

Edinburgh Tram Project

Mediation between

**tie Ltd
and
Infraco**

Opening Statement of Infraco

1 Infraco – Dr Jochen Keysburg ("JG")

1.1 JG introduced himself as Chairman of the Bilfinger Executive Board before thanking parties, particularly CEC, for making this Mediation happen.

1.2 JG stated that the current situation was unacceptable for what were 3 reputable international companies, and for a reputable city. He stated that the reputational damage could not be underestimated.

1.3 JG agreed with Sue that there should be a strong commitment to find a solution. The view was also expressed, however, that if a solution was not found over the next four days, then a solution may never be found. The result of this would be that one party would have to pay.

1.4 JG said that Infraco had been fully committed to producing their Project Phoenix proposal. It would be necessary to start at the top and agree on principles to move forward. If agreement could be achieved at that level, then agreement on the detail may follow thereafter.

1.5 Finally, JG said that he had not had direct in depth involvement in the project and was therefore not overly familiar with the detail. In that respect, he then handed over to Richard Walker to give Infraco's opening statement in full.

2 Introduction – Richard Walker ("RW")

2.1 RW opened by introducing himself as the Managing Director of Bilfinger Berger Civil UK Ltd, the Chairman of the Infraco consortium and a signatory to the Infraco Contract.

2.2 RW noted he would respond to Sue Bruce's specific points during later discussions.

3 Project Phoenix

3.1 RW stated that his view was that Infraco had been dragged into this impasse and deadlock situation, by tie.

3.2 Infraco's Project Phoenix proposal was stated as giving a fixed price lump sum from the Airport to Haymarket. RW acknowledged that CEC required a tram line from Edinburgh to St.Andrews Square.

4 Objectives

4.1 RW stated that the key objective were:-

- (i) to obtain agreement on the Project Phoenix proposal;
- (ii) revise the terms and conditions; and
- (iii) achieve a mechanism to allow for a bolt on extension, to satisfy the Haymarket to St.Andrews Square aspect.

4.2 RW noted that consideration had also been given to Project Separation, however it was true that everyone in the room wanted to achieve a revenue earning tram service.

5 Why Project Phoenix

5.1 RW stated that they had arrived at the need for Project Phoenix for the following reasons:-

- (i) a fundamental difference between the parties in relation to the interpretation of the contract;
- (ii) conflict between the client and the project management roles;
- (iii) the fact that essentially tie are the problem – and that is something that has to change; and
- (iv) of 13 adjudications, 12 of the decisions have been disputed by tie.

6 Benefit of Project Phoenix

6.1 RW noted the following, as being the key benefits of coming to agreement on Project Phoenix:-

- (i) avoid wasting the £400 million already spent by CEC;
- (ii) achieve price and time certainty for CEC;
- (iii) provision of a revenue earning service; and a
- (iv) avoid disputes.

7 Successful Projects

7.1 RW then considered what characteristics a successful project has, and noted these as being the following:-

- (i) a defined and agreed scope;
- (ii) a defined and agreed design;
- (iii) clear terms and conditions;
- (iv) clearly identified price; and
- (v) effective delivery.

8 Project Funding

8.1 RW then put forward a high level analysis of the figures in question.

8.2 The published budget was noted as being £545 million. Of this RW stated that £405 million had been spent to date. This leaves £140 million.

8.3 RW stated that £179 million had been paid to Infraco.

8.4 This leaves £270 million remaining for Project Phoenix.

9 Tender Concept

9.1 RW stated that the contract was initially tendered for on a build only basis. RW also stated that the utilities and design were supposed to be completed by the time of the award.

9.2 RW stated that at the time of the award, each of the following remained incomplete:-

- (i) Utilities;
- (ii) Design; and
- (iii) Third Party Stakeholder Agreements

9.3 RW stated that at this point, tie then had the following three options:-

- (i) delay the award of the contract; or
- (ii) accept the large Infraco contingency for dealing with the incomplete aspects; or

(iii) for tie to take the outstanding risks on themselves.

9.4 RW stated that tie took the third option noted above, and took on the outstanding risks themselves.

10 Commencement of Works

10.1 RW stated that following the signing of the contract, Infraco commenced works, despite the fact they were faced with restricted or no access in some areas.

10.2 RW stated that after commencement of works, tie refused to acknowledge Infraco's entitlement to claims. RW referred to a quote from the previous Chairman of tie in which he told the press that Infraco "would not receive a penny more".

10.3 In January 2009, Infraco came to the decision that they had to apply the contract rigorously.

11 Princes Street

11.1 RW stated that for Princes Street, an agreement was sought to provide a future platform from which to carry on works.

11.2 With specific regards to the quality of the works on Princes Street, RW stated that he accepted there were issues with the quality and that he wished to put this right.

11.3 RW stated that despite an agreement to continue works on a cost reimbursement basis, tie still sought to dispute the issue.

12 Contract

12.1 RW stated that whilst the concept of the contract was as a design and build contract, tie retained the risk under Schedule Part 4.

12.2 RW then referred to the specified exclusions and pricing assumptions and stated that if the facts differ in the works, then a notified departure occurs.

12.3 RW then quoted from paragraph 3.2.1 of Schedule Part 4 which states the following:-

"It is accepted by tie that certain Pricing Assumptions have been necessary and these are listed and defined in section 3.4 below. The Parties acknowledge that certain of these Pricing Assumptions may result in the notification of a Notified Departure immediately following execution of this Agreement. This arises as a consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the

parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply."

12.4 RW stated that the inference from this was quite clear. As Infraco commenced the works based on incomplete design, it was explicitly provided for in the contract that changes may have to be made against a developing factual background. Thus, the fact that Infraco made claims for Notified Departures was in fact anticipated when the contract was agreed.

12.5 RW then referred to Clause 4.3 of the Infraco Contract which states the following:-

"Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing).

12.6 RW emphasised the words *"Nothing in this agreement"* stating that Infraco were well within their rights to claim additional relief or payment under Schedule Part 4.

12.7 Finally, RW referred again to Schedule Part 4, paragraph 3.2.1 and stated that this took them straight to clause 80 – not to clause 65 as was argued by tie.

13 Major Differences

13.1 RW noted the major differences between the parties, as being the following:-

- (i) The primacy of Schedule Part 4 of the Infraco Contract;
- (ii) Payment mechanisms for differences/changes to the works;
- (iii) Right to exclusive access (designated working areas);
- (iv) Application of Clause 80; and
- (v) Application of Clause 65.

14 Scope Change

14.1 RW stated that the consequence of a change was that it amounted to a notified departure.

14.2 RW stated that the change mechanism was provided for within the contract.

14.3 RW stated that tie had persistently failed to recognise a change when it occurred.

15 Design Approval Process – Roseburn Viaduct

- 15.1 RW then referred to what he considered to be the correct design approval process.
- 15.2 RW then referred to the issues at Roseburn Viaduct, and stated that tie had taken the value engineering. RW said tie had signed a legally binding agreement with the SRU to implement value engineering.
- 15.3 RW stated that what tie had not done in this case, was take the CEC planning authority with them.,
- 15.4 RW stated that the approval process took 30 months rather than the 90 days which it was supposed to take.
- 15.5 The issue of design approval process had also arisen in relation to Picardy Place, Airport Kiosks, RBS Gogarburn and at various tram stops.
- 15.6 In total the delay to Roseburn Viaduct is 30 months. This resulted in an inevitable delay to the programme.
- 16 **Russell Road Retaining Wall**
- 16.1 RW stated that a significant change arose in relation to this aspect of the works, from the BDDI to IFC Change.
- 16.2 It was noted that eventually Infraco received a letter from tie, which said that a change might be applicable.
- 16.3 There was also an issue in relation to contaminated soil. RW said that Richard Jeffrey had acknowledged responsibility for the contaminated materials rested with tie. Despite this, the issue became the subject of an adjudication, where the decision was in favour of Infraco.
- 16.4 RW said Infraco submitted an estimate of £4.5million. This was initially reduced by Infraco, by £2.5 million, and then again by £180k, at the instance of RW.
- 16.5 tie still said that no change was applicable.
- 16.6 The adjudicator then found in favour of Infraco for £1.46 million.
- 16.7 There was then a further 6 weeks before Infraco received the change order.
- 16.8 RW stated that he believed the RRRW dispute was about principle rather than money. He considered this to be the case on the basis that 16 months had been spent on what was a relatively insignificant difference between the parties (15%).

16.9 RW stated that the change should have been recognised, acknowledged and negotiated.

17 Access to Depot

17.1 RW said that Infracore were entitled to unrestricted access to the depot site under the Contract, and that it would be pumped dry and free from utilities.

17.2 RW then showed a photo of the depot site from January 2009 which showed flooding and ongoing work on the utilities.

17.3 RW then showed a photo from February 2009 in which the situation had not improved much.

17.4 RW then noted the following as core issues:-

- (i) TCO No.28 agreed on 2 April 2009;
- (ii) total tie delay was 11 months;
- (iii) Infracore are entitled to EOT and cost
- (iv) MUDFA still occupied the site;
- (v) tie refused to recognise

18 Depot Delays Graph

18.1 RW then showed a graph which set out delays to the depot works.

18.2 It was stated that in October 2010 Infracore decided they had to stop and enforce the contract rigorously.

18.3 The earliest possible completion date now, is December this year.

19 Current Delays

19.1 RW stated that total delays are potentially 27 months.

19.2 RW attributed these to the intransience and refusal to acknowledge changes, of tie.

20 On Street Works

20.1 RW stated that at a meeting with tie the OSSA was developed in cooperation with tie, but was thereafter suddenly rejected by tie.

20.2 RW stated that on street works could have been commenced a year ago, however there was still the possibility that the previous arrangement could be looked at, tweaked slightly and used as a bolt on to the Project Phoenix Proposal

21 Presentation On Street Works Issues

21.1 RW then showed a video presentation, which outlined the alleged problems between Lothian Road and Haymarket.

21.2 The film provided the following:-

- (i) the utilities were the key problem in this area;
- (ii) a 1.2 meter exclusion zone was required underneath the areas where the tracks were being laid, which should be free of utilities;
- (iii) 368 utility conflicts were identified and this was a non exhaustive list;
- (iv) a utility conflict is where the utility encroaches into the exclusion zone.
- (v) utility conflicts were often discovered during the process of carrying out the works;
- (vi) utilities are excluded from the Infraco contract;
- (vii) the process of works was halted whilst they were dealt with;
- (viii) every single utility has to be identified and dealt with – this may be done quickly in some instances, but may take longer (up to months) in other instances;
- (ix) Infraco is ready and able to carry out the necessary works subject to them receiving the proper instruction; and
- (x) Infraco cannot give a fixed price for works on the basis of the uncertainty of the utilities.

22 tie Mediation Statement

22.1 RW then referred to the Audit Scotland Report which tie had included at Exhibit 5. RW stated that Infraco had not been consulted when this report was produced.

- 22.2 RW referred to paragraph 44 which states that tie had achieved a 47% saving through claims. Infraco do not recognise these figures. RW stated that these words and numbers amounted to nothing more than spin.
- 22.3 RW referred to exhibit 10 in which it was noted that the committed costs had been exceeded by £1 million. RW noted that this is likely an uncomfortable position for CEC.
- 22.4 RW then referred to the mediation statement and said that this was simply the same old points/arguments, which had simply been reworked and presented more eloquently by tie's new advisors.
- 22.5 RW used the analogy of the US Presidential Race between Al Gore and George Bush and referred to a quote which said "The other party must respect and acknowledge the decision and move on".
- 22.6 RW questioned why tie think they are entitled to continue to persist with the same arguments (which Infraco consider unfounded).
- 22.7 RW suggested that if that is what tie want to do, they should do it in court.

23 **Proposed Delivery**

- 23.1 RW outlined Infraco's proposals for moving the project forward, which included the following:-
- (i) CEC becomes the client;
 - (ii) An experienced project manager replaces tie;
 - (iii) Infraco contracted to CEC;
 - (iv) Project Board is formed with representatives from Infraco, CEC, Transport Scotland, also possibly with an independent chairman.

24 **Summary**

- 24.1 RW outlined the following final main points:-
- (i) tie should accept the principles set out in independent and binding adjudication decisions;
 - (ii) put the city of Edinburgh first;
 - (iii) Infraco proposal should be utilised; and

- (iv) the right people should be found to take the job forward.