



**EDINBURGH TRAM NETWORK**

**PROCUREMENT OF A MULTI UTILITIES DIVERSION  
FRAMEWORK AGREEMENT CONTRACTOR ("MUDFA")**

**NOTE ON KEY COMMERCIAL ISSUES**

**12 JULY 2006**

	<b>COMMERCIAL ISSUE</b>	<b>tie COMMENT/REQUIREMENT</b>
1.	<p>Liquidated damages of £50,000 per week up to an overall cap of £1.3m. Liquidated damages are triggered if the MUDFA Contractor fails to complete the MUDFA Works by the Longstop Date.</p> <p><b>DLA Piper Comment:</b> <i>One of the CARP Candidates has requested that the level of liquidated damages should be equated to the five Work Sectors which form part of the MUDFA Works, and that liquidated damages should be levied on a "tapering" basis. A justification for the level of liquidated damages needs to be prepared.</i></p>	<p>We discussed this issue on Wednesday night and you were going to obtain the paper prepared for Tramco by DLA Leeds to which I then fed in information on pre-estimates of loss. The levels were closer to £50,000 per day rather than per week.</p> <p>The Tramco pre-estimates were on the basis that late Tram delivery and commissioning leads directly to loss of revenue and abortive operating costs on opening of the system. As discussed, with MUDFA this basis is valid on the assumption that late completion of utility diversions also leads to Infraco being late in completion. This of course requires an examination of the way in which the MUDFA programme is on the critical path for Infraco works. This same examination would inform the consideration of the tapering basis proposed by one of the candidates.</p> <p>In addition to back to back liquidated damages provisions, a MUDFA delay also delaying Infraco could manifest itself in claims for extra cost by Infraco and those could be very significant indeed.</p> <p>At the end of the day, the MUDFA team need to consider the point where the liquidated damages provision goes beyond the level of acceptable norms to the tenderers and therefore the potential LDs simply get added to their tender price. It's clearly not value for money if this happens. Since we already have tenders are we not too late to form this judgement for MUDFA?</p>
2.	<p>Defects Correction Period of 5 years</p> <p><b>DLA Piper Comment:</b> <i>Both CARP Candidates have agreed in principle</i></p>	<p>I have more questions than answers: What was the rationale for a defects liability period</p>

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	<p><i>to accept this requirement. However, neither CARP Candidate has priced for this. Does tie still require a Defects Correction Period with a length of 5 years? CEC originally required a period of 3 years.</i></p>	<p>of 5 years? If neither candidate has priced for this, presumably they will do when we ask them the question. Presumably this might be significant? Can we get a differential price for 5 and 3 years? What period will they be used to giving a defects liability period for? What are CEC's requirements now?</p>
3.	<p>On demand £5m Performance Bond commencing on the Effective Date and ending at the expiry of the Defects Correction Period</p> <p><b>DLA Piper Comment:</b></p> <p><i>Both CARP Candidates have agreed to provide a Bond in these terms. tie to consider the time period over which this Bond is to be provided. Should the Performance Bond end on the issue of the last Certificate of Substantial Completion and be replaced by the Retention Bond?</i></p>	<p>This and the retention bond at 4 below also feel like a duplication of protection to me. Again I ask what the rationale was for the dual instruments when we put the tender together.</p>

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4.	<p>Retention of 3% or a £1.5m retention bond commencing on the Effective Date and ending at the expiry of the Defects Correction Period.</p> <p><b>DLA Piper Comment:</b></p> <p><i>Both CARP Candidates have offered to provide a Retention Bond on the above terms. Given the requirement for an on demand Performance Bond as described above, does tie require both Bonds to be in place for the same time period. CARP Candidates have commented that there is a duplication of protection.</i></p>	See 3 above.
5.	<p>Cap on liability</p> <p><b>DLA Piper Comment:</b></p> <p><i>One of the CARP Candidates has requested a cap on liability for £1.3m and the other has capped out its liability at 5% of the Final Account. tie to advise on its requirements. We suggest that advice is sought from TSS and Heath Lambert.</i></p>	What requirement did we draft into the contract and what was the rationale? What would be the market acceptable cap?
6.	<p>tie's Requirement for a Parent Company Guarantee</p> <p><b>DLA Piper Comment:</b></p> <p><i>Both CARP Candidates have agreed to provide a PCG. tie to confirm that this is still required.</i></p>	Yes – always a requirement.
7.	<p>Calculation of the Value Engineering Incentive ("VEI") and VEI payment thresholds of a minimum of £250,000 and a maximum of £1m</p> <p><b>DLA Piper Comment:</b></p> <p><i>Both CARP Candidates have agreed to accept the concept of VEI. tie to confirm that the thresholds and triggers for payment of this incentive are still acceptable. TSS will prepare an example showing how this incentive will work in practice.</i></p>	The calibration of this incentive is dependent on how high we have set the bar as I understand it. If the quantities in the contract are too conservative then it will be too easy for them to achieve and there will then be no incentive for them to make the juicier savings through true value engineering. I think I would like to see a TSS evaluation of the incentive. Was such an evaluation not prepared when we prepared the tender?
8.	<p>Provision of vehicles and site accommodation ends on the expiry of the Defects Correction Period</p> <p><b>DLA Piper Comment:</b></p> <p><i>tie to confirm its requirements. One of the CARP Candidates has suggested that the above provision of site accommodation and vehicles should end on the issue of the last Certificate of Substantial Completion.</i></p>	Can't comment on this one.

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9.	<p>Requirements for Collateral Warranties in respect of stakeholders</p> <p><b>DLA Piper Comment:</b></p> <p><i>Both CARP Candidates have asked that the parties who require warranties should be identified. We propose that Transport Scotland and CEC should be listed as the recipients of warranties. Is this acceptable? Do these entities require to see our proposed draft Collateral Warranty?</i></p>	<p>CEC would certainly require to receive the warranties – not sure why TS would require them.</p>