

tie – Edinburgh Tram Network

Summary of Geoff Gilbert's key comments in relation to Pricing Assumption 1

Conference call 24 February 2010

- 1 This note is a summary of the key comments made by Geoff Gilbert in relation to Pricing Assumption No.1 during a conference call held on 24 February 2010. Present on the call were:
- Geoff Gilbert (GG)
Stewart McGarrity – tie
Andrew Fitchie – DLA Piper
Brandon Nolan – McGrigors LLP
Simona Williamson – McGrigors LLP
- 2 Although the SDS Provider developed the ER's up to a point, tie had to intervene in this and develop the ER's themselves [*this corresponds with what AF said at the con with RK*]. There was a separate line of debate, which ought to be evidenced by documents, around getting SDS to accept the ER's and the functional requirements in them.
- 3 There was slippage in the SDS design programme. There were fierce discussions with BB about this, and the idea emerged to wrap all of those discussions up in a negotiation – hence the trip to Wiesbaden. BBS had access to SDS during the period, chaperoned by tie (although SDS were at times unco-operative).
- 4 There was a design freeze following the design drop in November for the purposes of reaching an agreed position with BBS – otherwise, the negotiations would have been around an evolving design. It was the only practical way forward. The design freeze did not mean that SDS stopped working on the design – it was just to introduce certainty into the discussions with BBS.
- 5 The letter sent by tie to BBS on 11 December 2007 was very much an opening shot for the discussions that were to take place in Wiesbaden a few days later (as was BB's reply of 12 December 2007). The letter of 11.12.07 set out tie's expectation that they wanted a fixed price with no significant qualifications. Whether tie would achieve that was to be the subject of the discussions in Wiesbaden.
- 6 There was a recognition of where the design really was at that stage and tie were pushing BBS to take as much of the risk in relation to gaps in the design as possible. Although GG cannot recall precisely the state of the design at the time, his recollection is that the issue was not so much that there were major elements of design *missing*, but that the level of much of the design was preliminary. Stage E was missing in many cases, and Stage F (which broadly equates to IFC) was missing in all cases.
- 7 The big issue for tie was balancing cost with risk: it was recognised that if tie were asking BBS to take on the risk for what the design would eventually be, then there would be a premium for that. The less developed the design, the bigger the premium for the risk. BBS were concerned about the level of the design, and that was the driver for the meeting in Wiesbaden. To take an extreme example, BBS were concerned that they might end up having to repave the whole of Edinburgh as part of the project.
- 8 BBS made the point in the negotiations that they did not consider this to be a D+B contract in the true sense, but tie's clear intent was that BB would take a good measure of the risk around the development of the design. The discussions did not envisage the possibility that this would be a remeasurement contract.

- 9 GG could not recall any conversations with BBS around the time of Wiesbaden in relation to the possibility that BBS would lose their preferred bidder status if agreement could not be reached on terms that were acceptable to tie.
- 10 BB's letter of 12 December 2007 was their opening position to set the scene for the discussions in Wiesbaden. Although the assumptions referred to might look at first sight as if they would be encouraging from tie's point of view, in reality nothing was being conceded.
- 11 The Wiesbaden discussions took place around Friday 14 December 2007, although GG cannot recall the precise dates, or duration, of the meeting(s). GG was not present, but was on the other end of the telephone in Edinburgh.
- 12 GG cannot recall precisely what happened when Willie Gallagher and Matthew Crosse returned to Scotland, which he presumes was in the week beginning Monday 17 December 2007. In general terms, the mood was that there had been very robust discussions in Wiesbaden.
- 13 GG has no specific recollection of the sequence of events reflected by the e-mails of 19 and 20 December 2007. He cannot recall who generated the first draft of the Wiesbaden Agreement, but considers that it was "probably not" him – principally on the basis that he would not then have needed to make the amendments shown in red on the 19.12.07 version (attached to his e-mail of 13.29) where he added in a reference to *intent* and the drawings issued on 25 November 2007.
- 14 GG cannot recall his reaction to Richard Walker's e-mail of 6.07am on 20 December 2007, nor any specific discussions that followed that e-mail. He does not recall who came up with the amended wording that eventually found its way into the executed document, although his suspicion is that it was not BB. His view is that it was not in BB's interests to clarify the wording, and so they would not have proposed it.
- 15 GG does not recall whether any engineering input was sought by tie in relation to the wording, although he may have discussed the point with Dave Crawley of tie – although his view is that this would not have taken tie anywhere.
- 16 In general terms, his recollection is that there was a strong desire to get the agreement of CEC at the meeting on 20 December 2007. BB's concerns were substantial. GG would not have conceded the word design "*intent*" in the original formulation in clause 3.3. There was discussion with Richard Walker about what "*substantially different*" would mean. GG recalls discussing with him changes in design principle, which might mean from one type of bridge (e.g. a suspension bridge) to another (e.g. a slab and beam bridge). GG was aware that the original words were not precise, but he is not sure that the eventual formulation is any more precise than the original words.
- 17 GG would have liked wording such as "*substantial changes*" or "*significant changes*", and although BB had originally been prepared to go with this, they clearly had a change of heart. GG cannot remember anything specific in relation to this "change of heart", but has deduced this must have been the case from the e-mail trail. If he were in BBS' shoes, he would not have accepted the wording "*substantial*".
- 18 GG's does recall making the manuscript addition at 3.4(c) of the executed agreement, and believes that they were inserted because of some issues with Siemens, who would not sign the document. He does not recall any discussions where Pinsent Masons were involved (at this stage), but has a vague recollection of issues with Siemens and possibly their lawyers.
- 19 From January 2008, there was a struggle to get BBS engaged in the resolution of the contract conditions and the schedules. The ER's were continuing to evolve at the same time. Schedule Part 4 was being developed at this time, although the central core was what had been agreed at Wiesbaden. GG recalls an occasion where Michael Flynn alleged that GG had been trying to change what had been agreed at Wiesbaden, something which GG vehemently refuted.

- 20 There was some discussion around Pricing Assumption 1, in the context of adding the reference to approval bodies.
- 21 Discussions around Schedule Part 4 were linked into discussions around clause 80: the base line had been set for what the price covered, but tie wanted control in relation to how change would be priced.
- 22 GG does not agree with para 16.2 of the note on factual matrix document: what tie were trying to articulate was that if the *intent* of the design changes, that is the Employer's risk. If the design develops in the normal way, that is the Contractor's risk. When considering whether something is a substantial change, GG does not have in mind that it would be a change to the ER's. The ER's are a functional specification about performance of the tram system - they do not say much, if anything, about the functional design.
- 23 If there were changes to the BDDI for buildability reasons, then the contractor should not be paid for these. Similarly, if a part of the design is *missing* and there is a clear requirement for it in the ER's, the risk lies with the contractor.

McGrigors LLP
24 February 2010