

Edinburgh Tram Peer Review

Meeting with members of Tie Management Team 22nd December 2009.

Attendees: Peer Review Willie Gillan, Mike Heath, Andy Sloan (remote review Malcolm Hutchinson)

Tie Richard Jeffrey, Tony Rush, Steven Bell, Frank Mc Fadden, and Dennis Murray (all part of sessions)

Topics covered were as attached agenda.

Key issues

The team acknowledge that the project has reached a stage where its current Infracore contractor the Bilfinger Siemens Caf consortium needs to deliver improved progress and reduced forecast costs for the project to be delivered as envisaged within a time of less than 2 years delay from the original 2011 delivery date.

We note the inconclusive outcome of the mediation which followed our last visit in June.

We also understand that there seems no realistic prospect of any change in attitude from Bilfinger who have an interpretation of the contract fundamentally at variance with Tie's.

We support the Chief Executive and Board's willingness to bring the performance and commercial issues to a head in a realistic timeframe and we reviewed the options currently being considered to deliver the most advantageous outcome balancing time and cost.

Our recommendations are a summary of a conversation at the end of the day with the Chief Executive and Project Director. I have attached a short commentary under each.

Recommendation

1. Develop a strategy underpinning the four options discussed at Board and any others which may arise.

We think that these are the only realistic options at present but felt that each of them might best be presented with the expected outcome as the introduction and key aspects of the strategy including costs timeframe and legal implications being briefly set out. We would see the legal issues being documented simply as risks and not presented as impediments.

2. Develop a mediation strategy including the probability of a degree of buy out as the option most likely to succeed, but also plan for the project continuing successfully following termination particularly the contract strategies that will be feasible/required.

We think that a solution that removes the key impediment to progress, Bilfinger in a realistic timeframe is through mediation leading to negotiation. Mediation will allow both parties to set out their positions and aspirations in a setting that allows some room for flexibility whereas immediate bi lateral negotiations are likely to be surrounded by suspicion on both sides.

In any event Tie will need to take back a lot of the “risk” it thought it had transferred and keeping the rest of the contract whole while Tie repackaging the Civil works under a standard contract will need to be researched but appears simpler and cleaner.

Without a negotiated settlement then Tie will have to move to termination and have a plan to replace Bilfinger as Principal Contractor immediately at termination to keep the job going. Doing this to enable Tie to “act with due regard to efficiency and economy “may prove fertile ground.

We agree that Bilfinger need to be persuaded that this is a job that they should not have undertaken and that they can have a dignified exit at a reasonable cost. We welcome the strategy to identify areas where the consortium (BSC) is weak so that an overarching failure to deliver the contract in the round is possible rather than rely on finding a breach since we know that breaches will be arguable and drawn out to prove and have contractual remedies to be exercised first. We think Tie and CEC’s lawyers will need tasking to adopt a we want to do this commercially so how can we do it approach, whereas their pre-disposition will to look for something that can be litigated conventionally.

To that extent, we believe that the strengthening of the Commercial team with someone to develop and implement this strategy is a must.

3. That Tie properly understands the contractual liabilities for ground conditions reference back to the offer through to the current agreement – particularly the unforeseen element.

Our review indicated that the position taken by Tie on ground conditions seems at variance with the wording of the contract documents. Given this is so significant to cost, time and design matters we think a quick review from offer through the various agreements and a clear direction to the on street teams might offer benefits.

4. That a review is taken on the effectiveness of the DRP process going forward. *We have heard the results of the DRP’s so far. We noted last time that this is a slow process to deliver an outcome and can be played to the last minute by an obdurate contractor. We gather that the DRPs so far have produced mixed results and in one case a questionable outcome. Crucially they do not seem to have affected the contractor’s attitude at all.*

DRPs are a labour intensive and emotionally draining process for Tie’s team and this is put into focus by the apparent lack of senior input from the other side. Since other approaches might contribute more to the strategy we would downgrade the effort on DRP but keep one or two going just to keep applying pressure.

5. Restrict their impending audit issues to programme, mitigation and design. *We support the use of audits as a pressure point but suggest that their effectiveness would be best if focussed largely on the key areas that will be the symbols of poor performance. We do think that Tie will need to think how it will enforce its requirements for audit information if BCS co-operate at the minimum level they think meets their contractual obligations.*

6. We are not persuaded that the strategy of isolating SDS will be effective in the timescales discussed.
We think this has the risk of the perverse outcome of BSC and Tie agreeing that SDS are the problem and arguing about when the problem crystallised which will be time consuming and likely to be inconclusive.
7. Revisit recommendations on pages 6 and 7 of Peer Report of June 2009.
We discussed breaking out a discrete piece of earthworks and market testing it as a very real pressure point..
8. Start thinking about the management of the Siemens related activities.
We ran out of time to raise this but as the civil works have proved so difficult when they should be the simplest activity and a good deal of this can go back to design in some way then having the right technical and commercial strength to front up to Siemens now would be time and money well spent.

Peer review team 22nd December 2009
Mike Heath.