



**NOTE ON THE APPORTIONMENT OF INFRASTRUCTURE DESIGN RISK AND THE  
APPOINTMENT OF A DESIGN TEAM BY TIE**

**EDINBURGH TRAM NETWORK**

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**1. Background**

**tie** wants to appoint a design team as soon as possible for two main reasons:

- 1.1 to achieve the infrastructure programme; and
- 1.2 to facilitate and maintain control of the design process in "sensitive" design areas which will be subject to control from CEC or other bodies (e.g. Princes Street and its World Heritage status, Leith Walk and its impact on other road users, Leith Docks and the sea walls, various structures etc which are listed or are in conservation areas).

In appointing this design team, there needs to be a consideration of how the risk associated with the preparation of the design is managed, and which party is best placed to manage that risk. The choice of parties available to manage this risk are **tie**, **tie's** design team (to be appointed) and the infrastructure provider (to be appointed). Importantly, there needs to be careful consideration of how the procurement of the design team sits with the procurement strategy for infrastructure, tram vehicles, system integration etc.

At our Infrastructure Team Meeting on 7 April 2004, the issue of design risk was discussed. It was proposed by IK that the new technical team which is currently being procured by **tie** via OJEU Notice for infrastructure/design services and services to be provided post Royal Assent on all Lines, should be novated to the infrastructure provider.

In this note, the following issues are considered:

- requirement for an early decision on the procurement of the design team;
- the advantages/disadvantages of novation;
- alternatives to novation;
- what should **tie** do about the current procurement process for technical advisers? and

- issues for discussion at the next infrastructure meeting.

## 2. Requirement for an early decision on the procurement of a Design Team

As stated above, **tie** wants to appoint a design team as soon as possible to achieve programme and facilitate/maintain control over the design process in "sensitive" design areas. Given that **tie** has just issued an OJEU Notice for technical advisers (which includes design services) and is awaiting responses to the pre-qualification questions for this OJEU Notice by [5] May 2004, an early decision needs to be taken by **tie** as to how these design services are to be procured.

The current OJEU Notice and Memorandum of Information (MOI) have been drafted very widely and relate to a whole range of technical services to be provided post Royal Assent for all Lines, including design services.

In considering how to progress this procurement, **tie** needs to consider whether this procurement fits with the overall strategy for infrastructure procurement given that the strategy for infrastructure procurement and the apportionment of design risk is evolving. Also, **tie** needs to consider the impact on the design consultants who have expressed an interest in bidding for the new commission - what are these consultants bidding for? A long-term commission for **tie** or a commission which is to be novated to an infrastructure provider?

## 3. The Advantages/Disadvantages of Novation

"Novation" refers to a scenario where a new contract is created with a new contracting party "stepping into the shoes" of one of the original contracting parties. The original contract continues as if the novated contracting party was never a party to that contract, and with all obligations of that party being extinguished. The new contracting party is responsible for the obligations of the novated contracting party. By comparison, "assignment" does not create a new contract but relates to the transfer of specified rights.

The pros and cons of novating of **tie**'s design team to an infrastructure provider are set out below:

- Pros:*
- novation of **tie**'s design team sits with the concept of the infrastructure procurement route being considered by **tie** which would involve the contracts for tram vehicles, system integration etc being novated to the infrastructure provider;
  - design risk is transferred to the infrastructure provider but this risk can be managed by the infrastructure provider by being "backed off" to the novated design team;
  - there is continuity of design of the "sensitive" design areas by the same design team (especially important if the design is not complete); and
  - the infrastructure provider's costs may decrease given that the infrastructure provider will not have to get a new design team up to speed on the design for the "sensitive" design areas.

- Cons:*
- acceptability to the technical consultants. Following the Blyth v Blyth case, consultants are wary of novation and may prefer to continue working for **tie** rather than being novated to a contractor;
  - acceptability to the infrastructure provider. Given that the design risk will lie in its entirety with the infrastructure provider, contractors may prefer to work with their own design teams rather than have **tie's** team "imposed" on them;
  - dependant on what **tie** decides in relation to the current procurement for technical advisers, there would be a loss to **tie** of its technical team to the infrastructure provider, and requirement to re-procure or re-structure the requirement for technical services if the current procurement process is continued. (See Section 5 of this Note for further discussion.);
  - pre-novation, **tie** could be working with two different technical teams unless procurements are phased;
  - post-novation, **tie** will only be able to rely on a warranty from its design team as the contractual "nexus" for the design work carried out for **tie** pre-novation;
  - costs may increase ? - depends on the attitude of the infrastructure provider and the technical consultants to novation;
  - there may be additional costs associated with the infrastructure provider having two design teams as the infrastructure provider may have a separate design team working on "non-sensitive" design areas and the interface with the design prepared by the novated **tie** design team (this could be the case in any option); and
  - the infrastructure provider may not carry out the same level of diligence on the design prepared by **tie's** design team.

#### 4. ALTERNATIVES TO NOVATION

The apportionment of infrastructure design risk could be dealt with in the following alternative ways to novation of **tie's** design team:

4.1 Design risk retained by **tie** in relation to "sensitive" design areas and design liability for these "sensitive" design areas ultimately retained by **tie's** design team. The infrastructure provider would only have design risk for any design prepared by it in relation to "non-sensitive" areas and any design interface with "sensitive" design areas. Indemnity to be provided to infrastructure provider by **tie** with regard to any design for "sensitive" design areas which caused losses etc to the infrastructure provider because of deficiencies in the design.

- Pros:*
- design team is retained by **tie** and is available to **tie** to monitor the design carried out by the infrastructure provider and its design team; and
  - acceptability to the infrastructure provider.

- Cons:*
- design risk for "sensitive" design areas is borne by **tie**;
  - non-acceptability to **tie** of giving an indemnity to the infrastructure provider;
  - reliance on design team's PI cover by **tie** - (but contractor's PI cover is not likely to higher but higher financial covenant from the Contractor?); and
  - will design carried out by **tie**'s design team be complete ?

4.2 Entire design risk (including design risk for "sensitive" design areas) is passed to the infrastructure provider with no indemnity from **tie** to the infrastructure provider for the design prepared by **tie**'s design team.

- Pros:*
- design team is retained by **tie** and is available to **tie** to monitor the design carried out by the infrastructure provider and its design team;
  - design risk is completely borne by the infrastructure provider;
  - no risk retained by **tie**;
  - consistent with PFI/PPP approach; and
  - requirement on infrastructure provider to carry out a full due diligence exercise on the design prepared by **tie**'s design team.

- Cons:*
- more expensive option as the infrastructure provider will price the risk of taking on the design prepared by **tie**'s design team with no indemnity from **tie**, and the infrastructure provider will have to get a new design team up to speed on the design for "sensitive" design areas;
  - acceptability of this approach to the infrastructure provider; and
  - no continuity of design by the same design team (especially important if the design is not complete).

4.3 Entire design risk (including design risk for "sensitive" design areas) is passed to the infrastructure provider with no indemnity from **tie** to the infrastructure provider for the design prepared by **tie**'s design team but a collateral warranty from **tie**'s design team is given to the infrastructure provider.

- Pros:*
- design team is retained by **tie** and is available to **tie** to monitor the design carried out by the infrastructure provider and its design team;
  - design risk is completely borne by the infrastructure provider;
  - no risk retained by **tie**;
  - requirement on infrastructure provider to carry out a (full) due diligence exercise on the design prepared by **tie**'s design team but with risk for the "sensitive" design areas being backed off by a warranty from **tie**'s design team.

- Cons:*
- acceptability to the design team of providing a warranty (OJEU Notice refers to requirement on design team to provide warranties);
  - acceptability to the infrastructure provider of relying on a warranty;
  - more expensive as both the Infrastructure Provider and design team with price the risk of relying on/providing a warranty;
  - will the design on the "sensitive" design areas be complete ? What is being warranted ? and
  - no continuity of design by the same design team (especially important if the design is not complete);

## 5. What should tie do about the current procurement process for technical advisers?

Dependent on whether novation or an alternative to novation is chosen by tie with regard to the apportionment of infrastructure design risk, a range of options could be applied by tie to the current procurement of technical advisers.

### 5.1 Continue with the procurement process and use an alternative to novation

- Pros:*
- current process is continued with no delay and with no re-procurement costs;
  - "clean" procurement, with tie and bidders clear on objectives of procurement process; and
  - avoidance of conflicts of interest.

*Cons:* - infrastructure procurement is not determined and this route may not sit with ultimate infrastructure procurement strategy.

### 5.2 Suspend the procurement process after close of receipt of expressions of interest in May until a decision on the interaction of this procurement with the infrastructure procurement is taken.

*Pros:* - tie and bidders will be clear on objectives of procurement process once a decision is taken.

*Cons:* - delay in procurement programme; and

- potential loss of confidence in procurement process ?

### 5.3 Stop the current procurement and start process again. If a novation route is being followed, issue an OJEU Notice for design services and tell bidders that their contract will be novated to the infrastructure provider. Issue a separate OJEU Notice for the technical services which will not be novated. Tell bidders that they can bid for both commissions but that tie will award the contracts to different bidders so as to avoid any potential conflicts of interest.

*Pros:* - "clean" procurement, with tie and bidders clear on objectives of procurement process; and

- avoidance of conflicts of interest
- Cons:*
- procurement will require to be started again with associated costs;
  - delay in procurement programme; and
  - potential loss of confidence in procurement process ?
- 5.4 Continue with the current procurement, appoint advisers and then novate the contract to the Infrastructure Provider. The contract which would reflect the services set out in the OJEU Notice/MOI could not be novated to the Infrastructure Provider as the range of services covered would be far too wide. Therefore, the services which were not relevant to the infrastructure provider would require to be removed from the novated contract.
- Pros:*
- current process is continued with no delay and with no re-procurement costs.
- Cons:*
- acceptability to the technical team who are to be novated - the consultants may have preferred to carry out on-going services for **tie**;
  - there is a risk of a potential procurement challenge because the OJEU Notice and the MOI were drafted on the basis of there being only one contract for technical advisers;
  - potential loss of confidence in procurement process ? and
  - further procurement of technical advisers would need to be initiated with associated costs.
- 5.5 Continue with the current procurement, tell Bidders that there will be two contracts - one for design which will be novated and one for on-going technical services to be provided to **tie**. Explain that due to potential conflicts of interest, one bidder cannot be appointed to perform both contracts.
- Pros:*
- current process is continued with no delay and with no re-procurement costs.
- Cons:*
- bidders may not favour novation and may not bid for the design contract which is to be novated;
  - potential loss of confidence in procurement process ?
  - there is a risk of a potential procurement challenge because the OJEU Notice and the MOI were drafted on the basis of there being only one contract for technical advisers.
- 5.6 Continue with current process. Set up the contract for the appointment of technical advisers so as the design services/design could be assigned to the Infrastructure Provider. A "Chinese Wall" would be set up between assigned team and team remaining with **tie**.
- Pros:*
- current process is continued with no delay and with no re-procurement costs; and

- **tie's** technical team retained for on-going services
- Cons:*
- bidders may not favour assignation;
  - residual risk of there is partial assignation? and
  - management of conflicts of interest could be too problematic.

## 6. **Issues for Discussion at Next Infrastructure Meeting**

- 6.1 Time criticality of appointing design team - how does this sit with the infrastructure procurement programme ?
- 6.2 Can **tie** wait to make a decision on the procurement of technical advisers after the market testing of infrastructure providers has taken place ?
- 6.3 How much design will be prepared before the infrastructure provider is appointed ? What will be novated/assigned ?
- 6.4 What do **tie** tell the infrastructure provider in the Infrastructure ITN ?
- 6.5 What is the cost/benefit analysis of allocating all risk to the infrastructure provider ? Is there benefit to **tie** in paying an infrastructure provider to carry out a due diligence exercise on design prepared by **tie's** design team ? Could this diligence exercise uncover latent defects ? Would this be done in any event by the infrastructure provider as it will be carrying full risk for "non-sensitive" design and for design interface with the "sensitive" design ?
- 6.6 Does **tie** want to retain the same set of technical advisers to supervise the infrastructure design and carry out the other technical services (which could include network extensions)? Can these roles be separated ?
- 6.7 Review of standard **tie** terms and conditions will be required.