

Transport and Environment Committee

10am, Thursday, 16 November 2023

Response to the Edinburgh Tram Inquiry

Executive/routine
Wards

1. Recommendations

- 1.1 To note the actions outlined in Appendix one to the Chief Executive's report in regard to the recommendations made by Lord Hardie in the Inquiry Report;
- 1.2 To refer the report to the Council of 14 December 2023;

Andrew Kerr

Chief Executive

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Response to the Edinburgh Tram Inquiry

2. Executive Summary

- 2.1 The report addresses the motion agreed by the Council in September 2023 detailing the Council's response to the Edinburgh Tram Inquiry and in particular outlines the actions taken or proposed to be taken in regard to the Inquiry's recommendations. The report also includes information on the financial cost of the initial tram project, providing a breakdown of costs highlighted by the Inquiry. Assurance is provided on how the Council would approach breaches of the Employee Code of Conduct or instances of misleading behaviour by Arm's Length External Organisations and contractors. Finally, an update is provided on any possible legal action connected to the initial Tram Project.

3. Background

- 3.1 Following the opening to revenue service of the tramline in Edinburgh from Edinburgh Airport to York Place on 31 May 2014, the Scottish Government indicated that it intended to commission a public inquiry to understand why the construction of the line had been delivered over time and budget and delivered an incomplete line. In July 2014 the Inquiry was formally established by Scottish Ministers, with Lord Hardie appointed as the Inquiry chair. The Inquiry Report was published on 19 September 2023. It provides a detailed account of the progress of the project and identifies themes and factors that contributed to difficulties in project delivery.
- 3.2 On 28 September 2023, the Council considered a motion on the Tram Inquiry findings and agreed the following:
- 3.2.1 To approve the following adjusted motion by Councillor Day:
- 1) To note Lord Hardie had published his Tram Inquiry findings.
 - 2) To note its extensive nature, cost and lengthy timescale.
 - 3) To request a report on these findings and implications to the November Transport and Environment Committee, then to the December Full Council meeting as a matter of urgency.

- 4) To agree that the Chief Executive's report should include, but not be limited to, implications for future project management practices, and information and/or proposed actions on the following topics:
 - a) A briefing on why the final cost of the initial tram project was reported to councillors at a far lower sum than evidenced by Lord Hardie and who is responsible for this inaccurate information being reported to councillors;
 - b) A copy of the Council's Corporate response to the Maxwellisation process for Lord Hardie's draft report be provided to all councillors;
 - c) An update on the possibility of recourse for the Council to recoup public funds through legal action, either through currently sisted actions or otherwise, against corporations or individuals (including through individuals' professional indemnity insurance);
 - d) The outcome of any action to be taken regarding any individuals still in the employ of the Council as a result of the findings;
 - e) Given recommendations 20-24 inclusive regarding officer candour (notwithstanding any future resulting statutory process by the Scottish Government and regardless of whether this was likely to happen in other Councils to ask the Chief Executive to provide assurance that there were robust arrangements in place to deal with allegations of breaches of the Employee Code of Conduct. In addition, the Chief Executive should provide assurance of any arrangements in place for ALEOs and contractors.
- 5) To note that the subsequent report might contain confidential information about individuals or be subject to legal privilege and recognise that the report may have to be addressed in private. However, for the sake of public transparency, a public report should be provided with any necessary private material published for councillors in a confidential annex.

3.3 This report is due to be considered by Transport and Environment Committee on 16 November 2023, Governance, Risk and Best Value Committee (GRBV) on 28 November 2023 and the Council on 14 December 2023.

4. Main report

4.1 Due to the complexity of the Inquiry report and the differing responsibilities of the committees considering it, to address the actions agreed by the Council, each element is summarised in a separate Appendix, with this covering report explaining the different elements.

- 4.2 Appendix one details the Council's understanding of the failures in delivery of the first phase of the tram project and how that can be used to ensure future delivery of tram infrastructure projects can avoid similar issues. Transport and Environment Committee and the Council have the power within their remits to consider this information.
- 4.3 GRBV Committee has the power to look across at all aspects of Council performance and there will be matters across the report it may wish to scrutinise. However, to avoid duplication of scrutiny, it is recommended that it focusses on appendices two, three and four and any matters involving governance or risk.
- 4.4 Appendix two of the report details the financial cost and reporting of the tram project. This is primarily for the consideration of GRBV and the Council.
- 4.5 Appendix three details the response to the motion in regard to any action to be taken regarding employees as a result of the Inquiry's findings and to officer candour, including Arm's Length External Organisations (ALEOs). This Appendix is for the consideration of GRBV and the Council.
- 4.6 Appendix four is a confidential appendix and updates the Council on any possible legal action. This is for the consideration of GRBV and the Council.
- 4.7 The recommendations of the Tram Inquiry are addressed in the appendices in the report as follows:
- 4.7.1 Recommendations 5 – 7, 9, 10 and 13-19 are considered in appendix one.
- 4.7.2 Recommendations 20 (misleading statements and independent advice) and 21 (accuracy of reporting), are considered at Appendix 3
- 4.8 The following recommendations are not for the Council to consider and as such are not covered within the Appendices to this report:
- 4.8.1 Recommendations 1 to 4 of the Inquiry Report relate to the conduct of public inquiries and are therefore for the Scottish Government to consider.
- 4.8.2 Recommendations 8 (Optimism Bias), 11 (assurance on grant funding) and 12 (Minutes) 22 (sanction in damages), 23 (criminal offence) and 24 (duty to disclose) are for the Scottish Government to consider.
- 4.9 In advance of GRBV and the Council meeting, this covering report will be supplemented by any recommendations the Committees make to the Council.

5. Next Steps

- 5.1 The report is due to be considered by Transport and Environment Committee on 16 November 2023, Governance, Risk and Best Value Committee on 28 November 2023 and the Council on 14 December 2023.

6. Financial impact

- 6.1 Details of the financial cost of the Initial Tram Project are outlined in Appendix two of this report.
- 6.2 Details of the costs associated with litigation are outlined in Appendix four of the report.

7. Equality and Poverty Impact

- 7.1 Integrated Impact Assessments have been carried out as part of the Tram Project phases and would be an integral part of any future tram or light rail projects.

8. Climate and Nature Emergency Implications

- 8.1 There are no additional climate or nature emergency implications as a result of this report.

9. Risk, policy, compliance, governance and community impact

- 9.1 Risk management is outlined in Appendix one of the report in paragraphs 2.4.8 – 2.4.11.
- 9.2 Risk, and how it was applied in the project, was examined extensively within the Inquiry report. The management of risk and the governance surrounding it is detailed in recommendations 6, 7 and 9 included in Appendix one.
- 9.3 Governance is also detailed in Appendix one in paragraphs 2.4.15 – 2.4.18. Arm's Length External Organisation governance and how that is to be strengthened is included in Appendix three.

10. Background reading/external references

- 10.1 [Act of Council No 22 of 28 September 2023 – Minute](#)
- 10.2 [Edinburgh Tram Inquiry Report](#)

11. Appendices

- 11.1 Appendix One – Response on the Tram Inquiry's findings on the Tram Project
- 11.2 Appendix Two – Reporting on the financial cost of the Initial Tram Project
- 11.3 Appendix Three – Officer Candour and ALEOs
- 11.4 Appendix Four – Legal Recourse (B Agenda)

Appendix 1

Response to the Edinburgh Tram Inquiry report

1. Background

- 1.1 Following the opening to revenue service of the tramline in Edinburgh from the Airport to York Place on 31 May 2014, the Scottish Government indicated that it intended to commission a public inquiry to understand why the construction of the line had been delivered over time and budget and delivered an incomplete line. In July 2014 the Inquiry was formally established by Scottish Ministers, with Lord Hardie appointed as the Inquiry chair and with the following Terms of Reference:
1. To inquire into the delivery of the Edinburgh Tram project ('the project'), from proposals for the project emerging to its completion, including the procurement and contract preparation, its governance, project management and delivery structures, and oversight of the relevant contracts, in order to establish why the project incurred delays, cost considerably more than originally budgeted for and delivered significantly less than was projected through reductions in scope.
 2. To examine the consequences of the failure to deliver the project in the time, within the budget and to the extent projected.
 3. To otherwise review the circumstances surrounding the project as necessary, in order to report to the Scottish Ministers making recommendations as to how major tram and light rail infrastructure projects of a similar nature might avoid such failures in future.
- 1.2 The [Inquiry Report](#) was published on 19 September 2023. It provides a detailed account of the progress of the project and identifies themes and factors that contributed to difficulties in project delivery. It also discusses the consequences of the failures in project delivery and makes recommendations.

2. Main report

Purpose and Scope of this report

- 2.1 Lord Hardie as chair of the Inquiry has authored a detailed report into a complex series of events and circumstances into delivery of the tram project from 2006 to 2014. He has made a series of recommendations as to how major tram and light rail infrastructure projects can avoid similar failings in future.

- 2.1 Consideration of the Edinburgh Tram Inquiry Report (the “Inquiry Report”) provides an opportunity for the Council to demonstrate its understanding of the factors that contributed to the difficulties in the first phase of tram delivery. This is important to provide robust assurance that the Council understands the failures in delivery of the first phase of tram and to build confidence in future infrastructure delivery. It is also important that the Council gives consideration to the consequences of the failure to deliver the tram project within the parameters originally approved by the Council and to the recommendations made by the Inquiry Report.
- 2.2 The Inquiry Report is necessarily lengthy and detailed as it describes the events, behaviours and decision making that contributed to the tram project from its commencement until the delivery of the section of line from Edinburgh Airport to York Place. It is not the purpose of this report to reproduce that detail, or to consider evidence and recommendations which do not relate to the Council. It is not possible to replicate in detail the evidence considered and the findings of the Inquiry Report within this paper. The Inquiry Report is included as background reading to this paper.
- 2.3 The Council also had corporate control of tie Ltd, an Arms Length External Organisation (ALEO) wholly owned by the Council (“tie Ltd”). Tie Ltd was set up to provide the procurement, project management and financial management capability to ensure that a number of major transport-related projects were delivered. These projects included delivery of a tram system in Edinburgh.

Evidence and findings of the Inquiry Report

- 2.4 Not all of the failings identified by Lord Hardie were within the control of the Council, however the following issues are of particular relevance:

Outturn cost of the project¹

- 2.4.1 The original budget for the full extent of line 1a (Airport to Newhaven) was assessed to be within the original budget allowance of £545m. Following a mediation held to resolve contractual disputes at Mar Hall, a revised budget for completion of the line to York Place was assessed to be £776m.
- 2.4.2 Lord Hardie has undertaken a review of the total outturn cost of the project. Taking account of additional costs resulting from construction of the line to York Place and the additional cost of borrowing necessitated by the overspend, he has assessed the total cost of the line to York Place at £852.591m. How this additional cost was considered and approved is explained in greater detail at in Appendix 2 of this report.
- 2.4.3 In addition, because a further phase of project delivery was required to complete the line as originally intended, the cost of delivery of the line to Newhaven must also be included in the overall cost of delivery. This is considered in greater detail below.

¹ Inquiry Report 24.2 to 24.30

Procurement strategy

- 2.4.4 The procurement strategy devised by tie Ltd and considered by the Council as part of its approval of the Final Business Case (FBC) for the tram line and sought to reduce risk, particularly in relation to design and utility diversions.
- 2.4.5 The strategy was not fully implemented and key contracts (relating to design and utilities diversions required to implement the procurement strategy) were not effectively managed by tie Ltd. Delay in completion of the design led to the design contract being novated to the contractor responsible for infrastructure and maintenance before design was complete, leading to retention of the design risk by tie Ltd when it should have been fully mitigated.
- 2.4.6 While the Inquiry Report puts primary responsibility for design delay on tie Ltd, it does state that there were failures by the Council which contributed to the design delay. These included a failure by the Council to clarify its own requirements, a failure by the Council to coordinate responses and comments, and the significant volume of design inputs that were received from the Council.
- 2.4.7 In addition, although the Council ultimately had to bear the cost of the failure to implement the procurement strategy and the risk resulting from that, it did not have sufficient understanding of the failure to implement the procurement strategy to be able to mitigate these costs.
- 2.4.8 The Inquiry Report finds that some Council officials were aware that the price for the Infraco works was not fixed at contract close. However, most were not due to the fact that they relied on what was reported to them by tie Ltd and its advisers. Elected members were not aware of the failure to implement the procurement strategy and the effect that this could have on the budget.
- 2.4.9 In addition, the risk allowance made at the time of the FBC assumed that the procurement strategy would be implemented in full. Although this was not delivered, the risk allowance was not updated to reflect this and this connection was not fully understood by the Council.

Risk Management

- 2.4.10 The Council was ultimately responsible for the outturn cost of the project, with the contribution of Scottish Ministers being capped. Therefore, it was essentially underwriting the costs and risks incurred by tie Ltd in project delivery. However, the Council did not have a full understanding of the approach taken to risk in the project.
- 2.4.11 In assessing risk for the draft Interim Outline Business Case in 2005, an incorrect reference class was selected, the most up to date guidance was not used and subjective deductions were made. Had the correct guidance been used, it would have been clear that the projected cost of the project exceeded available funds. This was an opportunity lost for the Council to

reassess the basis of the project and to better understand the risk associated before proceeding.

- 2.4.12 The management of risk throughout the project was overly optimistic, subjective and did not take account of optimistic bias. There were a number of reductions in risk allowance which Lord Hardie considers could not be justified. In addition, the probability applied to the quantification of risk was reduced without being flagged to the Council. This resulted in the risk allowance being too low.
- 2.4.13 The Council did not insist upon an independent review of tie Ltd's approach to risk quantification. In light of the Council's responsibility for cost overruns, it should have ensured that a detailed independent risk review was completed. If that had been completed prior to signature of the Infraco contract, it is likely that a review of the Infraco contract would also have been recommended.

Independent legal advice

- 2.4.14 The Council did not obtain independent legal advice, and instead relied on a duty of care extended to the Council by DLA Piper Scotland LLP (DLA) who acted for tie Ltd. Although concerns were raised about this approach by officers, independent advice was not instructed by the Council in advance of signature of the Infraco contract, and in any event until autumn 2010.
- 2.4.15 Lord Hardie finds in the Inquiry Report that the decision not to obtain independent legal advice left the Council unprotected and had far reaching consequences for the project.
- 2.4.16 In addition, the terms of the contract entered into and the subsequent amendments to it were not fully understood and assurances given on the terms of the contract gave rise to false confidence in project delivery.

Governance

- 2.4.17 The Inquiry Report describes a number of deficiencies in the governance structure selected for the project, including confusion in the purpose of various bodies created and a lack of understanding of the responsibilities of key roles. In addition, the governance structure was unnecessarily complex.
- 2.4.18 The governance created did not ensure satisfactory reporting to the Council as ultimate project owner.
- 2.4.19 Together, this led to a lack of clear roles and confusion on who was ultimately responsible, alongside a structure that did not allow issues and problems to be identified and resolved as they emerged.
- 2.4.20 The Inquiry Report also describes the governance and oversight of tie Ltd as an arms length company to the Council and the role of Councillors on the company board, which did not satisfy the purposes for which it was carried out and gave rise to a false feeling of confidence.

Reporting to Councillors

2.4.21 The Inquiry Report observes that the flow of information to Councillors was by Council officials through reporting, albeit that some of the reporting was based on reports issued by tie Ltd which themselves were lacking and not subjected to independent scrutiny which could have revealed emerging issues.

2.4.22 The Inquiry Report makes clear that there were instances where reports drafted by Council officers and issued to Councillors were misleading or incomplete, even where Council officers were aware of the true position. This resulted in decision making which was not robust as it was not taken in view of the facts at the time. ²

Consequences of failure in delivery

2.5 The Inquiry Report provides insight into the consequences of the failure to deliver the project to programme and within budget.

Additional cost of Trams to Newhaven project

2.4.23 To make a valid comparison with the original budget allowance it is necessary to factor in the cost of completion of the line to Newhaven. The final account for the construction of that section is not yet available, though taking the current budget of £207.3m the total cost of the entire line has been assessed by Lord Hardie as follows:

	£ (m)
Assessment of total cost to York Place	835.739 ³
Construction cost York Place to Newhaven	207.3
Total	1,043.039

2.4.24 When the final account for the line to Newhaven is available this figure can be confirmed but, in the meantime, represents the best estimate of the additional cost of the construction of line 1a in excess of the original budget of £545m. The Council has borrowed to fund the cost of construction of the line to Newhaven and this will have to be considered as part of the outturn final account.

2.4.25 The impact on Council budgets is projected to be £14.3m per annum from 2014 to 2044 for the first phase of tram delivery and £9.7m per annum from 2023 to 2053 for the section of line to Newhaven. These costs are in line with

² For example see 14.199 et seq; 13.171 to 13.178

³ This figure corresponds to the £853.739m reported in Appendix 2, Table 1, less £16.852m of parliamentary process costs incurred by Scottish Ministers, which Lord Hard acknowledges should be excluded from any like for like comparison with the original £545m budget

estimates provided to members when prudential borrowing was approved in 2011 and 2019 respectively.

Delay to benefit realisation

- 2.4.26 The line to Newhaven was not delivered until 2023, causing a delay to the benefits that were projected to be delivered by the tram line. In addition, the additional cost of the project reduced the benefit to cost ratio below 1. Lord Hardie considers that had this been known at the time the project was approved, it was unlikely that the project would have received consent as the benefits would not have been sufficient for approval.
- 2.4.27 The level of development in this area anticipated in the FBC for phase 1 did not materialise.
- 2.4.28 The reasons behind this are complicated as, in addition to the fact that the tram was not constructed, there was a credit crunch and Forth Ports operational land was removed from the mixed use allocation in the City of Edinburgh Council Local Development Plan 2015.
- 2.4.29 Since the line to Newhaven was approved, construction has commenced on a number of housing developments in this area and it is arguable that this may have been brought forward earlier if the tram had been constructed when originally scheduled.
- 2.4.30 The revenue projected to have been earned from the tram line was also delayed by the late completion. While this is difficult to quantify, it is considered that estimate of lost income in the Inquiry Report of £4m per annum is significantly overstated. This is because it does not recognise the additional costs required to operate that section of the line. It also does not take account of the fact that a large proportion of travellers would otherwise have taken a Lothian Bus, so the income would not have been additional to the wider Transport for Edinburgh (TfE) group of companies.

Disruption

- 2.4.31 The prolongation of construction works by three years and the requirement for the Council to undertake a separate project to complete the line to Newhaven meant that people living and working in Edinburgh and visiting it suffered disruption beyond that reasonably expected to be caused by a major infrastructure project.
- 2.4.32 Residents and businesses along the route of line 1a suffered the most disruption due to the noise, dust and inconvenience of living along the tram route. This included increased traffic flows during construction along diversionary routes which in some cases have been made permanent since construction completed.
- 2.4.33 The Inquiry Report also highlights the economic impact of the works on businesses, with particular reference to the impact on small businesses on Leith Walk and in the west end of Edinburgh, and the additional economic

impact suffered both as a result of the prolongation of the works and because of the manner in which traffic management was established.

Reputation

- 2.4.34 The Inquiry Report references the impact on the Council's reputation as a result of delivery of the first phase of tram. It is crucial the Council works to build trust so that residents and businesses in Edinburgh have confidence in the Council's ability to deliver major infrastructure projects so that investment can be made where required.
- 2.4.35 The relationship between councillors and officers was also significantly affected in particular because of the fact that the reports received by councillors for decision were misleading in places and information was omitted from them, as highlighted above and more fully in the Inquiry Report.

Recommendations

- 2.4.36 Recommendations 1 to 4 of the Inquiry Report relate to the conduct of public inquiries and are therefore for the Scottish Government to consider. They are not considered in this report.
- 2.4.37 Recommendations 8 (Optimism Bias), 11 (assurance on grant funding) and 12 (Minutes) 22 (sanction in damages), 23 (criminal offence) and 24 (duty to disclose) are for the Scottish Government to consider and are not considered in this report.
- 2.4.38 Recommendations 20 (misleading statements and independent advice) and 21 (accuracy of reporting), are considered at Appendix 3

The remaining Recommendations are as follows:

2.4.39 Recommendation 5

Where the Business Case for any future light rail project is based upon an assumption that, prior to the award of the contract for the construction of the infrastructure, certain matters will have been completed (e.g. design, the obtaining of all necessary approvals and consents or the diversion of utilities), the contract negotiations should be delayed until completion of these matters has been achieved, failing which before any infrastructure contract is signed a new Business Case should be prepared on the basis of the altered assumptions that prevail and should be approved by the promoter and owner of the project.

As set out above the failure to implement the procurement strategy on which the contract procurement and FBC were based was a key cause of the cost overrun and programme delay of the first phase of tram delivery in Edinburgh. If the contract negotiations for the Infraco contract had been delayed until the design contract was complete and utilities diverted the client risk associated with these elements would not have materialised.

There should be confidence that the procurement strategy has been executed when gateway milestones are met. The organisation holding the risk of any project should fully understand a procurement strategy and the milestones required to successfully implement it . This should be supported by a review to confirm that the procurement strategy has been successfully implemented and specific assurance given that the contracts reflect the procurement strategy and risk allocation anticipated.

It is recommended that the Council should adopt this Recommendation.

2.4.40 Recommendation 6

All versions of the Business Case, including any Business Case required as a result of altered assumptions, should include an assessment of risk that takes account of optimism bias in accordance with the current published government guidance.

The Tram Inquiry report found that the risk quantification was too low at the time of consideration of the Business Case. As a result, the Council lost a key opportunity to understand the potential cost of the tram project when making the decision to proceed and would have understood that it was not within budget. Therefore, consideration of optimism bias should be made at key decision points for each project with justification given for the reference class and level of optimism bias selected.

The Council could also consider undertaking a reference class analysis for large projects such as a future light rail project which would provide an additional level of assurance.

In such cases an appropriate governance mechanism to manage risk allowance should be developed to ensure that risk is robustly managed.

It is recommended that the Council should adopt this Recommendation.

2.4.41 Recommendation 7

The assessment of risk at each stage mentioned in Recommendation 6 should be the subject of a peer review by external consultants with experience of similar large-scale infrastructure projects in the transportation sector who should submit a report of each review to the promoter and owner of the project as well as to the procurement and project manager sufficiently far in advance of the signature of the infrastructure contract to enable the promoter and owner to consider whether to authorise its signature and, as appropriate, to consider any other available options requiring a strategic decision.

The selection of a reference class and the level of the optimism bias is for the risk management team for any project to decide. This introduces a level of subjectivity into the risk selection. A peer review as recommended will give the project sponsor assurance that the that the selection made is justifiable in the circumstances.

It is recommended that the Council should adopt this Recommendation.

2.4.42 Recommendation 9

The identification and management of risk should be an integral part of the governance of all major public-sector contracts in future. In identifying and managing risk the following principles should be adopted:

Probabilistic forecasts rather than single-point forecasts should be used to take account of the risk appetite of funders and project sponsors.

Funders, sponsors and project managers should be cautious when adjusting uplifts and there should be critical review of claims that mitigation measures have reduced project risk.

Effective governance needs to provide constant challenge and control of the project, including recording of where the project is compared with its baseline, and reacting quickly to get the project back on track, whenever there are signs that it is veering off course. This necessitates providing senior decision-makers with data-driven reports on project performance and forecasts combined with reports by the management team and independent audits.

In reporting to governance bodies there should be special emphasis on detecting early warning signs that the cost, schedule and benefit risks may be materialising so that damage to the project can be prevented. If early warning signs do emerge, the project should revisit assumptions and reassess risk and optimism bias forecasts.

The quality of evidence rather than process is the key to providing effective oversight and validation.

This Recommendation relates to all major projects undertaken by the public sector. The Council should undertake a review of how risk is managed across major projects in the Council in order to ascertain the processes followed and to ensure that a common approach is taken.

The Council has a differing risk approach dependent upon key criteria, for example the value and risk associated with each major project. It would bring clarity for a standard approach to be adopted with a clear process to be used across Council projects, incorporating the use of forecasting and early warning indicators as recommended.

Similarly, standard reporting should be adopted for ease of understanding and so that decision makers can identify trends and patterns across project delivery.

It is recommended that the Council should adopt this Recommendation.

2.4.43 Recommendation 10

In the interests of protecting the public purse and maximising the benefits from public expenditure on major projects, the Scottish Ministers should contemplate establishing a joint working group consisting of officials in Transport Scotland and representatives of the Convention of Scottish Local Authorities (“COSLA”) to consider how best to take advantage of:

tolerating the risk of cost overrun that is always a possibility in risk assessments by including all public-sector light rail projects in the portfolio of large projects undertaken by the Scottish Government, including those to be constructed wholly within the geographical boundaries of a single local authority;

the greater experience within Transport Scotland of managing major projects in the public sector; and

the necessary skills and expertise within Transport Scotland to deliver the project on time and within budget.

This is a Recommendation for the Scottish Ministers, however the Council recognises that there is a benefit of joint working across organisations. In the event that a joint working group is established it is recommended that the Council should offer support to that working group if invited to do so.

2.4.44 Recommendation 13

The procurement strategy for any future light rail project should make adequate provision for the uncertainties concerning the location of utilities and redundant equipment belonging to present and past utility companies, particularly in urban centres. In particular, although it is not possible to be prescriptive about the appropriate timescale:

the procurement strategy should include a requirement that the route of the track should be exposed and cleared of utilities well in advance of the infrastructure contractors commencing their work;

the procurement strategy should specify the period that should elapse between the exposure and clearance of the route and the commencement of construction, to ensure that the contractors have unrestricted access to the construction site and may proceed with the infrastructure works unencumbered by the presence of utilities; and

in fixing the period mentioned above, the procurement strategy should take into account the length of the route to be constructed, past experience of the time taken for the diversion of utilities in light rail projects in other parts of the UK and any additional constraints peculiar to the project such as an embargo on work to divert utilities during particular periods such as the festive season or special events (e.g. the Edinburgh Festival).

Utility clearance is a key risk for any light rail project and the strategy to deal with this risk needs to be carefully considered.

The procurement approach taken on the first phase of tram delivery for diversion of utilities was to divert the utilities ahead of the infrastructure works. However, due to the delay in design completion and the complexity of utility diversions this approach did not mitigate the utility diversion risk as anticipated.

This Recommendation proposes that utilities should be cleared well ahead of commencement of the infrastructure works and that a defined period should elapse between the diversion of utilities and commencement of infrastructure works.

The strategy successfully adopted on the Trams to Newhaven project was a “one dig” approach meaning that utility diversions were completed immediately ahead of infrastructure works. The project utilised large work sites to mitigate programme risk and closely managed the utility diversion contract working collaboratively with its infrastructure and systems contractor to reduce cost and risk associated with utilities. There may be alternative considerations for any future project that may require a different approach.

Therefore the Council could agree that this risk requires careful consideration but that it is not possible to be prescriptive on approach. It is recommended that in any future light rail project a clear procurement strategy for utility diversions should be adopted, taking account of considerations known at that time.

It is recommended that the Council should adopt this Recommendation subject to the caveat above.

2.4.45 Recommendation 14

Although some participants in the Inquiry criticised the use of MUDFA to divert utilities in advance of the infrastructure works and advocated the “bow wave” approach to the diversion of utilities that followed the mediation settlement at Mar Hall, I do not think it appropriate to be prescriptive about how the risks associated with the diversion of utilities are managed. It is sufficient for promoters of light rail schemes to be aware of such risks and to demonstrate that they have adequate proposals for managing them.

A key risk for any future light rail project relates to utility diversions and how this should be managed and mitigated. The procurement approach adopted and referenced in Recommendation 13 is key to mitigation of this risk. The project sponsor should be satisfied that there is a procurement strategy in place, that it is fully implemented and data provided to the project sponsor on the progress of utility diversions should include data on cost and delivery of diversions against programme such that progress can be monitored and early warnings flagged.

It is recommended that the Council should adopt this Recommendation.

2.4.46 Recommendation 15

In recognition of the various difficulties likely to be experienced in the design and construction of a light rail project through a city centre, the promoter and owner of the project should appoint as its procurement and project manager a company with suitably qualified and experienced permanent employees that has delivered a similar project successfully on time and within budget or can demonstrate that it will be able to do so.

The Inquiry Report highlights a number of instances where there was insufficient experience in delivery to give assurance that the project would be properly managed. The procurement and project management of a project is key to success and demonstrable experience should be secured as part of light rail delivery.

It is recommended that the Council should adopt this Recommendation.

2.4.47 Recommendation 16

Immediately following the appointment of the designer, and throughout the design of the project, the designer should engage with the promoter and owner of the project, the procurement and project manager, the local planning authority, the utility companies and interested third parties owning land that may be affected by the project to clarify their design criteria. In such discussions throughout the design of the project the promoter and owner of the project should co-ordinate responses to the various stages of design and, in doing so, should take into account the competing interests of different parties and of various departments within any local authority exercising different statutory functions as well as the significance of the project in the context of the community as a whole and should provide all necessary assistance and clear and timeous instructions to the designer to avoid delays and additional expense. In that regard:

prior to the appointment of the designer the local planning authority ought to produce sufficiently detailed design guidelines to enable the designer to take them into account from the outset when designing the tram network and to improve the prospects of obtaining the necessary consents and approvals without requiring repeated re-submission of designs that will result in delay to the project with resultant expense;

throughout the project a collaborative approach should be adopted by the promoter and owner to achieve an early resolution of any design issues that arise; and

the promoter and owner should assume primary responsibility for co-ordinating the local authority's response and for negotiating the resolution of all issues to enable clear instructions to be issued to the designer and to

avoid re-design of sections of the route following reconsideration of matters that have been resolved at an earlier stage.

The Inquiry Report identifies a difference in the approach taken by the Council to design before and after the Mar Hall mediation. Prior to the mediation there was not a single point of contact at the Council to coordinate the design responses and this led to confusion as to the Council's position.

In order to avoid this in future, Lord Hardie recommends that the Council produces detailed design guidance to assist design development, collaborate with the designer to resolve design issues and coordinate the response to design queries such that clear instructions can be given.

It is recommended that the Council should adopt this Recommendation.

2.4.48 Recommendation 17

The governance structure for the delivery of a major project such as a light rail scheme should follow the published guidance and should ensure that there is clarity regarding the respective roles of the various bodies and individuals involved in its delivery. In particular, the chairman of the company responsible for the procurement and management of the project should not also be its chief executive.

The Inquiry Report describes difficulties in the governance of the first phase of tram delivery as a result of complexity in the governance structure and also due to a lack of understanding by individuals and bodies as to their roles and responsibilities.

It is agreed that in future the Council should ensure that the governance structure follows up to date guidance and importantly clearly sets out the roles and responsibilities of bodies and individuals. The Council should also seek assurance that the roles and responsibilities are clearly understood and a mechanism for this is set out at Recommendation 18.

It is recommended that the Council should adopt this Recommendation.

2.4.49 Recommendation 18

As part of their investigations, representatives of OGC undertaking an independent "readiness review" of a publicly funded project and representatives of any person, including representatives of any public body such as Audit Scotland, undertaking a review of the progress of and/or expenditure on a project funded in whole or in part by public funds should interview key personnel involved in the project to ensure that each of them understands his or her role and is performing it effectively. In preparing any list of key personnel to be interviewed, the individuals undertaking the investigations shall include the person designated as SRO.

While this Recommendation is for third parties who may undertake a readiness review or audit of a publicly funded project in future, it is

recommended that the Council agrees to support any such review or audit to ensure that there is a clear understanding of roles and responsibilities.

2.4.50 Recommendation 19

At all stages of the project there should be a collaborative approach to delivering it. This should include the co-location of representatives from each organisation relevant to the particular stage reached and having an interest in its completion to enable any issues to be addressed and resolved at the earliest opportunity, thereby minimising the risk of the escalation of disputes with associated delays and increased expense.

The Inquiry Report describes some of the damaging behaviours adopted during project delivery by various parties. The advantage of co locating representatives having an interest in project completion is understood and indeed was successfully adopted on the Trams to Newhaven project.

It is recommended that the Council should adopt this Recommendation.

Reporting of Final Cost of Initial Tram Project

- 1.1.1 In reviewing the financial evidence to the Inquiry, Lord Hardie concludes that the estimated cost to the public purse of the initial phase of the project was £852.6m compared to £776m, reported to Council on 25 September 2014¹ by the former Chief Executive. In assessing the reasons for this difference, members should note that Lord Hardie regards the additional expenditure relating to the Tram project that was included in other budgets to have been “properly incurred”² by the Council and Scottish Ministers, but considers collating it with the rest of the project spend to be “in the public interest”³.
- 1.1.2 Lord Hardie’s assessment of additional costs is consistent with the evidence provided by the Council to the Inquiry. Analysis also shows that all additional costs incurred by the Council were managed within approved budgets and reported separately to the appropriate Council committee, in accordance with the financial governance arrangements. A breakdown of costs collated by the Inquiry is included in Table 1 below, with detailed explanations provided in subsequent paragraphs.
- 1.1.3 The analysis collated by Lord Hardie is helpful in setting out the total cost to the public purse of the project and provides a baseline for comparison of actual expenditure against the original budget of £545m and the increased budget of £776m.

¹ [Edinburgh Tram Project - Update Report, The City of Edinburgh Council 24 September 2014](#)

² Edinburgh Tram Inquiry Report, paragraph 24.9

³ Edinburgh Tram Inquiry Report, paragraph 24.9

Table 1: Estimated Cost to the Public Purse⁴

	Paid by Scottish Ministers	Project Costs £m Paid by CEC	Total
1. Reported Costs (2017) ⁵	500.000	276.662	776.662
2. Additional Costs of resolving outstanding disputes	-	4.456	4.456
3. Base Figure (Sum of 1 and 2 above)	500.000	281.118	781.118
4. Additional Costs (CEC)			
a) Hardship Relief Scheme		0.021	0.021
b) Open for Business Scheme	-	0.990	0.990
c) Reinstatement Works – Leith Improvement Programme, St Andrew’s Square and West End	-	6.927	6.927
d) tie Pension Fund Deficit	-	4.798	4.798
e) CEC Revenue Budget Recharge	-	9.821	9.821
5. Subtotal (Sum of 3 and 4 above)	500.000	303.675	803.675
6. Additional Costs (Scottish Ministers)			
a) Scottish Parliamentary Process	16.852	-	16.852
b) Rateable Value Reduction Scheme	6.300	-	6.300
c) Hardship Relief Scheme	0.064		0.064
7. Subtotal (Sum of 5 and 6 above)	523.216	303.675	826.891
8. Revenue cost of borrowing (NPV)	-	25.700	25.700
9. Total (sum of 7 and 8 above)	523.216	329.375	852.591

Additional Costs Incurred by CEC

1.1.4 **Additional Costs of Resolving Outstanding Disputes - £4.456m (Table 1, line 2)** - The cost of outstanding disputes relates to two separate claims. The first of which was reported to members in private due to commercial considerations; the second is still to be settled, but will be reported to members prior to any payment being made.

1.1.5 **Hardship Relief Scheme - £0.085m (Table 1, lines 4a and 6c)** – On 29 May 2008, the Council approved a report from the Director of

⁴ Source: Edinburgh Tram Inquiry Report, table 24.1

⁵ CEC Submission to the Edinburgh Tram Inquiry

Finance, recommending additional support to small businesses along the route of the tram line.⁶ The report's financial implications set out that 75% of the scheme would be met by Scottish Government, with the remaining 25% being met by the Council and contained within the overall estimate of Council Tax for the year.

- 1.1.6 **Open for Business Scheme - £0.990m (Table 1, line 4b)** - When the Council approved the decision to continue the project as far as York Place on 2 September 2011⁷ it also approved a package of media and marketing initiatives known as the Open for Business Scheme to provide additional support to business impacted by the project. The costs of these measures were included in the reporting of the Council's financial outturn for the relevant financial years.
- 1.1.7 **Reinstatement works funded from Capital Investment Programme - £6.927m (Table 1, line 4c)** – Additional works at the West End, St Andrew's Square, Leith Walk and Constitution Street were funded separately as part of the Council's wider capital investment programme, which was reported to members under separate financial governance arrangements. They were therefore not included in reporting against the £776m tram budget.
- 1.1.8 **Pension Fund Deficit - £4.798m (Table 1, line 4d)** –The pension deficit relating to the cessation of tie Ltd was reported to Finance and Resources Committee as part of the [Revenue Monitoring 2011/12 Outturn Report](#) and was funded from the overall Council revenue budget for that year. As stated in the report, where it has been established that there is a link between the employer and a Council, then that Council will meet the total of any deficit. Thus, the Council was responsible for meeting the costs of tie's pension deficit.
- 1.1.9 **CEC Revenue Budget Recharge - £9.821m (Table 1, line 4e)** –These costs comprise internal staffing costs as well as some of the costs of preparing for operations and were contained within the Council's overall revenue budget. These costs were included in the reporting of the Council's financial outturn for the relevant financial years.

Additional Costs Incurred by The Scottish Government

- 1.1.10 **Scottish Parliamentary Process - £16.9m (Table 1, line 6a)** – Before the Council could progress the tram project, it required the legal powers to do so. This was done via two separate acts of the Scottish

⁶ [Tram Construction Project - Discretionary Rating Relief/Other Possible Assistance - Report by Director of Finance, 29 May 2008](#)

⁷ [Edinburgh Tram Project, City of Edinburgh Council, 2 September 2011](#)

Parliament⁸ and was funded from grants from Scottish Ministers. As a previously incurred or “sunk” costs, they were excluded from the original £545m budget and Lord Hardie acknowledges that it is also appropriate to exclude this expenditure from a like for like comparison with the original budget. However, for completeness he adds them to calculate the total cost to the public purse.⁹

1.1.11 Rateable Value Reduction Scheme - £6.3m (Table 1, line 6b) –

Rateable values are independently determined by Lothian Valuation Joint Board. During the construction phase a standard 20% rateable value reduction was applied to all retail properties with a frontage on to the tram works, with discretionary additional relief applied in cases of more extreme disruption. It is estimated that this resulted in a reduction of non-domestic rates (NDR) income of £6.3m. As the Council pays all NDR collected into a national NDR pool, this reduction in income did not directly impact Council budgets and was not included in the Council’s assessment of costs.

Cost of Borrowing – Net Present Value

1.1.12 Revenue Cost of Borrowing (NPV) - £25.700m (Table 1, line 8) –

The Council decision to continue to build the initial phase of the tram as far as York Place was supported by a report which clearly set out the costs of borrowing¹⁰. It was estimated that the cost of borrowing would amount to £15.3m a year for a 30 year period, based on an assumed interest rate of 5.1%. The actual interest rate achieved was 4% and although the level of borrowing was higher due to delays in receiving developers contributions, the annual borrowing cost associated with the project is now calculated at £14.3m per annum. This is annually £1m less was reported to members in 2011. In calculating the additional sum attributable to the project, Lord Hardie takes account of the time value of money¹¹ and calculates that the interest cost equates to an additional £25.7m. The NPV calculation is set out in Annex A.

**CEC Finance
2 November 2023**

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⁸ The Edinburgh Tram (Line 1) Act 2006 and the Edinburgh Tram (Line2) Act 2006. Work was also commenced for a third act of parliament for a further line to the south of the city, but this was abandoned following the result of the congestion charging referendum.

⁹ Tram Inquiry Report, paragraph 24.11

¹⁰ [Edinburgh Tram Project, City of Edinburgh Council, 2 September 2011](#)

¹¹ The time value of money (TVM) is the concept that a sum of money is worth more now than the same sum will be at a future date due to its earnings potential

Annex A

NPV Calculation - Additional Borrowing of £246.5m at 4%

Rate	3.5%		
Year	Cash £m		NPV £m
-	14.3	1.0000	14.3
1	14.3	1.0350	13.8
2	14.3	1.0712	13.3
3	14.3	1.1087	12.9
4	14.3	1.1475	12.5
5	14.3	1.1877	12.0
6	14.3	1.2293	11.6
7	14.3	1.2723	11.2
8	14.3	1.3168	10.9
9	14.3	1.3629	10.5
10	14.3	1.4106	10.1
11	14.3	1.4600	9.8
12	14.3	1.5111	9.5
13	14.3	1.5640	9.1
14	14.3	1.6187	8.8
15	14.3	1.6753	8.5
16	14.3	1.7340	8.2
17	14.3	1.7947	8.0
18	14.3	1.8575	7.7
19	14.3	1.9225	7.4
20	14.3	1.9898	7.2
21	14.3	2.0594	6.9
22	14.3	2.1315	6.7
23	14.3	2.2061	6.5
24	14.3	2.2833	6.3
25	14.3	2.3632	6.1
26	14.3	2.4460	5.8
27	14.3	2.5316	5.6
28	14.3	2.6202	5.5
29	14.3	2.7119	5.3
	429.0		272.2
Borrowing to find budget increase £545m to £776m			231.0
Borrowing to fund estimated shortfall in developer contributions			15.5
			246.5
		NPV in excess of Borrowing	25.7

Response to Motion of 28 September 2023 (City of Edinburgh Council)

Motion Number 4

“The outcome of any action to be taken regarding any individuals still in the employ of the Council as a result of the findings”.

The Chief Executive of the City of Edinburgh Council commissioned an investigation into the Tram Inquiry Report recommendations to consider any findings and subsequent actions by individuals still in the employ of the Council.

The Chief Executive appointed the Service Director, Human Resources as Investigating Officer in line with the Council’s Disciplinary Procedure.

A detailed confidential investigation was undertaken to consider the recommendations and findings contained within the Tram Inquiry Report. The investigating officer sought to establish facts and evidence in response to these to allow for a conclusion to be reached based on those determinations.

Following completion of the investigation process, recommendations were considered by the Chief Executive who was satisfied that the process had been robustly conducted and concluded that there was no further action required.

As the implementation of recommendations continue this may result in consideration of other investigations as necessary which will be conducted in line with agreed policies and procedures.

Motion Number 5

“Given recommendations 20-24 inclusive regarding officer candour (notwithstanding any future resulting statutory process by the Scottish Government and regardless of whether this was likely to happen in other Councils to ask the Chief Executive to provide assurance that there were robust arrangements in place to deal with allegations of breaches of the Employee Code of Conduct. In addition, the Chief Executive should provide assurance of any arrangements in place for ALEOs and contractors”.

The following documents sets out arrangements which are currently in place for dealing with allegations of gross misconductⁱ, including consideration of suspension. These have all been subject to recent review and are deemed to be robust in allowing the Council to deal with allegations of breaches of the Code of Conduct.

These documents are referenced in the Employee Code of Conduct and outlined as part of the Induction process. In addition, documents are available to all colleagues on the Orb, and updates are provided when there are any updates or changes.

Within the City of Edinburgh Council, we have an Employee Code of Conduct (reviewed in 2023), Disciplinary Policies and a Disciplinary Code which are intended to ensure that colleagues understand their responsibilities, rights, and duties as a Council employee. This also forms part of colleagues Contract of Employment.

The City of Edinburgh Council Disciplinary Policies for Teaching Staff and Local Government Employees were reviewed and agreed by Policy and Sustainability Committee on 30 August 2022 and implemented from 3 October 2022.

At Policy and Sustainability Committee on 29 March 2022 it was agreed to adopt the Scottish Joint Scottish Joint Negotiating Committee (SJNC) Model Framework (the “Gold Book”) for Chief Executive Officers and specifically Appendix A – Chief Executive Disciplinary Framework.

There is also a Disciplinary Procedure for Chief Officers (Heads of Departments). If the Chief Executive is unable for whatever reason (e.g., conflict of interest) to take part in a process relating to Chief Officers, then the Gold Book would be applied.

Scrutiny and Challenge in regard to ALEOs

The Council’s relationship with its Arm-Length External Organisations (ALEOs) is outlined in the Tram Inquiry report and there are two recommendations (20 and 21) that relate to misleading the authority, scrutiny and challenge and the distinction in role between officer and councillors. Lord Hardie covers ALEOs extensively in his report. He focuses on control of the companies, supervision of the companies and mechanisms for scrutiny, reporting of the companies and the residual powers of the Council. He also examines the role of councillors on the boards of ALEOs.

The scrutiny of ALEOs by the Council and officers has significantly improved since the original tram project, with reports in 2012 and 2016 in particular looking at how ALEOs operate and their relationship with the Council. This has resulted in the formalisation of the Council’s observer role, increased scrutiny by Council committees and regular reporting. The 2016 report established dual reporting of the Council’s ALEOs to an executive committee and to the Governance, Risk and Best Value Committee to ensure that there was a level of consistency to monitoring and oversight of ALEOs across all Council committees. It also introduced Council ALEOs to making a submission to the Council’s annual assurance process. This requires ALEOs to highlight issues that may affect the accounts and any risks or compliance matters across the previous financial year. The Council observer role is a key element of the Council’s oversight of its ALEOs as it is the observer who acts as the first point of liaison between the Council and the ALEO and who would escalate any risks or issues to the Council.

However, despite the improvements to scrutiny since 2016, how the Council scrutinises and monitors its ALEOs can still be enhanced. Internal Audit has recommended that an ALEO framework be established which will examine and review how scrutiny can be improved and how to build on the good working relationships with ALEOs. This work is currently underway and will report in 2024. It will look to strengthen how the Council scrutinises its ALEOs both by officers and councillors, how ALEOs report to the Council, the governance documentation between the Council and the ALEO and the subsequent powers of the Council, the Council observer role and will explore Board membership.

Furthermore in recommendation 20, it specifically outlines that ALEOs should not submit false or misleading information to the Council and that information should be scrutinised and in the agreed Council motion assurance was asked to be provided on the arrangements with ALEOs in regard to recommendations 20-24 . As outlined above the scrutiny of ALEO information has increased significantly by councillors and officers. In the circumstances that misleading information was provided to the Council, then steps would need to be taken in accordance with the shareholder agreement or service level agreement (whichever was appropriate for that organisation). The Council’s ALEOs have very different arrangements in place due to their different legal statuses. This means that the mechanism for the Council to address issues such as this are different depending on whether the ALEO is a company, a charity and whether the Council wholly owns the organisation or not. This relationship though is outlined in the shareholder agreement or the service level agreements but there is currently not a consistent approach from the Council. The ALEO framework will be

examining all governance documentation between the Council and its ALEOs and will be recommending that the importance of candour is formalised in this documentation so that there is clarity and consistency in the Council's approach and an understanding of what action the Council can take.

Recommendation 21 highlights the need for local authority officials to be mindful of the distinction in roles between them and councillors. This is an important element of our governance, and the Member/Officer Protocol highlights the distinction of roles between officers and councillors. Currently training is being delivered to senior officers initially across the Council on the Protocol and this is covered extensively in the training.

Recommendation 21 also recommends that officers do not assume the accuracy of ALEO reports based upon the adoption of a 'one family' approach. As outlined above, the 2016 ALEO report sought to build greater controls to ensure more independent advice from Council officers through the use of Council observers and reporting arrangements. As part of the ALEO framework workstream this will be reviewed and strengthened further.

Procurement

Where a bidder fails to supply all information requested or supplies misleading information at time of tender the Council shall exclude the bidder from participation in the bidding process; where this comes to light prior to contract award and allows termination of any contract awarded as a result of that process. If this failure or misrepresentation arises after the award of contract, the Council's standard Terms and Conditions would allow the Council to terminate for breach of contract and pursue the contractor for damages. The Council's standard terms and conditions of contract provide that the contractor will owe the Council a 'duty of care' which should not fall below that expected of Good Industry Practice. In the event that they do, there is an indemnity and insurance requirement to address any losses suffered by the Council. This includes all actions, omissions, proceedings and costs applicable through breach of contract. For some high value, high risk projects it may be more appropriate to use bespoke Terms and Conditions.

It is recommended that the Council adopt recommendations 20 and 21.

ⁱ Gross misconduct is defined as behaviour of such a nature that the Council is unable to tolerate the continued employment of the individual concerned. Gross misconduct can also occur outwith the workplace. The Disciplinary Code sets out some examples of gross misconduct and some of these include:

- Gross carelessness or negligence in carrying out the duties and responsibilities of the post.
- Fraud, forgery, or other dishonesty including but not limited to: falsifying any document, record, claim or account.
- Serious negligence in work performance.
- Behaviour which brings the reputation of the council into disrepute, either carried out at work, out with work or using social media.
- A significant failure to comply with the Employee Code of Conduct, the Council's financial regulations, or service specific procedures.