

Tram – A Potted History

- In 2005 SDS, the designer, was engaged by tie to design the tram system. No CEC involvement at this stage. No timescale for delivery of design specified.
- Up to mid 2007 there was really very little CEC input at all. This was primarily due to the allocation of risk. Prior to the current Scottish Government being elected CEC were not at risk of cost overruns, that changed following the May '07 election when the SNP insisted CEC carry the risk of overspend if CEC wanted the project to progress. When I came on board to work with Colin, I advised that essentially there was no way a contractor would engage with a “man of straw” company.
- As predicted, in Autumn 2007 tie suddenly asked that CEC become guarantor under the contract. CEC were very much kept out of the picture in terms of actual negotiations and advised that all was well.
- Colin and I advised Gill in Autumn 2007 that for a contract of this magnitude and speciality we should obtain an independent legal view on the fitness for purpose of the contract. Clearly CEC legal didn't have experience of light rail contracts and what would be usual or not.
- It was decided at that time, against our advice, that DLA should in fact just extend their duty of care to CEC. They did so, despite the fact that they had previously formally noted that CEC and tie's interests may be divergent. Accordingly the DoC only extends so long as CEC accepts that DLA have acted on tie's instructions and such instructions are deemed to align with CEC's interests. It is accordingly worthless in my view.
- At that time the contract was very much being presented by tie as being “fixed price”. However, the design was less than 40% complete and a warning was flagged at the time that it was very risky to sign up to a fixed price contract where the design was not complete due to the significant possibility of cost overruns.
- What was eventually signed in May 2008 was a contract which made many assumptions about pricing and effectively transferred certain risks to CEC. At this point the contract was worth £512m, with £545m available funding. The final price had gone from £498m to £512m, when tie advised CEC that the premium was due to Infracore taking on additional design risk. It was reported to Council at this time that the contract was 95% fixed.
- Although CEC were not advised at the time, even at the date of signing there were already disputed issues between the parties.
- The director of City Development retired in mid-2008.
- Slowly but surely the price estimate has increased.
- In late 2008, Willie Gallacher, the tie CEO resigned. David Mackay (Chair) took over.
- In Feb 2009 a crisis occurred and CEC were only told at the last minute that a supplemental agreement needed to be signed to ensure Princes St works could start. CEC agreed to the signing but Tom assigned a team to work down at tie to sort out matters and deliver a one team approach. On the ground tie remained very defensive. The cost associated with the completion of Princes St was effectively £7m greater than the contract works price. This mainly arose from design changes relating to full depth reconstruction of the carriageway. It is fair to say that tie had little control over value engineering

opportunities related to this issue and why full depth reconstruction was required across this section.

- Not all of this is tie's fault. For whatever reason BSC, the Infracore contractor is being very intractable and know they have CEC over a barrel. There is evidence worldwide that their MO is to win a contract and then ratchet up costs via dispute. Even the best contract for a project such as this would not withstand a sustained assault if the contractor is being difficult.
- Richard Jeffrey joined tie in Mid 2009.
- tie have taken a few matters into formal dispute. tie have won one, lost two and sort of won the last. However, the fact remains that this attritional battle will not work as it would require every singly point to be formally disputed. Meanwhile time marches on and it may be a case of costing more to dispute than to agree a commercial settlement. The snag now being that commercial settlement will involve paying cash we simply don't have, coupled with the reputational issues around potentially spending an extra 100m on tram whilst at the same time closing schools etc.
- Highly sensitive and confidential (and not in the political/public domain), but current estimated max costs are around £640m, which is approx £40m over what is even possibly affordable. This forecast is unmitigated and is based on the worst case of all known risks at this time. It also include risks associated with commitments that are yet to be signed upto. We are therefore now looking at potential re-phasing of construction, but options are limited.
- In between legal battles we have also be rationalising the company structures. The transfer of Lothian Buses is planned for later this year.

Current Position

- Although RJ confirms that there is more evidence of contractor engagement, a timetable has yet to be agreed (which will determine costs etc) and no on-street works will commence until CEC agree to give more cash as we did for Princes Street. A timetable is due by end Feb 2010 but this appears unlikely to be achieved.
- A number of strategic options were examined in early 2009 including truncation, contract termination etc. It was decided to weather the storm and fight BSC through the dispute process. It is now clear that this needs to be revisited asap to allow us to at least have some sort of plan B. I have a meeting with Alan and Marshall on Tues to discuss further.

Please note that this is at an unbelievably high level and the history is far more complex. However, should give you a flavour of where we are and why.

Please also note that Members only have a small knowledge of the above so the info should be treated with caution.