

Private & Confidential

Report of Edinburgh Trams: 3rd Quarterly Review 3 March 2009

Attendees-			
Donald McGougan	City of Edinburgh Council	Bill Reeve	Transport Scotland
Marshall Poulton	City of Edinburgh Council	Jerry Morrissey	Transport Scotland
Alan Coyle	City of Edinburgh Council	John Ramsay	Transport Scotland
Steven Bell, Stewart McGarrity	Tie Tie		
Apologies-			

Item	Notes
Purpose of meeting	<ol style="list-style-type: none"> To follow on from the first formal Quarterly Review under the terms of the formal Financial Agreement between City of Edinburgh Council and Transport Scotland This review meeting considered the potential impacts on the project from the ongoing contractual dispute between tie and the Infraco consortium focussing. CEC / Tie were advised of the extent of Ministerial concern regarding the current contractual dispute at Princes Street and its potentially damaging impact on the project. An update on this dispute, together with an appraisal of implications for Edinburgh Council Finances were requested.
Dispute Resolution Procedures	<p>Tie advised that</p> <ul style="list-style-type: none"> Formal Dispute Resolution procedures were initiated on 19 February 2009 following unsatisfactory meetings with BSC Infraco consortium particularly Bilfinger Berger. Respective parties formally exchanged position papers on 2 March 09. All now have until 19 March, when Chief Executives are obliged to meet to agree and settle, or disagree and continue. Currently Tie awaits formal confirmation of which Chief Executive will represent the BSC consortium. Failure to agree means resorting to adjudication / mediation but meantime contractors are obliged to continue working and Tie has accordingly issued instructions to Bilfinger Berger to commence work on Princes Street.
Bilfinger Berger's Project Performance	<p>Although the dispute is currently focussed on Princes Street, and the issue for formal dispute resolution is relevant to that section only, it will have wider project implications. Also, although Bilfinger Berger is working across the geography of the project, their overall performance remains mixed, poor in some places and elsewhere acceptable. The reasons for this relate to;</p> <ul style="list-style-type: none"> Utilities – In some cases the utility works are outstanding and in others Bilfinger Berger are unwilling to begin work in advance of agreements in

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	<p>place.</p> <ul style="list-style-type: none"> ○ Outstanding Design – Design was novated at Financial Close but in some areas their design completion remains poor ○ Package / Sub Contractors & Supply Chain – Performance here remains questionable <p>Transport Scotland enquired what proportion of work was proceeding without delay? On the off track (non-street) sections Bilfinger Berger appear to be getting on with circa 75% of programme but it is patchy on each work section.</p> <ul style="list-style-type: none"> ● Airport to Gogar: - sub contractor appears to be working ok. ● Gogar to Haymarket:- problematic ● Haymarket to Newhaven: - overall stand off particularly over Princes Street but also Leith Walk. Tie and CEC stressed that the traffic management around the Princes Street closure is working to plan as facilitated for Bilfinger. ● Princes Street is the sole focus of the formal dispute resolution procedures and the disagreement with Bilfinger Berger appears to centre on; <ul style="list-style-type: none"> ○ The west bound traffic lane change to previous plans which Tie accept a degree of some additional costs but not to the extent which BB say have arisen; and, ○ Consequently Bilfinger Berger allege they are not contractually obliged to begin work
<p>Current programme status</p>	<p>Off track (off road): is approximately 80% complete with some 200 metres in vicinity of Rosebery House (Haymarket Terrace) which is due to finish in March together with 1km in Edinburgh Airport grounds and Edinburgh Park – neither of which areas are a block for Bilfinger Berger. Overall this equates to 1 or 2% of area important to Bilfinger Berger together with an additional structure at South Gyle guided busway.</p> <p>On Track (road sections) are 68% complete. Leith Walk is 99% complete with just BT cabling underway and the Central section is programmed for completion in April..</p> <p>MUDFA: Tie advised that delays to the overall programme have resulted from;</p> <ul style="list-style-type: none"> ● Delays in achieving final agreement of utility owners – e.g Scottish Gas at the Mound ● Planned traffic management schemes have required changes – volume of traffic ● Variations between survey and reality together with faulty materials (reinstatement / replacement at contractors expense but still with impact on Tie’s programme City Centre works embargos with associated demobilisation and re-mobilisation taking longer than planned
<p>Cost Implications:</p>	<p>Late utilities completion has already had a cost impact and required risk cash allowance to be drawn down. Final cost expected to be circa £55m in total including risk call down. However, across the project Bilfinger Berger are not managing the integration of programme where there has been utility issues, even where variation agreements have been agreed.</p>

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Claim Notice Analysis:	<p>Tie have received circa 310 change notices from Bilfinger Berger most of which were received late and or with little or no supporting logic and detail. Tie estimate that settlement of these on basis of current experience with Bilfinger Berger would indicate that base costs would rise to the range advised to TS at beginning of February £528m to £546m however Tie also accepted Transport Scotland's view that as there has been no agreement on above and Princes Street has gone to formal dispute resolution procedure this expectation now seems at risk..</p>
Commercial Options:	<p>Tie presented a review of their view of the commercial options currently available to CEC in the context of the ongoing dispute. They began by confirming that the BSC consortium is jointly and severally responsible for the Infraco contract. They had considered the strengths and weaknesses of the following options;</p> <p>Option A: Terminating BSC and re-procurement; Tie's preliminary view is they don't have a strong case so this is legally risky. Also this option represents a serious risk of delay with no certainty of successful re-procurement given previous reluctance of market and perceptions of difficulties over risk transfer</p> <p>Option B: Removal of BB by the BSC Consortium and appointing new civils partner; Has the attraction of least damage to contract if able to preserve Bilfinger Berger's supply chain and sub contractors. However, Tie would need to convince either Siemens and or CAF that it was solving their problems, not Tie's. Siemens have their own civils contractor so this is possible but nothing yet being resolved.</p> <p>Option C Removal of BB by Consortium – tie manage civils As above, but assessment of this option is ongoing as neither CEC nor Tie keen to take this on.</p> <p>Option D Negotiate a major variation to the Infraco contract to settle current dispute Obviously this is Bilfinger Berger's preferred option. However, it will be costly both in short and long term and therefore worst of all outcomes</p> <p>Option E Pursue settlement of current dispute through the formal DRP process Currently this is CEC / Tie's short term tactical preference aimed at precipitating a change in Bilfinger Berger's behaviour; Longer term to be followed by Options A or B.</p>

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<p>Other Programme and cost issues:</p>	<p>Unmitigated Impact on current Programme: Transport Scotland had been recently advised that CEC/Tie's mitigated programme remained July 2011 but given ongoing difficulties confirmation of the unmitigated programme was requested.</p> <p>Project Legal Costs of continuing DRP Transport Scotland advised that they considered that this was an ineligible capital cost. This opinion was not shared by CEC and Transport Scotland agreed to reconsider.</p> <p>Continuing Gateway Reviews: Tie advised that they were running informal Gateway Reviews – (Peer Reviews) one had been conducted last May and another was imminent. They were using essentially the same personnel as before with Malcolm Hutchison and Mike Heath together with others as necessary. This provided Tie the benefit of the views from independent authoritative individuals with sound knowledge of the project. Tie agreed to provide a copy of the remit to Transport Scotland.</p>
<p>Actions required from the Review Meeting:</p>	<p>The Council agreed to provide Transport Scotland with;</p> <ol style="list-style-type: none"> 1. a full impact assessment of the recent dispute on the project; by end of March to enable comprehensive briefings to ministers in terms of; 2. The unmitigated impact on both programme and cost due to the ongoing dispute 3. Assessment of possible scenario and costs if Bilfinger Berger decide to abandon the current contract with the BSC Consortium 4. Re-profiled cash flows for the coming 3 years 5. Appraisal of implications for Edinburgh Council Finances <p>Transport Scotland agreed to reconsider;</p> <ol style="list-style-type: none"> 1. their view that the Council's Dispute Resolution Legal Costs was an ineligible capital cost for grant support.

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