

Auckland Light Rail update for Ministerial Oversight Group

| | |
|---------------------------------|--|
| Reason for this briefing | <p>The Auckland Light Rail Ministerial Oversight Group (the Ministerial Group) was established to provide direction to officials on the government's expectations and key outcomes for light rail. It was also agreed they would receive regular updates on the project.</p> <p>This briefing provides the Ministerial Group an update since the last meeting held in July 2019. The next face to face meeting will be on Monday 21st October 2019.</p> |
| Action required | Agree to circulate this briefing to the Ministerial Group. |
| Deadline | 23 September 2019 |
| Reason for deadline | The scheduled Ministerial Group meeting scheduled for Monday 23 September 2019 was cancelled and it was agreed that this memo would be circulated in replacement. |

Contact for telephone discussion (if required)

| Name | Position | Telephone | First contact |
|-------------|---------------------------------------|------------|---------------|
| Helen White | DCE- Strategy & Investment (acting) | ██████████ | |
| Amelia East | Project Director- Auckland Light Rail | ██████████ | ✓ |

MINISTER'S COMMENTS:

Withheld to protect the privacy of natural persons

| | | | |
|-------------------|-------------------|-------------------------|---------------|
| Date: | 20 September 2019 | Briefing number: | OC190879 |
| Attention: | Hon Phil Twyford | Security level: | In confidence |

Minister of Transport's office actions

- | | | |
|---------------------------------------|---|--|
| <input type="checkbox"/> Noted | <input type="checkbox"/> Seen | <input type="checkbox"/> Approve |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Referred to | |
| <input type="checkbox"/> Withdrawn | <input type="checkbox"/> Not seen by Minister | <input type="checkbox"/> Overtaken by events |

Purpose of report

1. This briefing provides an update to the Auckland Light Rail Ministerial Oversight Group (MOG) on the City Centre to Mangere (CC2M) Light Rail project.
2. The next meeting will be held on Monday 21 October 2019. Papers for that meeting will be circulated early in the week commencing 14 October 2019.
3. This briefing provides Ministers an update on the following key items:
 - 3.1. **Project Update**
 - 3.2. **The Engagement Timetable for the Ministerial Oversight Group**
 - 3.3. **Outcomes for the light rail project**
 - 3.4. **The Policy Programme**
 - 3.5. **The Decision making process**

Agenda item one: Project update

4. The Response Requirements Document (RRD) was finalised on 31 July 2019, and was released to NZTA and NZ Infra. With both parties confirming their participation, the process for developing proposals is now fully underway.
5. The RRD sets out the Evaluation Criteria and weightings that will be used in the Ministry's evaluation of the proposals. They are split as:
 - 5.1. Commercial and Financial (20%)
 - 5.2. Technical Solution (25%)
 - 5.3. Service Delivery (20%)
 - 5.4. Iwi and Stakeholder Engagement (15%)
 - 5.5. Outcomes Narrative (20%)
6. The weightings within the Outcome narrative category are further split as:
 - 6.1. Improved access to opportunities through enhancing Auckland's Rapid Transit Network and integrating with the current and future transport network (40%)
 - 6.2. Optimised environmental quality and embedded sustainable practices (15%)
 - 6.3. Enabling of quality integrated urban communities, especially around Mangere, Onehunga and Mt Roskill (30%)
 - 6.4. A high quality, attractive and highly patronised service (15%).
7. Notwithstanding the weightings, all outcomes are important and we expect the NZTA and NZ Infra to each deliver a balanced proposal which demonstrates how the four outcomes will be met.
8. The Evaluation Plan and Framework upon which the Proposals will be scored is currently under development by the Ministry of Transport, although as set out above, the headline criteria and weightings are already established. To ensure decision makers are impartial and not challenged in their decisions, this process is managed by the procurement team and does not typically have input at the governance level.

9. The formal announcement on this ALR process was made at the Building Nations Infrastructure NZ conference on 23 August 2019. This was followed up by a press release from the Minister of Transport.
10. Managed stakeholder engagement from a project perspective has begun, although is governed strictly by communication protocols. Officials met with the Mayor and Auckland Councillors in a closed session on 20 September 2019 to talk them through the process. Other key stakeholders such as Auckland Transport have also met with the Project Director and are engaging confidentially with the Respondents in the development of their bids.
11. The Ministry of Transport lead negotiating team is now meeting fortnightly with NZTA and NZ Infra, via the interactive engagement process (IEP). The third set of meetings was held in the week of 9 September 2019. The lead team is made up of Amelia East (Project Director), Bryn Gandy (DCE at MoT), Fiona Mules (Commercial Lead) and Sarah Sinclair (Legal Lead). As part of the IEP structure, NZTA and NZ Infra are required to provide the lead team with some early deliverables, so that there is a good understanding as early as possible of the features of their proposals. These early deliverables cover the Respondents' proposals for:
 - 11.1. Commercial teams and risk allocation principles
 - 11.2. indicative proposed route alignment
 - 11.3. legislative or regulatory changes
12. These early deliverables will allow us to identify any key policy or system issues that require your feedback. We expect to be able to discuss these at the meeting on 21 October 2019.
13. A proactive release of papers to go with the announcement and communications to key stakeholders was made on 6 September 2019 on the MoT website.
14. The current high level project timeframe is set out below.

| <i>Project milestones</i> | <i>Dates</i> | <i>Status update</i> |
|--|------------------------------------|----------------------|
| STAGE 1: Set up phase | | |
| Response requirements document and outcomes for light rail | 7 June - 31 July 2019 | Complete |
| First MOG meeting | 23 July 2019 | Held |
| STAGE 2: Proposal development | | |
| Interactive Engagement Process | 2 August – 15 November 2019 | Started |
| Respondents confirm involvement in the process | 14 August 2019 | Confirmed |
| Public announcement | 23 August | Complete |
| Proposals deadline | 29 November 2019 | |
| STAGE 3: Evaluation of proposals | | |
| Ministry-led evaluation process | 1 December 2019 – 10 February 2020 | Planning underway |
| Draft Cabinet paper to Minister | By 28 February 2020 | |

Agenda item two: the engagement plan for the Ministerial Oversight Group

15. The MOG has monthly meetings scheduled. Based on feedback from the first meeting that future meetings should focus on milestones or key issues, we have proposed the following engagement timetable.
 - 15.1. The MOG to meet twice more this year and for a final time in late January/early February 2020 in preparation for the Cabinet process, focusing on the key issues surfacing from the Early Deliverables that the Respondents are required to provide.
 - 15.2. The meeting frequency and content will balance the principle of distance with the need to ensure your colleagues retain oversight of the process and have opportunities to provide guidance on key policy matters, and prior to receiving a Cabinet paper in February 2020
 - 15.3. Expected meeting dates: 21 October, late November 2019; late January/early February 2020
 - 15.4. We have also pencilled in a potential meeting in December should the need arise for specific engagement.
16. We can discuss the proposed engagement timetable to ensure it meets the Terms of Reference and expectations of the Ministerial group at the 21 October meeting. Should Ministers wish for more information prior to the formal MOG meetings, they should in the first instance contact the Minister of Transport's office. Officials are happy to assist where directed.

Agenda item 3: Outcomes for the light rail project

17. The Minister of Transport will start to publicly discuss what the Government is trying to achieve through the Auckland Light Rail Project being:
 - 17.1. Access and Integration
 - 17.2. Environment
 - 17.3. Urban and Community
 - 17.4. Experience
18. We think it is beneficial to the project to discuss these outcomes in public. This ensures we maintain public awareness of the project and the benefits that it is aiming to achieve, which is important for ongoing social licence. Reinforcing the outcomes based approach is also a helpful message to send to the market. It also helps to manage the inevitable 'information void' which occurs during the commercial process for developing proposals.
19. We have started to prepare materials and a stakeholder engagement plan and will work with the Minister of Transport's office to identify the best fora for these announcements. We will advise the Ministerial Group in advance of any public discussions.

Agenda item four: the policy programme

20. Alongside the commercial process for developing the proposals, officials are gearing up the policy work programme. This policy programme meets two needs, it will:
 - 20.1. Support the lead team who are fronting the discussions with the Respondents, so that as the Respondents raise policy or system questions, the lead team are informed by

relevant agencies of current policy positions and considerations. As required, these questions can also be elevated to you and the Ministerial Oversight Group for your feedback.

20.2. Support the final advice to Cabinet on the issues and implications arising from the two Respondents' proposals.

21. The work programme has four main work streams:

21.1. Work stream one: [REDACTED] this is a key priority

21.2. Work stream two: Identifying any likely changes that are needed to the operation of the National Land Transport Fund, including legislative amendments

21.3. Work stream three: Other legislative or regulatory changes that the Respondents are likely to seek

21.4. Work stream four: Approaches to implementing the next stage once a preferred delivery partner has been identified, including the potential roles for different agencies (in particular the Ministry of Transport, NZTA, Auckland Transport).

22. Priority is currently being given to Workstream one. [REDACTED]

23. [REDACTED]

24. The remaining work streams are at an earlier stage of development, and we expect that this work will take place in an iterative way, so that we are taking account of the questions asked by the Respondents. A key starting point for officials is to develop a set of objectives and principles for each area of work.

25. We will work with Ministers key agencies, including Auckland Council and Auckland Transport, and will brief you on the proposed objectives and principles.

26. We also expect to raise with MOG on 21 October the substantial policy issues that have been highlighted during the commercial process.

Agenda item five: The decision making process

27. We want to discuss the discretion afforded to Ministers in making a decision about the preferred delivery partner for ALR.

28. The RRD process is likely to give rise to a contract in itself that governs the process of receipt and consideration of the proposals (known as a 'process contract' or 'tender contract'), particularly as each of the Respondents is responding to the RRD at their own risk and cost. We have had the legal firm Minter Ellison Rudd Watts prepare a legal opinion on this matter and can share this with Ministers if desired.

29. The RRD retains discretion to MoT and Ministers to consider policy matters (as an overlay of the evaluated criteria). It also explicitly states that the ultimate decision as to the preferred delivery partner lies with the Cabinet, and notes that Cabinet may, having received the Secretary of Transport's recommendation, require more information, or decide on an alternative course of action.
30. However, in considering such matters, the law (as relating to process contracts) would require that decisions are made (by MoT and Ministers) in 'good faith'. Acting in 'good faith' does not necessarily require the Crown to treat both Respondents equally at all times – this is not always going to be appropriate given the inherent positional differences between the Respondents. However, it does require the Crown to act honestly and have a willingness to consider information which might change a reasonable and honestly held view – for example, by ensuring to the extent possible that both Respondents have the same relevant information available to them, and that the evaluation criteria is applied in the same manner to both Proposals.
31. Likewise, in respect of applying public policy considerations when evaluating the Proposals, Ministers have an unfettered discretion to apply public policy considerations but such considerations should be applied fairly across both Respondents and not used as a means of unduly favouring one Respondent and its Proposal over the other.
32. To minimise the risk of a legal challenge for breach of the RRD process, the Crown should be careful to comply with the process set out in the RRD and probity documents (both before, during and after the evaluation stage) and at all times treat the Respondents fairly and even-handedly. If in doubt, the Crown should refer probity matters to the appointed Probity Advisor to ensure the Crown is both seen to be and is in fact complying with the probity principles governing the parties' conduct throughout the RRD process.
33. Entering into the parallel process is a significant undertaking for NZ Infra in particular, and it is required to enter into this process at its own cost and risk with no guaranteed outcome. Ultimately, the Government is entering into this process in good faith, and will be expected to run a fair and transparent process, and to consider the two proposals in an even-handed manner. The market will take a close interest in the process that we are running, and a good faith approach will be important to maintain market confidence beyond the life of this particular exercise.

Recommendations

- (a) **Forward** this briefing to the Ministerial Oversight Group. Yes/No

MINISTER'S SIGNATURE:

DATE: