

Tie Limited

**TRAM Project
(Commercial In Confidence)**

Paper to : Tram Board
Subject : SDS Novation Issue
Date : 18th September 2006

1.0 Introduction

1.1 this paper sets out the current issues in respect of the SDS Novation and the extent of their detailed design and the Project's recommendations to resolve these issues.

2.0 Background

2.1 The original OBC Procurement Strategy [is/was?] based on SDS undertaking the design of the works under their contract with **tie**, largely [was is meant by largely?] completing this before award of the InfraCo contract- and then ~~the~~ SDS design agreement then being novated to the successful InfraCo bidder.

2.2 In this way the detailed designs which have been warranted and validated [by whom – TSS?] as delivering the Tram system functionality are completed [at para 2.1 state "largely completed"] before conclusion of negotiations with the preferred InfraCo bidder. [This enables tie to negotiate a price with the preferred InfraCo bidder with minimal risk allowance in respect of the design meeting the functionality within the specified constraints – is this correct? Not sure I agree with this. Perhaps we can discuss?]. This novation is therefore a component to the transfer of design and [consent – this is the first time consents are mentioned – does it need more explanation?] risk from **tie** to the InfraCo.

2.3 This overlap of detailed design works and preferred bidder negotiations also reduces the overall delivery programme since the InfraCo contractor will already have a detailed design at award of contract.

3.0 SDS Design And Novation Issues

3.1 SDS are uncomfortable with the novation given a clause in their design contract which provides the Employer (either **tie** or the InfraCo contractor after novation) absolute discretion to decide whether the design deliverables are complete. SDS are concerned that an InfraCo may apply this clause unreasonably to avoid payment of the full amount due.

3.2 During pre tender consultations with InfraCo bidders they have intimated that they may not wish to use SDS to do all of the design, and in particular the system design (namely system integration) and those elements of the work that SDS would produce performance specifications for e.g. communications systems.

[Should we mention some where the issue of SDS working for two masters once novated depending on the progress of the MUDFA designs?]

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4.0 Implications Of these Issues

Novation

- 4.1 If, in extreme situation, SDS were to refuse to novate their agreement [at what point would we know this was an issue – may have a bearing on implications] to InfraCo the position would be:-
- Risk transfer is still effected by virtue of the contract between InfraCo and **tie** and SDS remain liable to **tie** for their designs meeting the functionality requirements, to the extent that they are relied upon by InfraCo.
 - In the absence of the novated SDS agreement the InfraCo will include risk premiums around the performance of their design and on obtaining consents and/or seek to exclude liability, to a greater or lesser extent. [Would tie not take/keep this risk, passed down in the SDS contract?]
 - The delivery programme will be extended due to InfraCo needing to engage another designer to undertake detailed design work, which they would only commence after award. [May depend at which point SDS refuse to novate]

Extent Of Detailed Design Undertaken by SDS

- 4.2 As the InfraCo are taking the risk on designs they will have a view on which organisation is best placed to deliver which element of the detailed design and thereby mitigate their risks.
- 4.3 If InfraCo's views are ignored then **tie** will effectively be paying for work by SDS which is of no real value.
- 4.4 There is also the subsidiary but related issue that given the now compressed timescales the sequence of detailed design delivery by SDS needs to be prioritised on the basis of the elements that are risk and price critical to InfraCo.
- 4.5 The above is shown graphically in the diagrams in Appendix A.

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5.0 Legal Position

- 5.1 DLA have advised on the legal position in respect of SDS's contract on these issues.

Novation

- 5.1 Legal position is that:-
- SDS's obligation to novate is absolute
 - Tie holds a £500,000 on demand retention bond until such time as the novation is effected.
 - Failure to novate would trigger a termination event and give tie the right to recover losses (excluding consequential losses) up to the £10m cap per event.

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- Tie also holds a parent company guarantee with Parsons Brinkerhoff Group, this would also be triggered in the event of SDS refusing to novate.

Extent Of Detailed Design Undertaken by SDS

5.2 The legal position is that:-

- Under the novation arrangements tie may omit scope from the services to be novated to InfraCo.
- InfraCo tenders are being sought on the basis of a mandatory novation of SDS.
- There are no procurement compliance risks in InfraCo either a wholesale or partial refusal to novate on the part of either SDS or InfraCo. [This bullet doesn't make sense?]

6.0 Proposed Mitigations

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6.1 SDS's concern on the absolute discretion of the InfraCo deciding whether deliverables are complete is not unreasonable, provided that InfraCo is left with sufficient levers to protect its commercial position (otherwise they will argue for lower caps and possibly exclusions of liability). [Therefore it is proposed that relaxations, possibly making any disputes on this issue the subject of dispute resolution – this sentence doesn't make sense?]. Legal advice is currently being provided on a range of options in this respect.

6.2 The Project will use the strong obligations on novation contained within the SDS contract as a negotiating lever to ensure that InfraCo's reasonable commercial position is maintained.

6.3 The Project will sound out the InfraCos on a reasonable compromise position during the early stages of the bid period. However, to maintain delivery pressure on SDS there will be no negotiation of this issue until nearer the end of the bid period – say mid December. [Too soon? Need to also cover in this paper the implications re consents, TROs/TTROs, land acquisition etc. Not just about detailed design.]

Extent Of Detailed Design Undertaken by SDS

6.4 To avoid unnecessary expenditure on detailed design that the InfraCo bidders will not use the Project will settle a common position on the extent of design that they would accept from SDS. The Project will vary SDS's contract to reflect this. [Need to bottom out programme and cost implications of doing this.]

Prioritisation Of Design work by SDS

6.5 By negotiation and agreement SDS's detailed design effort will be prioritised to minimise the bidder risk price and performance allowances or risk transfer exclusions.

7.0 Consultation

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7.1 The following have been consulted on this recommendation:-

- Damiaen Sharp – Transport Scotland
- James Papps – PUK
- David Connolly – CEC
- Graeme Blissett - **tie**

7.0 Recommendation

7.1 It is recommended that the Board approve the approach to dealing with this issue as set out above.

Proposed Geoff Gilbert Date:- 19/5/06
Project Commercial Director

Recommended Andie Harper Date:- 19/5/06
Project Director

Approved Date:-
Tram Project Board DPD Sub-Committee