

### **Comments on DRP summary prepared by tie Limited**

The purpose of this note is to summarise the analysis carried out by CEC Legal, City Development and Shepherd & Wedderburn (“S&W”) of the DRP adjudication decisions when compared to the briefing document provided by tie limited for CEC.

The June Council report referred to 15 matters at DRP. These included:

Three disputed matters resolved by negotiation:

- Haymarket – This was agreed at £195k versus a £400k BSC initial position and a £96k tie position.
- Baird Drive – This was agreed at £915k versus a £3.9m (later £1.9m) BSC position and a £600k tie position.
- Balgreen Road – This was agreed at £295k versus an £800k BSC position and a £300k tie position.

and three resolved by mediation:

- Princes street bus lane – Whilst no figures were supplied, this was to be dealt with as part of Princes Street Supplemental arrangements
- Percentage uplift in prelims – No figures were provided.
- Extension of time 1 – This was agreed at £3.52m versus a £7.09m BSC position and a £3.52m tie position.

The remaining nine matters were resolved by formal adjudication:

- Hilton Car park – This was decided in tie’s favour with a saving of £90k as the BSC position was £90k and tie’s position was zero. tie found liable for one third of the fees and expenses with BSC liable for two thirds.
- Gogarburn Bridge – This was decided in BSC’s favour and tie were unsuccessful in the redress sought. In terms of cost it was determined at £176k against a tie estimate of £72.5k and a BSC estimate of £313k. tie were found liable for all the fees and expenses.
- Carricknowe Bridge – This was decided in BSC’s favour and tie were unsuccessful in the redress sought. In terms of cost it was determined at £138k against a tie estimate of £99.5k and a BSC estimate of £392k. tie were found liable for 75% of the fees and expenses.
- Russell Road Retaining Wall – This was decided in BSC’s favour and tie were unsuccessful in the redress sought. In terms of cost the issue in dispute was determined at £1.46m against a tie estimate of £701k and a BSC estimate of £1.84m (cited as £4.6m in the summary but this included a further two issues not taken to adjudication). tie were found liable for the fees and expenses. The commentary was not clear that tie were unsuccessful in the redress sought.

- Section 7 track drainage – This was decided in BSC’s favour. In terms of cost it was determined at £997k against a tie estimate of £25k and a BSC estimate of £1.35m. tie were found liable for 80% of the fees and expenses.
- Tower Bridge Place– This was decided in tie’s favour at -£261k, representing a saving of over £700k as BSC’s position was +£456k and tie position was -£305k.
- Depot Access Bridge - This was decided in BSC’s favour. In terms of cost it was determined at +£1.23m against a tie estimate of -£4.83m and a BSC estimate of +£2.48m (later reduced to +£1.82m). However tie’s position (and estimate) was based on the fact that an associated wall required to be taken into account. The adjudicator rejected this argument, although any sums relating to this wall could still be recoverable via a further DRP. tie were found liable for all the fees and expenses.
- Mudfa Rev 8 – This was decided in BSC’s favour, but for an extension to Section A only of 154 days. The overall value of this was not provided but tie’s defences stood up for much of the case. Each party were found liable for one half of the expenses.
- Murrayfield underpass – This was decided in BSC’s favour. The value was relatively insignificant (less than £50k) but it was an important result as tie are unable to instruct works in such scenarios. This DRP should likely never have proceeded on the basis it did as on later examination of the detail it was clearly going to fail from the outset as no estimate was agreed and the clause tie relied upon required an estimate to have been agreed. tie were found liable for all the fees and expenses.

In terms of looking at which party has ultimately succeeded at DRP then you will see from the above that the three negotiated settlements and three mediations all increased the overall base project cost, meaning that BSC “won”. Seven of the adjudications went to BSC and two went to tie. Therefore an overall 13:2 BSC versus tie win/lose ratio is correct. However, it is also true to say that there has been a significant saving to the public purse through the application of the DRP process. Such savings do, however, have to be offset against any additional legal and management costs required to achieve such savings. These have not been provided (nor asked for to date). The question of wins and losses therefore very much depends on the definition of “winning” used.

It should also be noted that the value of the "saving" as described by tie/DLA is also a grey area as the value of claim submitted by Infraco at point of adjudication is in some cases reduced from their opening claim value. It should also be noted that the interpretation of the pricing schedule is not clear from the decisions to date (Adjudicators Hunter and Wilson coming to broadly different conclusions). However, regardless of their views on the pricing principle, both adjudicators found against tie in terms of the issues before them.

S&W also reviewed the decisions from a legal perspective. They were simply reviewing tie’s summary of the decisions against the actual decisions and they were not asked to expand into commenting on the rights or wrongs of the decisions themselves. Their comments on the summary which tie provided were that:

- Overall, the commentary identifies the “main issues” raised in each adjudication.

- The commentary did not include any reference to award of expenses (now included above);
- The commentary did not clearly summarise the arguments advanced by the parties nor was it clear who had ultimately been successful.
- The overall impression is that, whilst not inaccurate, the commentary conveyed surprisingly little hard information.
- With regard to at least three of the adjudications, they noted that the commentary was not clear that tie were unsuccessful in the redress sought.

In conclusion, whilst tie's summary is not inaccurate, it appears to present the DRP findings in the best possible light as opposed to giving a clear and concise presentation of the facts. We would agree that BSC are indeed entitled to to claim a 13:2 win rate, the overall increase in project costs has been reduced by taking these matters to DRP.

Although we have not seen the decision yet, it appears that tie have also lost the latest Landfill Tax DRP.

3 December 2010