our disputes with BSC as described for the full delivery of Phase 1a (E above). There is therefore a similar range of outcomes around these base estimates which cannot be narrowed unless and until the disputes are materially resolved and we are working to a new agreed programme.

Taken at face value, the conclusions to be drawn from the above estimates are that:

- Airport to Haymarket is deliverable within the approved funding of £545m
- Airport to St Andrew Sq may be deliverable for £545m depending on the outcome of the commercial disputes
- Airport to Foot of the Walk is not deliverable for £545m – but may be deliverable in the range £600m to £620m again depending on the outcome of the commercial disputes

7.4 Impacts on TEL Business Plan

Updated patronage and revenue forecasts for tram and bus have been prepared by Steer Davies Gleave for each of each of the Incremental Delivery Options. Work is now ongoing to validate these new forecast and the related operating costs forecasts to produce forecasts for the combined TEL tram and bus

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operations for each incremental delivery stage. The following is a preliminary commentary on options A and B.

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A: Airport – Haymarket

This is the focus of the BSC consortium's construction activities at the moment with 2220% in aggregate of the construction already complete.

The tram reaching the Airport is key to the Scottish Governments plans to have interchange with heavy rail services at both Edinburgh Park station and the planned Gogar Intermodal Station. Tram services along the route from the Airport to the City Centre is a significant part of the predicted mode shift from cars to public transport and connects to the existing Park & Ride sites at Ingliston and prospective new site at Hermiston Gait. There is interdependence between the demand for tram travelling east and the forecast growth in passengers at the airport and new development at Edinburgh Park and the Gyle Shopping Centre. High quality public transport will be an integral part of the fulfilment of plans to develop the Sighthill area and its Universities. The accessibility and social inclusion objectives achieved by tram serving the high density, lower car ownership areas from Edinburgh Park to Haymarket are delivered by this section.

Notwithstanding the foregoing the business case has always predicted significantly lower demand in absolute terms for tram travelling east at all stops towards the City Centre than it does travelling south-west from Leith towards the City Centre – this is primarily a result of fewer opportunities to integrate bus and tram services from the west of the City. Preliminary outputs suggest that patronage on an Airport to Haymarket tram service will be around 30% the patronage forecast for the full Phase1a tram service. At this level of patronage the challenge for TEL would be to operate a tram service from Airport to Haymarket which does not leave them with an operating loss from Tram operations to absorb for many years after the commencement of operations.

B: Addition of Haymarket - St Andrew Square

In this option the last stop would be St Andrew Square but the track itself may extend round to York Place.

Extending the tramway to St Andrew Square would alleviate the issue of forced interchange toward the west end and Princes St for passengers travelling from the Airport. It would connect the Airport and the west to the central business district and city centre retail areas and therefore to the concentrations of employment in the city centre. Significantly it would ensure that the infrastructure already constructed on Princes St would form part of the first stage of delivery. In finalising any incremental delivery plan it would be important to retain the desired relationship with Henderson Global's redevelopment of St James Square.

The TEL demand modelling assumes that measures can be implemented to maintain bus timetables through the Haymarket to St A Sq corridor as forecast increases in PT demand increase in the future. The existence of a tram service

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as far as St Andrew Sq would provide a high volume safety valve to manage that increased demand at peak times if it proved desirable.

Preliminary patronage forecasts for this option suggest that patronage on an Airport to St Andrew Sq tram service will be around 50% of the patronage forecast for the full Phase1a tram service. It's likely that the completed analysis will show a far more manageable impact on the overall TEL operating results than a service which only reaches to Haymarket.

7.5 Further options for prolonging the delivery of the entirety of Phase 1a

There may be merit in opening a service from Airport to Haymarket first to start building patronage and proving the reliability of the service. Staged opening also goes side by side with the development of options to further prolong the delivery of the tram in the remaining on street sections if this was deemed necessary to further until such time as funding sources for incremental delivery is identified.

7.6 Grant from Scottish Ministers

The terms of the Grant to CEC from Scottish Ministers stipulate that the Grant is for the delivery of the whole of Phase1a and that if CEC does not do so or threatens not to do so it is an act of default which can lead to inter-alia claw back of all or part of the Grant by Scottish Ministers. These circumstances dictate that any decisions on incremental delivery must be made with full knowledge and engagement with Transport Scotland and Scottish Ministers who in turn must be persuaded of CECs resolve to complete all or substantially all of the project as funding became available and the imperative to deliver value for the investment already made in the project to date.

7.7 Further work / next steps

Decision making still needs to be anchored on resolution with BSC on big picture cost and programme issues – so it is reasonable to make decisions about Incremental Delivery informed by adequate resolution of matters under project Carlisle. Work ongoing includes:

- Completion of the analysis of the revenue and operating profit forecasts for Incremental Delivery options in consultation with colleagues at Lothian Buses.
- Further refine the capital cost estimates for each option to integrate our thinking on Incremental Delivery into any commercial resolution with BSC providing a clear contractual mechanism to implement an incremental delivery approach for the remaining on-street works.
- Examine the feasibility and financial impact of a staged opening of the service from the Airport to Haymarket in the first instance.

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8.0 Business Case

At the full council meeting on 24th June, ~~it~~ ~~was~~ ~~asked~~ to go back to the September council meeting with an **update** on the Tram business case. A separate workstream was set up for this area.

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9.0 Governance and Communications

9.1 Governance

The governance structure which was put in place for Pitchfork 1 was amended as follows:

Level	What	Who
Level 1	Progress update held when required but routinely on Wednesday	Project Team + DLA
Level 2	Mondays	Project Team + invited others as relevant
Level 3	Update CEC weekly + FCL (this became the strategic overview meeting)	Richard Jeffrey, Dave Anderson, Marshall Poulton, Donald McGougan
Level 4	Challenge by non-execs every 4 weeks from early June	Non-Execs and selected members of Project Team
Level 5	TPB – every 4 weeks	TPB members
FOG	Starting 17/6	

Additionally an events log was kept to record all the meetings/briefings being held and any key decisions made, including those with Transport Scotland and CEC – this was to ensure that tie had records of who had been briefed on progress with the Pitchfork process and key decisions being made. A copy of this events log is available on the Project Pitchfork extranet area.

The TPB minutes record the support and agreements made by the TPB. TPB were updated on 14th April, 5th May and 2nd June, 30th June and 28th July 2010.

Additionally, it was agreed that a Funders Operating Group would be set up to include Transport Scotland, CEC and tie. The first meeting of this group is was on 17th June 2010.

An update was given to full Council on 24th June 2010. This resulted in a motion in support of the actions being taken by tie being supported by 45 votes to 12. Additionally, a refresh of the Tram business case was requested by September.

9.2 Media Communications

Since March, there has been unprecedented demand for information relating to the ongoing discussions between tie/BSC in aid of resolving

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the “dispute” and the outcome of the DRP’s. This had been managed tightly by the Tram communication teams and some positive stories including the arrival of the first tram on Princes Street has all managed to keep the level of press coverage at a fairly low level. There had also been speculation about the report to full council on 24th June 2010 and it was expected that this would generate much media coverage which it did in the run up to the meeting. There was very low coverage following the meeting and the coverage was balanced and generally in favour of continuing with the project.

FOISA – Information Commissioner status

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10.0 Recommendations

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