

Paper to : TPB Meeting date : 18 November 2009
Subject : Programme Agreement & EOT
Preparer : Susan Clark

1.0 Summary

This paper requests approval from the Tram Project Board to award:

- 9 months relief from Liquidated and Ascertained Damages (LAD's), and
- 6 months of costs

for Sectional Completions A, B, C & D to BSC in respect of the Infraco agreed Rev 01 programme which currently delivers and Open for Revenue Service (OFRS) date of 6th September 2011. This assessment of relief and costs is in line with what **tie** calculates will be due to BSC predominately as a result of the delay to the MUDFA programme and other Employer delays and the resultant impact on the Infraco works.

As a result of this offer, BSC has agreed that:

- they will undertake an exercise to produce a revised programme which includes mitigation measures delivering the most cost effective programme to **tie**. The first draft of this is due to be complete by mid January with the final version by 29th January 2010. This is entirely within BSC's contractual obligations but has been a major point of contention between the parties for a number of months now, and
- the DRP relating to MUDFA Rev 8 to be suspended, and
- work will commence in a number of areas previously dormant.

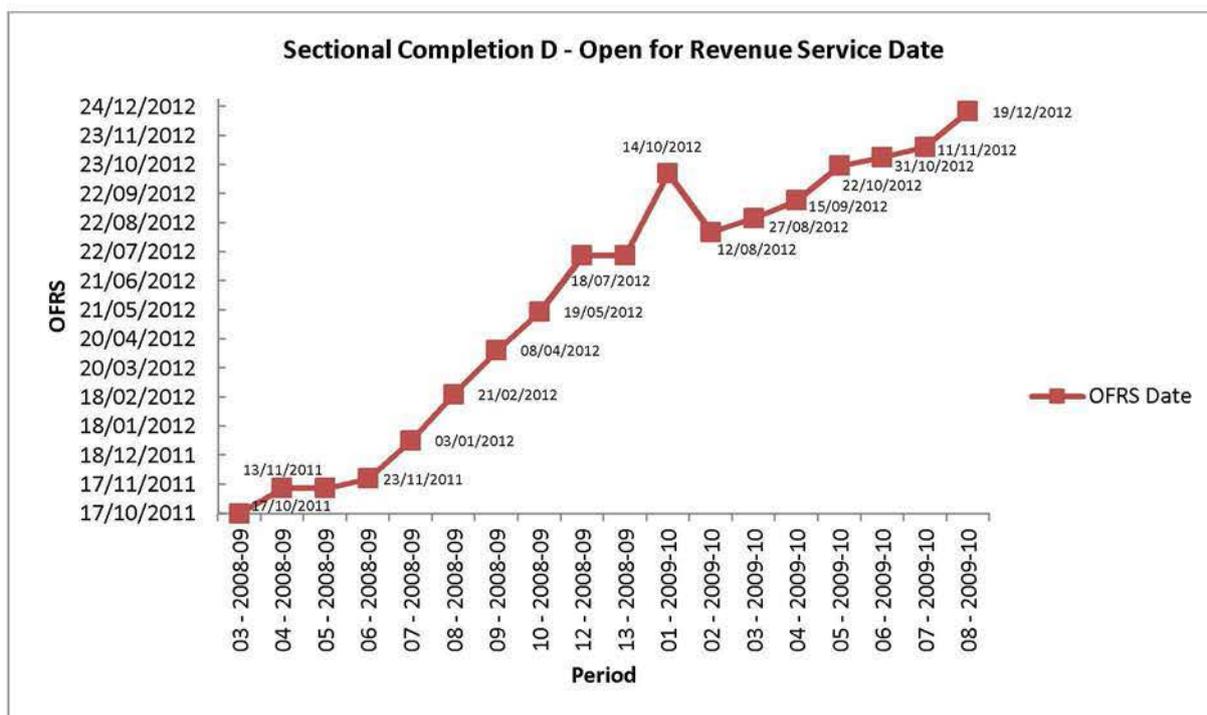
2.0 Background

2.1 History of Programme Slippage

BSC are currently predicting the following dates for the programme:

Section	Description	Contract Programme Rev 01	BSC current forecast
Section A	Depot completion	01 June 2010	3 June 2011
Section B	Test track	01 July 2010	101 Oct 2011
Section C	Construction complete	10 March 2011	22 June 2012
Section D	Open for Revenue Service	06 Sept 2011	19 Dec 2012

There has been a constant movement to programme as shown below:



These forecasts which are produced by BSC every 4 weeks take no account of mitigation measures which could be put in place to improve the programme end dates, contain programme logic which **tie** believes is flawed, does not accurately take account of actual progress and also includes delays for which BSC is responsible and should be mitigated at their own cost.

However, **tie** has experienced slippage to the utility diversion programme significantly in the Haymarket, York Place, Leith Walk and Forth Ports areas. This has been documented previously and undoubtedly gives BSC legitimate claim for relief from damages and an extension of time to the currently agreed Rev 1 programme.

For a number of months now **tie** has been in discussions with BSC over the production of a revised programme to take account of delays to date. Whilst BSC did deliver a revised programme in 2 stages, 1) unmitigated/entitlement programme showing a January 2013 OFRS date & 2) mitigated/Rev 2 programme showing an October 2012 OFRS date, these were not developed or submitted in accordance with the contract, did not provide the information required by **tie** to agree relief and extension of time and nor did it include sufficient mitigation or any proposed acceleration measures as required by the contract, and so it was rejected.

2.2 Dispute

Following this, BSC submitted a notified departure in relation to the latest version of the MUDFA Rev 8 programme. This was a separate attempt to seek relief/ extension of time. **tie** met with BSC to discuss this latest submission and to agree what was required in order for **tie** to be able to legitimately make an assessment of relief/extension of time. A number of actions were agreed at this meeting but the following day BSC referred this issue to DRP.

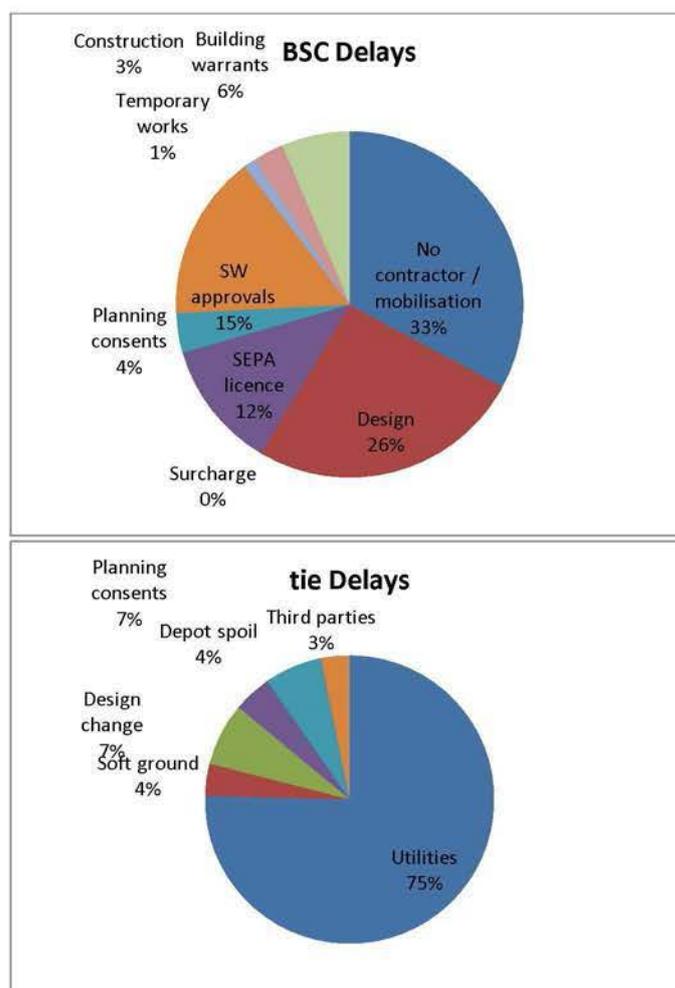
Position papers were swapped on the subject and agreement was reached to refer the matter to mediation and this was planned for 5/6 November 2009. However, during a meeting between David Darcy from Bilfinger Berger and Richard Jeffrey on 2nd November 2009 the agreement to award relief and costs was reached.

2.3 Analysis Substantiating Offer to BSC

In May 2009 against a backdrop of BSC presenting an OFRS date of January 2013 in a submission for an Extension of Time, **tie** undertook a couple of exercises as follows:

- 1) a programme review incorporating ideas which **tie** had to improve the OFRS date. This produced a programme with an OFRS date of February 2012, and
- 2) an exercise looking at the delays which **tie** felt that it was accountable for, the delays that BSC were accountable for and the delays which could be attributed to either party.

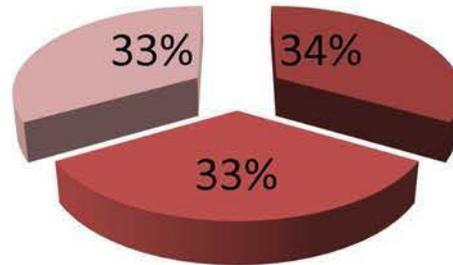
The exercise on delays culpability indicated the following responsibility for delays and reasons.



When this exercise was progressed to look at culpability for the delays overall we determined the following split:

Initial Assessment of Delay Attribution

■ To Be Demonstrated ■ BSC ■ tie



Based on a 16 month delay to the overall programme, **tie** could see that it was responsible for 5.3 months of the delay as a minimum. From this we could also see that there is another 5.3 months of delay for which culpability has yet to be determined and it is likely that **tie** will be responsible for at least some of this. For this reason we have offered a total of 6 months of costs and 9 months relief against liquidated and ascertained damages. This latter 9 months costs the project nothing additional apart from the ability to claim the 4 weekly damages against Infracore for late delivery.

tie has in place a process to capture reasons for delay to the project via a daily telephone conference involving the **tie** planning team and the **tie** project managers. This records the reason for the delays and culpability. This information is then used in 2 ways:

- 1) as part of a delay attribution database being created to give easy access to all information pertaining to delays on the project
- 2) concurrency Gantt charts – these have been set up for 80 pieces of works across the project and record in a diagrammatic way all the delays to progress in this section. This allows us to see at a glance which delays have been caused by the client (and therefore may give rise to relief due to the contractor) and which delays have been caused by the contractor (for which costs would not be awarded but relief might be if there was a concurrent Employer delay).

3.0 Impact on Programme

3.1 Programme Exercise Stages

The exercise being done to produce a new programme is being done in 3 stages:

- 1) bringing the programme up to date to reflect all known changes and events to 31st October and including all progress to date – this will include for all delay events to date including Changes and Compensation Events as described under the contract
- 2) inclusion of mitigation measures to deliver the most cost effective programme
- 3) inclusion of “acceleration” measures which could recover time yet further but which may have an additional cost associated with them.

It is likely that the result of this programme exercise will result in an OFRS date during 2012.

3.2 Output

This programme exercise will produce a programme which provides :

- robust estimate of each of the Sectional Completion dates
- Further evidence of relief/costs due to BSC
- A robust programme which can be used for the purposes of Stakeholder communications and traffic management planning.

4.0 Impact on Costs

4.1 Prolongation Costs

This award means that **tie** accept culpability for 6 months of costs. In line with the award made for EOT1 **tie** estimates that the indicative costs for this award are likely to be in the region of £10m. However, until the revised programme has been agreed and the full impact on all the subcontractors substantiated we are unable to definitively confirm these estimated costs.

4.2 Liquidated and Ascertained Damages(LAD's)

In awarding 9 months relief against the LAD's, **tie** has given up its right to claim LAD's from Infracore for slippage against each Sectional Completion Date for a period of 9 months.

Decisions/Support Required

TPB is requested to approve the decision to:

- Award 6 months of costs to BSC in relation to delays to the Rev 01 Programme, and
- Give relief of 9 months against each of the Sectional Completion dates in the Rev01 Programme.

Proposed

Name: Susan Clark
Title: Deputy Project Director

Date: 18 November 2009

Recommended

Name: Steven Bell
Title: Tram Project Director

Date: 18 November 2009

Approved

..... Date:
David Mackay on behalf of the Tram Project Board

