

The City of Edinburgh Council

10.00am, Thursday, 19 November 2015

Edinburgh Tram Inquiry – progress update

Item number	8.5(a)
Report number	
Executive/routine	
Wards	All

Executive summary

The City of Edinburgh Council has committed to participate fully in the Edinburgh Tram Inquiry (the “Inquiry”). This is in a context of continuing financial constraints, where the Council’s priority remains its responsibility to safeguard the public purse and obtain best value.

Following the preliminary hearing, the timetable for the oral hearings in the Inquiry has not been set.

The Council has learned significantly from the well-documented challenges and difficulties encountered in the first phase of the Edinburgh Tram Project and this has been taken into account as the Council moves forward with the proposed line extension to realise the economic and other benefits set out in the report at item 8.6(b).

With a view to its obligation to safeguard public funds and potentially recover losses the Council has raised protective proceedings in court. Those court proceedings have been the subject of comment by the Chairman of the Inquiry, Lord Hardie, in the context of the Council’s decision not to expend significant sums to fund tie’s Core Participant status in the Inquiry.

This report provides Council with an update on the progress of the Inquiry and responds to a further request by Lord Hardie, to confirm the Council’s position in relation to the extent of legal representation of individuals at the Inquiry, the participation of tie and potential conflicts of interest.

Links

Coalition pledges

Council outcomes CO24; CO25

Single Outcome Agreement



Edinburgh Tram Inquiry – progress update

Recommendations

- 1.1 The Council is recommended:
 - 1.1.1 to note the Council's continued willingness to assist and fully cooperate with the Edinburgh Tram Inquiry;
 - 1.1.2 to note that there is as yet no timetable for the oral hearings in the Inquiry; and
 - 1.1.3 to acknowledge that authority was delegated to officers by the full Council on 20 August 2015 to take all decisions or actions in relation to the Council's involvement in the Inquiry (with the stated provisos), but in light of Lord Hardie's remarks at the preliminary hearing in the Inquiry and subsequent Note and Direction, to take this opportunity to reaffirm the Council's position and the decisions taken by the Council in August 2015 in relation to the extent of legal representation of individuals at the Inquiry, the participation of tie and potential conflicts of interest.

Background

Introduction

- 2.1 Following commencement of passenger services in May 2014, Edinburgh Trams has seen a successful first year of operations. The Council is now moving forward with proposals to extend the tram line with a view to realising the significant economic and other benefits outlined in the report at item 8.6(b) ("Tram Extension Report"). The Council has taken into account the lessons it has learned from the first phase of the tram project, and further details are set out in the Tram Extension Report.
- 2.2 The Edinburgh Tram Inquiry (the "Inquiry"), was announced by Scottish Ministers in June 2014, and *"aims to establish why the Edinburgh Trams project incurred delays, cost more than originally budgeted and through reductions in scope delivered significantly less than projected"*.
- 2.3 The Council has committed to fully assisting the Inquiry and has applied for and been granted Core Participant status in the Inquiry.
- 2.4 A preliminary hearing had been convened by the Chairman of the Inquiry, Lord Hardie, to take place on 19 August 2015, but was postponed.
- 2.5 Following the rescheduled preliminary hearing on 6 October 2015, a timetable for the oral hearings in the Inquiry has not yet been set.

The Direction and Note

- 2.6 Prior to the preliminary hearing, the Council had been in discussion with members of the Inquiry team, including the Chairman, in relation to the extent of legal representation of individuals at the Inquiry and the participation of tie Limited (now CEC Recovery Limited) (“tie”).
- 2.7 On 12 August 2015 a decision was taken under the urgency procedures by the Chief Executive, in consultation with the Lord Provost, the Leader and Deputy Leader of the Council, the Transport and Finance Conveners and the leaders of the Conservative, Green and Liberal Democrat groups in relation to those issues in order that the Council could confirm its position to the Inquiry prior to the hearing on 19 August 2015.
- 2.8 The preliminary hearing was then postponed and the rescheduled preliminary hearing took place on 6 October 2015.
- 2.9 On 28 October 2015, Lord Hardie issued "Inquiry Procedure Direction No. 8 - Avoidance of the Risk of Delays to the Inquiry" (the “Direction”) and a note concerning issues of representation and potential conflicts of interest (the "Note"). The Direction and the Note are available on the Inquiry’s [website](#). The Direction requires to be responded to no later than 12 noon on 27 November 2015.

Main report

Participation in the Inquiry

- 3.1 Following the announcement of the Edinburgh Tram Inquiry by Scottish Ministers in June 2014, senior Council officers met with members of the Inquiry team on 22 July 2014 and again on 25 August 2014. At those meetings, Council officers conveyed to the Inquiry a clear indication of the vast quantity of information it holds in both electronic and hard copy form and emphasised the scale of the task to review the documentation. From the outset, the Council committed to fully assisting the Inquiry in making this information available to it.
- 3.2 Following extensive searching to determine the various sources and extent of documentation held by the Council, the Council began providing documentation to the Inquiry in early August 2014 and since then has worked closely with the Inquiry team to facilitate the provision of requested documentation and information.
- 3.3 The Council has facilitated the transfer to the Inquiry of a copy of an electronic database that contained around 470 GB of tie and Council data spread over approximately 1.2m documents. This is estimated as the equivalent of four floors of an academic library.
- 3.4 For the last few months, the Council has provided members of the Inquiry team with a fully accessible secure office within Waverley Court to enable the Inquiry

team to examine and photocopy tie's and the Council's hard copy tram project documentation that the Inquiry team wishes to review.

- 3.5 The Council continues to offer its full cooperation to the Inquiry and is making all efforts to assist the Inquiry.

Progress of the Inquiry

- 3.6 The Inquiry was announced by Scottish Ministers in June 2014.
- 3.7 The preliminary hearing in the Inquiry had been convened by the Chairman of the Inquiry, Lord Hardie, to take place on 19 August 2015, but was postponed. Prior to this, the Council had been in discussion with members of the Inquiry team in relation to the extent of representation of individuals at the Inquiry and the participation of tie. On 22 July 2015 the Council was asked to confirm its position in relation to those issues.
- 3.8 On 12 August 2015 a decision was taken under the urgency procedures by the Chief Executive, in consultation with the Lord Provost, as the Convener of the Council, in relation to those issues in order that the Council could confirm its position to the Inquiry prior to the hearing on 19 August 2015. The decision was made in consultation with the Leader and Deputy Leader of the Council, the Transport and Finance Conveners and the leaders of the Conservative, Green and Liberal Democrat groups. The action taken under the urgency procedures was reported to Council on 20 August 2015.
- 3.9 The rescheduled preliminary hearing took place on 6 October 2015. The Inquiry has published a transcript of the preliminary hearing, which can be referred to for its full terms.
- 3.10 On 28 October 2015, Lord Hardie issued the Direction and a Note concerning issues of representation and potential conflicts of interest.
- 3.11 There is as yet no timescale for the oral hearings.

Lord Hardie's Note dated 28 October 2015

Extent of legal representation for current/former employees and members of the Council

- 3.12 The Council is aware that some current and former Council employees have been asked to provide written statements to the Inquiry.
- 3.13 Lord Hardie has raised the issue of the extent of legal representation and asked the Council to consider it and decide what, if any, action it wishes to take in advance of the commencement of oral hearings in public.
- 3.14 There should be no suggestion that the Council has formed any view about individuals to criticise. No decisions have been taken about the extent to or circumstances in which current or former elected members and employees may be subject to criticism by the Council in the Inquiry.

- 3.15 The Council has obtained the advice of its counsel in connection with the Inquiry in relation to issues concerning separate legal advice for current and former elected members and officers.
- 3.16 The Council has proactively taken the decision to fund legal advice from an independent law firm to those current and former employees or elected members of the Council who are asked by the Inquiry to provide a statement and who wish to have advice in relation to the provision of that statement.
- 3.17 No decision has yet been taken by the Council to fund representation for those called to give evidence at Inquiry hearings. Any further decisions which might come to be necessary in this respect will be taken on a case by case basis, to be considered further as the Inquiry progresses.
- 3.18 In these circumstances, the Council's position therefore remains as previously communicated to the Inquiry.

Funding/participation of tie in the Inquiry

- 3.19 In his Note, Lord Hardie has asked the Council to consider the issue of participation in the Inquiry by tie and decide what, if any, action the Council wishes to take in advance of the commencement of oral hearing in public.
- 3.20 On 12 August 2015 a decision was taken under the urgency procedures by the Chief Executive, in consultation with the Lord Provost, as the Convener of the Council, that tie would not be a Core Participant in the Inquiry. This decision was taken after considering the following:
- 3.20.1 Tie is a dormant non-trading company with a sole director appointed by the Council. It would require to be "revived" with the appointment of further officers in order for it to be able to issue instructions as a core participant in the Inquiry. It is difficult to envisage who would be prepared to accept such a board appointment in the circumstances; and
- 3.20.2 The costs associated with reviving tie in order for it to be in a position to provide instructions and the legal costs involved with regard to representation at the Inquiry would be substantial. Tie has no income or assets to meet any costs and in all likelihood they would have to be borne out of Council funds, in addition to the costs already being borne by the Council in relation to the Inquiry.
- 3.21 The Council has provided the Inquiry with full access to tie's documentation and the Inquiry can obtain evidence from former employees of tie should it wish to do so. The Council has used and will continue to use all proper endeavours to assist the Inquiry and provide information to it in relation to the role of tie.
- 3.22 In the Note, Lord Hardie refers to the Court of Session legal actions involving the Council and tie.
- 3.23 Lord Hardie has questioned whether elected members who were involved in the decisions around tie's participation in the Inquiry were made aware of the legal

actions. The legal actions were the subject of a formal decision of the Council following extensive briefings. On 24 April 2013 a special meeting of the Finance and Budget Committee (now Finance and Resources Committee) was convened to consider a report by the Chief Executive in relation to potential recourse in connection with the Project. The meeting was held in private under the relevant local government legislation as it related to advice received and action to be taken in connection with legal proceedings.

3.24 The committee took the decision that protective court actions should be raised and served as follows:

- By the Council against DLA Piper Scotland LLP ("DLAP");
- By tie against DLAP; and
- By the Council against tie.

3.25 In advance of the committee decision, which is a decision of the City of Edinburgh Council in line with proper governance, senior officers and the Council's external solicitors carried out full confidential legal briefings with all of the political groups of the Council. Full legal briefings were provided, with presentations being given to each political group separately on 15 and 17 April 2013, to which all members were invited and at which members were given, and took, the opportunity to ask questions. The recipients of those briefings included the senior councillors across the political groups who have subsequently been consulted and involved in the Council's decision-making about tie's participation in the Inquiry.

3.26 The actions were raised on a protective basis: had they not been raised and served, the right to pursue the claims would almost certainly have been irretrievably lost through the operation of time limitation, known as prescription. This was the prudent approach to take to safeguard public funds. Because of the similarities between the actions by the Council and tie against DLAP, the additional cost incurred by tie in raising an action against DLAP beyond that already incurred by the Council in raising its action against DLAP was relatively small. It was not necessary to revive tie in the manner that would be required for tie to participate and instruct legal representation in the Inquiry, were it to be a Core Participant.

3.27 The Council has given consideration on a number of occasions to the question of whether tie should be revived, and it remains satisfied that there is a proper distinction to be made between the court actions involving tie which do not require substantial resourcing at present, and participation in the Inquiry which would require substantial resourcing.

3.28 The court documents (known as summonses) in the actions are not, at this stage of proceedings, public documents. The Council cannot disclose their contents without the consent of the parties to the proceedings. However, even if the

Council were able to obtain consent, disclosure at this stage could be characterised as misconduct by the Court. The Council has taken legal advice on this issue, and more generally in relation to the court actions, from its senior counsel in connection with the proceedings, James Wolffe QC, Dean of Faculty. The Council has a duty to obtain best value for the taxpayer. The actions were raised in order to seek to protect and safeguard the Council's position in relation to potential recovery of losses. It was right and proper to do so.

- 3.29 Both actions were sisted (suspended) prior to defences being lodged. Subject to the agreement of the Court it is intended that the actions remain sisted until after the Inquiry's final report and findings have been published.
- 3.30 The proceedings brought by the Council against tie were also brought on a protective basis, so as to avoid any rights of action being irretrievably lost through the operation of prescription.
- 3.31 In the event that the action by the Council against tie proceeds, tie's legal representatives would, of course, require to carry out the investigations that are referred to in the Note. In particular any lines of defence available to tie would be advanced and the action would be determined through the court process. However, subject to the agreement of the Court, it is intended that this action will remain sisted until after the Inquiry's final report and findings have been published, when further decisions will be taken.
- 3.32 As referred to above, the then Chief Executive was briefed on the court actions prior to those actions being raised. The new Chief Executive was briefed in relation to the court actions in advance of the decision of 12 August 2015.
- 3.33 It remains the case that the Council considers that it would not be an appropriate use of the Council's funds for it to pay the costs of tie's participation in the Inquiry as a Core Participant. This is contrary to the situation where tie has raised proceedings in order to safeguard the Council's funds and recover losses. The Council is currently required to address a budget shortfall of up to £126m over the next 4 years and faces increasingly difficult choices in reconciling increasing costs of providing services with real-terms reductions in available funding. At a time when the Council is going through a period of unprecedented change, it has a responsibility to manage the financial impact of participating in the Inquiry and to minimise the cost to the taxpayer.
- 3.34 The Chairman has indicated his wish for tie to participate in the Inquiry as a Core Participant. The Council has already set out its view that it is not necessary for tie to become a Core Participant. However, the Council has no objection to the participation of tie in the Inquiry as a Core Participant if the costs associated with that participation are met by the Inquiry. This would still place a significant burden on the public purse and, in particular, would add to the overall costs of the Inquiry.

Pinsent Masons LLP ("Pinsent Masons")

- 3.35 In the final section of his Note of 28 October 2015, Lord Hardie raises the issue of potential conflict of interest, as it affects the Council and Bilfinger Construction UK Limited ("Bilfinger"), a member of the Infraco consortium, arising from the instruction of Pinsent Masons by each as solicitors at the Inquiry.
- 3.36 Reference is made to paragraphs 5 to 13 of the Direction.
- 3.37 DLAP acted on behalf of tie in relation to the Project.
- 3.38 McGrigors LLP ("McGrigors") was asked to provide additional advice to tie in relation to specific issues concerning the Project from July 2009, whilst DLA remained tie's primary lawyers. McGrigors continued to be involved on specific issues, as and when requested, until January 2011, when DLA's engagement came to an end and McGrigors took over from them. McGrigors also provided advice to the Council during this period, and acted on behalf of both the Council and tie at the mediation.
- 3.39 Following the hive-up of tie, McGrigors continued to act for the Council in connection with certain matters relating to the Project. McGrigors did not continue to act for tie following the hive-up, other than in relation to the protective summons which has been raised by tie against DLAP.
- 3.40 Pinsent Masons acted for Bilfinger in connection with the Project.
- 3.41 On 1 May 2012, McGrigors merged with Pinsent Masons.
- 3.42 Following the merger, both the Council and Bilfinger wished Pinsent Masons to continue to act for them in relation to issues concerning the Project. The Council considered that it would not be an appropriate use of public funds to lose the background knowledge of the Project that had been built up by its legal team.
- 3.43 Since the mediation in March 2011 and the settlement agreement there have been no disputes between the Council and Bilfinger. It was therefore agreed between the Council and Bilfinger that, subject to appropriate information barriers between the two separate Pinsent Masons' teams advising the Council and Bilfinger respectively, Pinsent Masons would continue to act for Bilfinger in relation to the completion of the Project and for the Council in relation to certain specific matters concerning the Project, but not for the Council in relation to the completion of the Project.
- 3.44 The Project was subsequently brought to a conclusion and the final account was settled. There are no outstanding matters to be dealt with between the Council and Bilfinger in relation to the Project. Accordingly, there has been and continues to be no conflict between the Council and Bilfinger.
- 3.45 There were disputes between tie and Infraco in the period between the signing of the Infraco Contract and the mediation. These concerned primarily contractual issues arising from the terms of the Infraco Contract. Many of these

issues were determined under the contractual dispute resolution process by way of mediation or adjudication. 12 adjudications were completed between tie and Infraco, the results of which in the absence of court proceedings were binding on the parties.

- 3.46 The Council was not directly involved in the disputes until the mediation which took place in March 2011.
- 3.47 No doubt the key individuals at tie who were involved in these disputes will be called upon by the Inquiry to give evidence.
- 3.48 DLAP represented tie in all the completed adjudications, apart from one in which tie was represented by McGrigors. DLAP are a Core Participant in the Inquiry, separately represented, and will be in a position to assist the Inquiry.
- 3.49 Siemens plc were a member of the Infraco consortium and are also a Core Participant in the Inquiry, separately represented, and will also be in a position to assist the Inquiry.
- 3.50 The disputes which arose are all a matter of factual and historical record.
- 3.51 The Inquiry process is an inquisitorial, rather than an adversarial, one. The Council and Bilfinger have confirmed that they are committed to continuing to use all proper endeavours to assist the Inquiry in its objective of establishing "why the Edinburgh Trams project incurred delays, cost more than originally budgeted and through reductions in scope delivered significantly less than projected". There are no issues which lie between the Council and Bilfinger. Both wish to be represented by Pinsent Masons and there is no impediment to Pinsent Masons doing so, given that no conflict exists between these two parties.

Measures of success

- 4.1 The City of Edinburgh Council continues to play a central role in the Edinburgh Tram Inquiry and continues to participate in an open and transparent manner whilst minimising the expenditure of public funds.

Financial impact

- 5.1 The Council has allocated up to £2 million of funding from the Council's reserves.

Risk, policy, compliance and governance impact

- 6.1 The Chief Executive and/or Deputy Chief Executive have delegated authority to take all decisions or actions in relation to the Council's involvement in the

Inquiry, provided the financial consequences of such decisions or actions do not exceed £2 million and subject to regular reporting.

Equalities impact

7.1 There are no direct equalities impacts as a result of this report.

Sustainability impact

8.1 There is no direct sustainability impact as a result of this report.

Consultation and engagement

9.1 There has been extensive consultation and engagement with elected members on the decisions taken which are referred to in this report.

Background reading/external references

[Notice of meeting and B agenda, Finance and Budget Committee \(Special Meeting\), 24 April 2013](#)

[Minutes of the City of Edinburgh Council, 26 June 2014](#)

[Transcript of the preliminary hearing in the Inquiry on 6 October 2015](#)

[Inquiry Procedure Direction No. 8 dated 28 October 2015](#)

[Note by Lord Hardie dated 28 October 2015](#)

[Edinburgh Tram Inquiry](#), City of Edinburgh Council Report, 20 August 2015

Andrew Kerr

Chief Executive

Contact: Alastair Maclean, Deputy Chief Executive

Email: alastair.maclean@edinburgh.gov.uk | Tel: 0131 529 4136

Contact: Carol Campbell, Head of Legal and Risk

E-mail: carol.campbell@edinburgh.gov.uk | Tel: 0131 529 4822

Links

Coalition pledges

Council outcomes CO24 - The Council communicates effectively internally and externally and has an excellent reputation for customer care.
CO25 - The Council has efficient and effective services that deliver on objectives.

**Single Outcome
Agreement**