

MUDFA CONTRACT IMPROVEMENTS

BRIEF

DLA Piper Comments 23.03.07

1.0 Objectives

- Progressive ramp up of workload from Pre Construction Phase to Construction Phase.
- Commercial mechanisms that reflect the progressive ramp up in activity
- Minimise changes to contract Agree
- Include meaningful incentivisation Suggest that any incentivisation mechanism should be based on tweaking the existing drafting in Clause 48 of the MUDFA (Value Engineering Incentive)
- Include more effective 'penalties' See comments on LDs below. It is not clear on what basis tie can commercially negotiate this into the existing contract terms
- Include Phase 1b as a separate option in contract (this may not be necessary if we commit work in workpackages reflecting the revised programme) This is how the contract was set up. Suggest tie discuss the position on impact on the Prelims with Gary Easton/TT.

2.0 Approach

- 2.1 We recognise that the completeness, accuracy and buildability of the designs is the key to de risking the utilities diversions and ensuring efficient delivery.
- 2.2 To effect this we need to map the end to end process for the initiation of each workpackage. This process needs to incorporate the 'RAT Pack' process. Please clarify what is the RAT Pack process.
- 2.3 We need to be clear on the extent and timing of AMIS input into design (Have we had Andy Malkins Email setting out his interpretation of their input into design). Has a tie review been carried out with regard to tie's interpretation of the AMIS design input ? For example, see Clause 2.3.9, 2.4 and Schedule 1 (Scope) of the MUDFA, especially paragraphs 2.10 until 2.24, 2.26 - 2.33 (which obligations are also repeated during the Construction Phase).
- 2.4 The steps through the Preconstruction process need to include the following (please amend if anything I have missed)
- Initiate workpackage process for a workpackage (what is the information we need to provide with this? See Clause 8.9 of the MUDFA
 - Description of scope

Formatted

Edinburgh Tram Project

- Applicable delivery constraints – working time, commencement and completion dates, third party constraints and consultations, physical boundaries of the worksite. It is tie's risk to manage the third party agreements.
 - Preliminary design (that which is to a sufficient level of detail to enable an estimate of cost and programme to be provided). Was anticipated that this should have been provided during the Pre-Construction Phase.
 - Etc
 - SU consultations
 - RAT Pack design process
 - Tie and third party approvals
 - Issue of detailed designs
 - SU consultations and agreement
 - Obtain wayleaves and licences
 - Drawdown on TTRO
 - VE of detailed design
 - Review of detailed design for completeness and buildability
 - Preparation of workpackage price and programme based on finalised detailed designs. This needs to be based on the pre-agreed rates. Was intended to be an update to the Anticipated Final Account agreed at the end of the Pre-Construction Phase.
 - Negotiation and agreement of the workpackage price and programme. Need to be careful with this as amendment to the proposed pricing potentially undermines the commercial position agreed during the tendering period. From a procurement perspective, tie cannot move away in any significant way from the pricing mechanism which was competitively tendered.
 - Issue notices and communications
 - Instruct implementation workpackage
 - Mobilisation for workpackage delivery
- Timescales need to be set for each step

2.5 Commercial arrangements – basis for setting price and programme

- Need a process for agreeing the price for each package, the adjustment of Preliminaries (Core Prelims as a separate workpackage, workpackage specific prelims with the price for each workpackage?). This should already have been dealt with on the basis that the work was always going to be instructed in individual packages. Suggest that you clarify with Turner Townsend
- Process for setting the workpackage price and programme if cannot agree between AMIS and tie. As above, this should be on the basis of the agreed rates.
- Basis for adjusting Construction Phase Prelims. Should already have been dealt with.

Edinburgh Tram Project

3.0 Considerations

- AMIS are preparing a programme reflecting the current dates for commencing each workpackage. Do we have this? SC This should be driven by tie's programme for achieving the Land Consents and associated detailed design. Then agreed with AMIS.
- What are the constraints that we have given AMIS for this programme? SC Both Bidders were given Festival and Christmas constraints. They were told that further constraints arising out of the third party agreements would be confirmed in the Work Orders issued by tie. Also, should have been discussed as part of the agreement of the Construction Programme during the Pre-Construction Phase.
- AMIS have prepared a Memorandum of Understanding in respect of the contract. What are our views on their position? What do we accept and what do we disagree with and why? SF/MH See separate comments at the end of this Note.
- How does this compare to Martin Hutchinsons proposals? MH What has been proposed by MH?
- How much of the end to end process is already included in the contract? Is there anything we need to add in? Are the timescales deliverable? SF We need visibility on what has/has not been achieved to date in order to comment on timescales. To move away from the contract, creates commercial and procurement risk for tie.
- Design – Is the definition of design in the contract sufficient? Is the definition of AMIS input into the designs in the contract sufficient? I have given references to various provisions. These need to be reviewed by tie. What changes do we need to make to SDS contract to make the end to end process work within the timescales we need/have established under the MUDFA contract? TC/MH/JJ
- How does the Jim Johnsson report compromise our position, if at all? GG What is this report ?
- What is it that we really want out of VE by AMIS? Is it all things necessary to minimise delivery risks + efficient sequence of activities to minimise programme and hence cost and minimise risk to completion by due date? Is this really all we can realistically achieve? SC/MH/TC/JJ See Clause 48 for a suggested list of AMIS value engineering activities. Given that AMIS is not doing the design, the opportunities are limited.
- How do we deal with disagreements on workpackage price and programme? TC/MH Need to be careful here as the pricing proposal was not to have a lump sum price for work packages.
- Need to map the end to end process – TC
- What are the LD arrangement we wish to negotiate in and why? Should this for each workpackage or based on a longstop date? What is the negotiation tactic – MH/SF I have attached a

Formatted

Edinburgh Tram Project

separate e-mail on LDs which was circulated at the time of drafting the contract. The calculation of LDs and the triggering of those LDs is dependant on the inter-relationship of the Infraco and MUDFA programmes. LDs for Sections was considered and rejected on the basis of programme considerations. AMIS wanted lower levels of LDs for individual Sections but this was rejected during CARP on the basis that tie wanted to levy £50k per week on the longstop date.

- What is the incentivisation arrangement we want to apply? To each workpackage or all workpackages or a combination of both? MH/SF Currently sits as an incentivisation across all work packages. To agree something different needs to be carefully measured against the base tender price and the rates - otherwise, there is a significant risk that tie will end up paying more.

4.0 Next Steps

- Conclude actions listed above by Monday morning
- Meet with team Monday morning to review and rehearse our position. GG/SC/TC/MH/GB Suggest that someone with knowledge of the content of the contract and what was agreed pre-contract with AMIS should be present. Suggest that Gary Easton should also attend
- Meet with AMIS Tuesday am latest
- Meet with SDS to settle any issues arising from this with them
- Formalise changes to contract and end to end process
- Get both signed up
- Communicate process/train teams

We need to add dates to the above

Comments on Memorandum of Understanding

Formatted

Having read the terms of this Memorandum, we do not recommend that this Memorandum or a variant of it should be signed.

The Memorandum is inaccurate in places and to execute it, would set up AMIS been able to make various delay and cost claims against tie. Execution of this Memorandum also undermines the drafting of the MUDFA which was negotiated and competed under terms subject to the Procurement Regulations.

The contractual solution should be to make necessary amendments to the existing MUDFA based on the fact that the objectives of the Pre-Construction Phase were not all achieved.

Our detailed comments are as follows:

Formatted

Edinburgh Tram Project

Recital B - Essentially correct - but MUDFA does allow for Construction activities to be commenced although all Pre-Construction Activities have not been completed.

Formatted

Recital C - Mobilisation activities is not a pre-requisite to completion of Pre-Construction. Site office and vehicles should have been instructed by tie under a Work Order. See Clause 8.6.1.

Formatted

Clause 2 - Our understanding from the rest of this Memorandum is that the Pre-Construction Deliverables were not achieved. Therefore, this statement is incorrect. Also, we believe that the reference to Final Account should be Anticipated Final Account. The date of 27 April 2007 is not understood - the AFA should be submitted at the same time as the rest of the Pre-Construction deliverables.

Formatted

Clause 3 - What is the Risks and Trade Offs paper ? Suggest this should be reviewed by TT and the legal team. The agreement of the contents of this paper is a concern if the identified risks were known at the time of tendering. This is not a lump sum contract - is AMIS worried that they got their rates wrong ?

Formatted

Clause 4.1/4.2 - We are not aware of any greater programme constraints than were already expressed to AMIS. They were given a copy of Schedule 13 and it was agreed that discussions on programme would take place during the Pre-Construction Phase. This comment is of particular concern. See paragraph 2.7 of the Scope in Schedule One which details a whole range of programme constraints which were to be worked through in the Pre-Construction Phase. Suggest that tie speak to TSS and the team working on the programme with AMIS. What was discussed during the tendering period and what has been discussed recently ? Unclear as to how the impact on Preliminaries has manifested itself. Again, suggest that this is discussed with TT/Gary Easton.

Formatted

Clause 4.3 - clarification required.

Formatted

Clause 4.4 - clarification required. Not clear as to how this impacts on the Preliminaries. Again, suggest that this is discussed with TT/Gary Easton.

Formatted

Formatted

Clause 5 - Not entirely true. They may not have an opportunity to increase this - but there is a minimum fund of £250k.

Formatted

Clause 6.1/6.2/6.3/6.6 - the contract cannot be set aside. It is the administration of the contract and the timely provision of the design that holds the key to this project working in practice. The whole ethos of the Pre-Construction Phase and the VEI was to create an environment for partnering.

Formatted

Clause 6.4 - minor realignment should only be permitted and this should be in place sooner than 29 June.

Edinburgh Tram Project

Clause 6.5 - the valuation of this Work Order should be made in accordance with the existing Pricing Schedules.

Formatted

Clause 7 - any costs incurred by AMIS, should be met by AMIS. The proposal that tie should meet all costs does not seem to fit with the earlier partnering and collaborative working approach.

Formatted