
From: Nick Smith
Sent: 24 January 2008 09:00
To: Gill Lindsay; Colin MacKenzie
Subject: FW: Consents

A little better than I thought, but by my calcs, prior and technical approvals are only 27% complete. As far as I am aware this was intended to be 100% by December 2007 and is running at least 12 months late. This has a significant impact on CEC's ability to know the quality of finished product being delivered and a consequential significant elevation of risk.

Kind regards

Nick

Nick Smith
Senior Solicitor
Legal Services Division
City of Edinburgh Council
City Chambers
High Street
Edinburgh EH1 1YJ

(t) 0131 [REDACTED]
(f) 0131 529 3624

From: Duncan Fraser
Sent: 23 January 2008 18:42
To: Nick Smith
Subject: RE: Consents

| | Total | Approved | |
|-----------------|-------|----------|--------------------------------------|
| Prior Approvals | 62 | 6 | |
| Technical | 89 | 35 | none for roads and only 2 structures |

From: Nick Smith
Sent: 23 January 2008 18:10
To: Duncan Fraser
Cc: Colin MacKenzie; Gill Lindsay
Subject: RE: Consents

Duncan

Gill has a question re consents achieved to date. I understood it to be a very small %. Any idea of % of approval required fully achieved as at today's date?

Kind regards

Nick

Nick Smith
Senior Solicitor

Legal Services Division
City of Edinburgh Council
City Chambers
High Street
Edinburgh EH1 1YJ

(t) 0131 [REDACTED]
(f) 0131 529 3624

From: Duncan Fraser
Sent: 23 January 2008 17:53
To: Nick Smith
Cc: Colin MacKenzie; Gill Lindsay
Subject: RE: Consents

Thanks:-

There is to be a meeting tomorrow to discuss an "agreed" programme for approvals based on the BBS deliverable on site programme. This may still result in delays however lets hope not. Your point however about agreeing a programme then the snow ball effect is possible and on current performance likely. The liability will be a function of causation, which in turn will pivot on financial close documents. I consequently believe that we should take the time now to get these right and this may mean 4 weeks?

As for quantum this is nor possible to evaluate as we do nor know what the base line is until this is submitted to us. Based on our confidence and experience to date we do not expect any of the submission to right first time and also expect a number of iteration until they are acceptable. This means that each time the submission is re-submitted the clock starts again.- this to some extent will control the snow ball effect for our approvals process but does not deal with delay to works commencement. Again if this I in their liability then we should not be liable??

On their hidden claims I believe that each discrete compensation event must be comprehensive in terms of total costs and time- can this be checked with DLA.

From: Nick Smith
Sent: 23 January 2008 16:51
To: Duncan Fraser
Cc: Andy Conway; Rebecca Andrew; Colin MacKenzie
Subject: RE: Consents

That makes general sense. I guess the next question is the number of such events which will arise - ie is CEC likely to expect betterment in 5, 30, 50 or 90% of cases? If it is a high proportion then the risk is proportionally higher too. Only be CEC knowing what it is getting/what BBS has priced for can the risks be ascertained fully. is there historical info on what has been approved to date - ie have we approved say 80% of those submitted without any issue to date, or have we argued about 100%.

It also doesn't deal with:

- what is agreed in terms of approvals programme/critical path; and
- how snowballing is dealt with in terms of disruption/delay payments; and
- how the "hiding" of claims works.

To give an example, say 100 drawings are submitted in week 1 and within agreed timescales CEC approves 48 and requires betterment in respect of 2 drawings. Say the betterment cost is £1m, but the consequential 6 week delay cost is a further £5m. Say in the same 100 drawings 50 are rejected as they are not up to minimum standard due to SDS fault, with a consequential 5 week time delay. The issues are then:

1. how does the 6 week delay in drawings affect the critical path of other drawings approval. ie 6 weeks later the revised drawings will be back, meaning that the drawings which were supposed to be approved then may be delayed too - is that subsequent delay also for CEC's account? Sense would suggest yes, although SDS/BBS would need to mitigate as best as possible to re-jig whatever they can to minimise any delay. I'm sure it's much more fluid than I am making out but you get the issue.
2. However, the larger question is whether the CEC delay in relation to 2 drawings "hides" the delay created by SDS for a far larger number of drawings but for less time delay? Is the cost shared in relation to the delay (ie the 5m is split by weeks and proportional to the number of duff drawings - ie CEC covers 2/52 and BBS cover 50/52 of cost overrun for the relevant number of weeks).

Again, apologies for pedantry, but DLA will need to know how to draft the clauses.

Kind regards

Nick

Nick Smith
Senior Solicitor
Legal Services Division
City of Edinburgh Council
City Chambers
High Street
Edinburgh EH1 1YJ

(t) 0131 [REDACTED]
(f) 0131 529 3624

From: Duncan Fraser
Sent: 23 January 2008 16:26
To: Nick Smith
Cc: Andy Conway; Rebecca Andrew
Subject: RE: Consents

The base line is understood to be that BBS are taking on the liability for the designs being fit for purpose and thus in compliance with codes etc. hence at the minimum threshold. However there are some exceptions to this where the design was incomplete and in these locations a provisional sum has been allowed for and if this is inadequate the Council would pay for further design work and construction costs.

On the question of being above the minimum compliant threshold then this is betterment and the Council pays. However this may result in a shades of grey argument of what is compliant. Where planner are involved they may not like the shape and form of an object even though it function and again I understand that CEC would pay the extra. Now this is not where we should be however it is where we are. Under this form of contract a compensation event would occur which would include all costs including delay and disruption. So we should understand the total financial implications for each compensation event.

I have in arriving at this understanding been advised by the Tram Director as to the contract and agreements with SDS and BBS.

I hope this sets the context for the Consents!

From: Nick Smith
Sent: 22 January 2008 16:13
To: Steve Sladdin; Alan Coyle; David Cooper; Stephen Hajducki; Duncan Fraser; Colin MacKenzie

Cc: Gill Lindsay; Andy Conway
Subject: Consents

All

As discussed this morning there appears to be a significant issue with regard to design approvals and consents. In short my understanding is that it is CEC's contention that CEC should not be liable to BBS/SDS for a compensation event where CEC/BBS/SDS have agreed a programme for approval of drawings (which are up to standard) and CEC complies with it. I think CEC accepts the principle that if it requests changes which were not agreed/required (eg re-route the tram via George Street or gold-plate the rails) then CEC will foot the bill.

It was originally intended that before financial close most if not all of the approvals required would have been obtained by SDS. On that basis BBS would have been able to accurately specify and price the project materials, CEC would have approved the quality of design and materials used and there would be little or no risk of project delay as a result of lack of consents. The fixing of the overall price would also be much more certain.

Unfortunately the design process is now over 12 months late in delivery and I understand that SDS were put under no definitive timetable by tie (ie no penalties for non-timeous delivery). This is the unfortunate present position.

The problem which I understand that CEC now has is that tie have been leading the technical negotiations and CEC has little or no visibility of the actual proposed output in terms of design or quality. Indeed, CEC is not aware of the basis on which BBS priced the deal. The only benchmark which CEC can be sure of is that all designs must be up to a minimum standard in that they must comply with the tram design manual and other CEC policies and guidelines. However, unless there is a requirement to go beyond such minimum requirements in the ERs or the Infraco suite then this could lead to arguments as to what is "acceptable". CEC's minimum level and Infraco's minimum level may differ. I understand from planning colleagues that there may therefore be scope for arguments over what is "acceptable". This may lead to delays at CEC's expense.

To give an example, say the design submitted is up to the minimum standard as per the policies, but is not up to the standard which CEC were expecting to see. In such a scenario, it is likely that any added cost **including any consequent cost of delay**, will be for CEC to account for, despite the fact that CEC was expecting different quality or design in the first place.

There therefore appear to be two options:

1. CEC has to trust that tie has specified sufficient quality in the ER's/Infraco suite to ensure that CEC will be satisfied (both as tram promoter and as planning authority) and that the materials used will not (i) lead to design approval delay; or (ii) lead to increased maintenance costs; or
2. CEC has to satisfy itself prior to signing up that it is happy with all design and materials. Given the backlog in design, it is difficult to see how this option is viable as the only sure way to do this is go through the full approvals process.

On the basis that it is likely that option 1 is the most viable, CEC will have to consider the risk of accepting that delays in the planning and approvals process may give rise to a compensation event, despite the fact that the agreed deal may never have been up to CEC's standards (albeit that they are above the minimum standards required). On the basis that CEC does decide to accept this risk then the contract requires to provide that:

1. BBS/SDS confirm that all materials submitted for prior and technical approvals and other consents will be fully compliant with the tram design manual, all other relevant CEC policies and guidelines and the terms of the Infraco suite (including SDS contract) and ERs.
2. To the extent that any materials/drawings submitted are sub-standard (ie not compliant as per 1 above) then BBS will require to cover the additional costs, including the cost of delay (including any snowball effect).
3. To the extent that any changes to the consents are required which are not related to the minimum requirements or those requirements specified in the ERs or the Infraco suite, then the necessary result is that CEC/tie will be liable for the additional cost, including that of delay (including the snowball effect of delays).

The only remaining argument will then likely be around whether any snowball delay (ie the consequential effect of sub-standard drawings (either in CEC's or BBS's view) on subsequent weeks approvals) is for CEC or BBS's account. No doubt DLA can advise on drafting or principles here.

It is reasonable for BBS to assume that the requirements set out in the SDS or Infraco contract are the ones they should have to comply with. All others will rightly be seen by BBS as a CEC or tie change. To the extent that CEC does not have full visibility of these minimum acceptable requirements then this is a significant risk, but one which I understand has always been tie's responsibility to manage in the Council;s best interests. There does, however, remain a serious risk for cost overruns where there is a mis-match between CEC's requirements/expectations and what has been agreed by tie, especially where what has been agreed by tie has been driven by the "carrot" of price reductions to the overall contract price.

Linked to this issue is the BBS pre-ordering issue. If there are no final approved drawings how can BBS pre-purchase materials? If they do pre-purchase and CEC is not happy with the materials when subsequently approving the drawings, will CEC either (i) have to carry the cost of the wasted materials and/or (ii) effectively be ransomed into approving sub-standard drawings?

You'll recall that these issues were highlighted in brief in the Directors Briefing Note in late November. However, the full extent of the risk is becoming clearer as contract close gets closer with no appreciable advance in approvals being obtained.

It is obviously a matter to be discussed at a much more senior level, quantified by tie and added to the risk register, but I hope that the above explains the issues. It may be that CEC wishes to obtain comfort from tie that there is no mismatch between CEC's expectations and what tie has agreed. However, I'm not sure what comfort tie could provide in this regard.

Apologies in advance if I've misunderstood the issues at hand.

Kind regards

Nick

Nick Smith
Senior Solicitor
Legal Services Division
City of Edinburgh Council
City Chambers
High Street
Edinburgh EH1 1YJ

(t) 0131 [REDACTED]
(f) 0131 529 3624