
From: Horsley, Chris [Chris.Horsley@dlapiper.com]
Sent: 25 October 2006 20:00
To: Bob Dawson
Cc: Fitchie, Andrew; Fitzgerald, Sharon
Subject: RE: Edinburgh Tram Network [BBS]

Bob,

Our initial thoughts on the way that the issues previously raised by BBS are dealt with in their comments matrix and linked into the 25 October letter are set out below. We consider a meeting with you at your convenience would assist in planning and executing a composite response.

1. Insolvency of **tie** Limited/back-up of CEC

- Note in the 'Parties' section that BBS say that CEC or the Scottish Ministers should guarantee the performance of **tie**'s obligations under the agreement.
- **tie** Default proposed to be extended to recognise **tie**'s position as a wholly owned company of CEC. Default heads to extend to insolvency, change in control, change in nature of business, breach of obligations in relation to insurance.
- Amendments needed to Indemnity provision to include a **tie** and CEC indemnity.
- Guarantee Agreement (in 25 October letter) wording provides for a 6 page document with CEC guaranteeing absolutely the payments for termination due from **tie**. CEC to make payment to BBS within 30 days of a written notice of **tie** defaulting in a payment under the compensation on termination provisions. Provisions are included to ensure that the guarantee is not discharged by any means other than express agreement.

The agreement appears straightforward (but requires revision) and locks CEC into the guarantee. We suggest that legal and commercial input required from CEC to move this forward. The guarantee is less demanding (in the sense that it only seeks cover of termination payments as opposed to all payment obligations) than the proposed level 'B' letter of comfort.

With regard to the inclusion of a CEC indemnity, this is not acceptable since it would require CEC as a contracting party to the Infraco Contract.

2. Performance Bond

- Bond should only be assignable without Surety consent to a party to which the Contract has been assigned or a funder.
- There is no mechanism in the Bond to cater for the reduction from £35M to £25M to £15M to £10M.
- The JV issue will not affect the Bond itself but will have an impact on any counterindemnity/ security arrangements required by the Surety
- Latest letter of 25 October suggests that the maximum level of performance bond acceptable is 10% of the value of the works, to expiry on the issue of the Certificate of Reliability. The alternate proposal is a second Performance Bond, which commences on issue of the certificate of Service Commencement for Section A and subsists for 3 years.

The first two points are negotiable (but not now, in our opinion) and are capable of solution. The third is a matter for the JV, not **tie**, unless this is saying there are major cost implications. The bonding approach is a commercial decision for **tie**, and the extent to which the cover of the post-Service Commencement bond compares to the original intended approach would need to be analysed in the context of the IMA response, in particular. It is not clear if BBS are suggesting that the Bond is one which is not effective until Service Commencement or if they propose the use of two bonds for different time periods.

3. Conditions Precedent to Payment

- Matrix merely notes that BBS require discussion of this point together with the Payment Mechanism.
- BBS require the deletion of the need to procure Collateral Warranties prior to receiving payment.
- Under the letter of 25 October, BBS require revisal to 28.7 so that the time period to procure warranties is increased, so that the requirement applies only to Key Subcontractors, and so that a warranty is only granted to **tie**. BBS query why such an extensive list of other parties require warranties and note that there will need to be negotiation with the sub-contractors over the terms of the warranties.

- Revisions to 70.5 required by BBS so that a full schedule of collateral warranties are identified prior to Infracore Contract signature.

Such details about collateral warranties are often the subject of negotiation, but it is difficult to understand why these commitments are thought to be sufficiently important to raise prior to bid submission as key issues. We can envisage some simple adjustment which could satisfy BBS concerns but again this will entail pre-commercial bid concessions.

4. Level of retention

- Matrix merely notes that BBS require discussion of this point together with the Payment Mechanism.
- BBS letter of 25 October rejects the proposed retention in 63.2 and instead suggest a level of 5% with 50% released on issue of the Reliability Certificate and the remaining 50% released on a date which falls 3 years after the Certificate of Service Commencement for section A.

This may be a continued misunderstanding of the retention mechanism, given that the final release is intended to be upon issue of the Reliability Certificate. It is however possible that BBS are intending to offer a longer period of retention in exchange for the smaller value. If so, this is a commercial position which tie would wish to weigh up once the complete financial/commercial offerings are under assessment.

Please let me know your availability for a meeting (perhaps Friday morning?) on these points.

Kind regards

Chris

Christopher Horsley
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From: Bob Dawson [mailto:Bob.Dawson@tie.ltd.uk]
Sent: 25 October 2006 11:07
To: Fitchie, Andrew
Subject: FW: Edinburgh Tram Network [BBS]

Andrew,

Please find attached the 'mark up' from BBS, again I don't think it complies with the ITN.

BBS will be looking for early comment on the 'show stopper' items from their letter dated 16th October, namely items 3, 4 & 5 (bond amounts and durations; Conditions Precedent and 15% 'retention' milestones) and I should be grateful if you'd look at these initially.

Many thanks

Regards

Bob Dawson
Procurement Manager

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From: Scott McFadzen [mailto:Scott.McFadzen@bilfinger.de]
Sent: 25 October 2006 09:46
To: Bob Dawson
Cc: Richard Walker; Gary Dalton; tim.hunter@siemens.com; gordon.smith@siemens.com
Subject: Edinburgh Tram Network

email to
tie Limited

FAO Bob Dawson

Dear Sirs

Bilfinger Berger - Siemens Joint Venture
Contract Compliance Matrix / Mark-up to the Infraco Contract

As required by the ITN, Volumes 1 and 2, please find attached 2 documents containing our mark up of the Infraco Contract and Schedules. We also enclose a 3rd document highlighting the key issues, for ourselves, in the ITN Documents.

The items discussed at the meeting on 18 October will be dealt with under separate cover.

I confirm our telephone conversation on 23 October 2006 in which I advised you that this submission would be approximately 48 hours later than the time stated in the ITN.

Please acknowledge receipt.

Yours faithfully
Scott McFadzen
Bid Director

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