
From: Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]
Sent: 20 March 2007 10:31
To: Stewart McGarrity
Cc: Graeme Bissett; Bob Dawson
Subject: RE: Tram Funding Agreement

Stewart

Thanks for this. Couple of comments:

1. On risks, from TS perspective, I would have thought that CEC is in position to generate a risk/cost increase- whereas TS is not (barring there being a delay on funding availability). TS therefore more in a passive role.
2. Noted in relation to the timing of agreements and production by TS of the AWPR and CEC documents. How do you see the **tie** -CEC agreement developing? HoTs and then detailed drafting or is there a template in mind?
3. Given Geoff's e-mail to you yesterday on possible Infraco/Tramco bidder requirements., do you see waiting until TS and CEC reach agreement before any letters of comfort/undertakings are produced?

Just as a note, you may know on the EARL project, a letter of undertaking from TS was provided to cover **tie's** commitments under the Nov '06 **tie** -EAL Master Agreement. An identical refresher of this letter (to support the **tie** -EAL Development Agreement) has now been questioned by TS Legal at last minute on the grounds that (i) it creates a contingent liability and (ii) could constitute State aid (i.e. an anti - competitive advantage). This matter was addressed by Damian, but I am not yet clear exactly how. It did delay the signature of the EAL - **tie** agreement and because of bidder sensitivity and I would want **tie** to have full confidence that what TS and CEC can offer on the tram is not in some way conditional or open to question in any way.

kind regards

From: Stewart McGarrity [mailto:Stewart.McGarrity@tie.ltd.uk]
Sent: 20 March 2007 06:45
To: Graeme Bissett; Damian.Sharp@transportscotland.gsi.gov.uk; Donald McGougan; Andrew Holmes; Matthew Crosse; john.ramsay@transportscotland.gsi.gov.uk; rebecca.andrew@edinburgh.gov.uk
Cc: Bill Reeve; david_mackay@██████████ Neil Renilson (TEL); Willie Gallagher; Fitchie, Andrew; Miriam Thorne
Subject: RE: Tram Funding Agreement

Dear All,

These are my notes and actions from yesterday's meeting. Corrections, clarifications or additions are welcome.

Present: Damian Sharp, John Ramsay (both TS) , Andrew Holmes, Donald McGougan, Rebecca Andrew (all CEC), Neil Renilson (TEL), Matthew Crosse, Stewart McGarrity (both **tie**)

(1) We agreed the principle that we should have two 'client side' agreements - one between TS and CEC and another between CEC and tie as envisaged in the discussion paper. However there was a very strong preference on the part of TS and CEC not to split the funding into 3 separate funding streams (Infraco / Tramco, land costs and tie direct costs) i.e. the desire is to consider the total cash flow requirements of the project as one and for the relative TS/CEC contributions to be determined with reference to that single funding stream.

Action:

- S McGarrity / G Bissett to consider what problems or complexities this might introduce in practice.

(2) We recognised the need to agree the value of the CEC / s75 land contribution element of CEC's £45m and therefore the balancing cash element to be provided by CEC. Further details of the proposed approach to delivering the £45m are provided in a paper to the TPB on 20/3.

(3) There was an acknowledgement by D Sharp that there needed to be risk sharing mechanisms in the agreement between TS and CEC to deal with eg cost overruns. There was an emerging consensus that effecting this risk sharing by allocating individual risks retained by the public sector to either either TS or CEC should be avoided wherever possible in the interests of clarity/simplicity in the agreement, to avoid disputes as to which party is responsible for any given risk/event and to recognise the relative financial capacity of TS or CEC to bear risks. The basis of sharing would be in proportion to the overall capital contributions and the the sharing percentages being discussed round the table were TS 91% - CEC 9%. (Post meeting note: These figures presuppose that we are talking about Phase 1a only, that it will cost £500m in total, that CEC's contribution will be £45m and TS would provide the balance of £455m. This requires further discussion).

(4) The simple proportional risk sharing principle above also recognises the role of the inclusive governance structure through the TPB in monitoring and controlling changes to agreed scope and programme and therefore changes to costs. However D Sharp highlighted that TS would need to approach Ministers with a view to understanding whether or not this proposed principle would be acceptable to them. All parties agreed to consider the list of 'contingent factors' in the discussion paper plus any other risks or uncertainties and identify those they feel could merit separate treatment/allocation. Possibility of TS taking on responsibility for delivering the Network Rail immunisation works needs separate consideration.

Actions:

- D Sharp to procure consultation with A. Cauldwell to determine if this overall principle would be acceptable to Ministers - prior to end March.

- All parties to identify risks which may merit specific treatment / allocation and circulate details.

(5) We noted that the drafting of the agreement should include provisions specifying the decision making process and criteria by which the decision to proceed with Phase 1b will be made. This may be important from the point of view of the Infraco bidders and price negotiation. We also recognised that the ratio of funding contributions and risk sharing will probably be different for Phase 1b and are in any case dependant upon the outcome of price negotiations for Phase 1a.

(6) D Sharp asked that CEC consider whether they think the TS grant should be fixed in nominal terms at the outset (inflated at actual plus projected inflation indices) or continually indexed throughout the project in light of the actual outturn inflation indices as prescribed by TS. Damian noted it works both ways on different TS projects. He also noted that the maximum indexed grant as calculated now based on cost profile data supplied by tie is less than the £500m included in the DFBC. This is a complex and to an extent (in selection of indices) subjective subject requiring further careful discussion.

(7) On documentation - TS already have an agreement in place for the Aberdeen Western Peripheral Road which has many elements similar to the one we are trying to create here between TS and CEC and this will be distributed for review together with the TS/CEC funding agreement in its draft form insofar as it was developed in the summer / autumn of 2006. It was agreed that it was important to get agreement to the high level principles before drafting proper / legal input commences.

Action:

- TS to distribute AWPR agreement and previous draft of a TS/ CEC funding agreement in relation to the Tram to all parties.

(8) On programme - We did not achieve the development of a detailed programme but there was consensus that the meat of the agreements would need to be drafted and in place around June to match with a programme of having the Infraco negotiations completed during the summer. We agreed all actions identified above to be completed by the date of our next meeting.

Next meeting: 17th or 18th or April. D Sharps secretary to liaise with A Holmes secretary and others to arrange an acceptable time.

Stewart

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