

## Edinburgh Tram Network

### Factual background in relation to Pricing Assumption 1<sup>1</sup>

- 1 The agreement between tie and the SDS Provider was entered into on 19 September 2005. The SDS Provider developed the Employer's Requirements from a high level as part of their scope of work under the SDS agreement, although some development of the Employer's Requirements was also carried out by tie themselves.
- 2 From the issue of the invitation to negotiate on 3 October 2006 until the end of October 2007, there were two bidders in live competition: Infraco (Bilfinger Berger and Siemens) and Tramlines (Laing O'Rourke, Grant Rail and Bombardier). During this period, tie sought to evaluate the bids in order to arrive at a preferred bidder and a reserve bidder. The bidders had full access to the design as it had evolved, and to the SDS Provider.
- 3 On 22 October 2007, tie and the Infraco entered into an agreement in relation to selection for appointment as preferred bidder<sup>2</sup>. tie and Tramlines entered into an equivalent agreement. The preferred bidder agreement was based upon "the Draft Deal". Part of that Draft Deal was a schedule in relation to price. The price schedule at that time consisted of a contract price analysis (which still required further development). It was also a term of the preferred bidder agreement that the preferred bidder would have the SDS Provider (and the tram supplier, CAF) novated to them, contemporaneously with execution of the construction contract. It was subsequently agreed that CAF would instead join the BBS consortium.
- 4 In the run up to the selection of the preferred bidder, both bidders made their Best and Final Offer. BBS' BAFO was £208,700,342.
- 5 On 5 November 2007, the BBS consortium was appointed preferred bidder. That appointment almost immediately triggered a series of negotiations in relation to contractual, commercial and technical issues, which went far beyond the scope of the Draft Deal. Bilfinger Berger were represented by Pinsent Masons, and Siemens by Biggart Baillie. The aim was to achieve financial close during the week commencing 11 January 2008.
- 6 To this aim, the final business case was issued by tie on 7 December 2007<sup>3</sup>. One of the key drivers was that there would be a single point of responsibility for design, construction, integration, commissioning and maintenance. In relation to design, this would be achieved by novating the SDS Provider to the Infraco. The business case was to be presented to City of Edinburgh Council on 20 December 2007 for acceptance by formal full council resolution whereby specific delegated authority to execute the contracts would be granted to tie.
- 7 On 11 December 2007, tie wrote to BB<sup>4</sup> to ask them to, amongst other things, fix their price save in relation to a few specified exceptions where the design was not available. This letter was essentially the opening salvo in the negotiations which took place in Wiesbaden later in the same week. One of the purposes of those negotiations was to reach a landing on how the risk in relation to design was to be apportioned. It was recognised that the level of much of the design was preliminary at that stage. The principal issue for tie was balancing cost with risk.
- 8 BB's response was sent on 12 December 2007<sup>5</sup>. In relation to price confidence, they stated that "*we have considered fixing our price on the information provided and believe that we are able to do this in all areas where the design is available.*" They then made reference to

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<sup>1</sup> Taken from discussions on 17 February 2010 with Steven Bell and Dennis Murray of tie and Andrew Fitchie of DLA Piper; discussions with Geoff Gilbert on 24 February 2010 and correspondence/e-mails provided by Stewart McGarrity

<sup>2</sup> Document B

<sup>3</sup> Document C

<sup>4</sup> Document D

<sup>5</sup> Document E

a schedule of items which had previously been described as "provisional", but in relation to which a fixed price would be agreed essentially upon payment of an additional premium, which totalled £8.12m. The letter also contained a list of assumptions on which their price and programme were based. Those assumptions appear to be the genesis of what eventually became the pricing assumptions in Schedule Part 4.

- 9 On 13 December 2007, a reply to the BB letter of 12 December 2007 was e-mailed by Julie Thomson of tie to Willie Gallagher and Matthew Crosse, for Willie Gallagher to sign<sup>6</sup>. It is not clear whether that letter was ever give to BB or not. The letter appears to have been drafted by Jim McEwan, possibly with the input of Geoff Gilbert. It states:

*"I refer to your letter of 12<sup>th</sup> December 2007 and have to convey to you the deep disappointment that I and my team feel on its content. This letter is the product of the labours undertaken since the announcement of BBS as the preferred bidder and yet it gives little of the required certainty we are seeking and without which we cannot proceed. The seriousness of this in the context of the approval of this Project cannot be overstated and unless we can find some a way forward which removes the uncertainty, then my recommendation to the City of Edinburgh Council will be that the Project should not proceed, I would see that as my duty and professional responsibility.*

*In reviewing your response to our 'particular points 1 to 5', I have outlined below the form and assurance we require against each:-*

*1) Price Confidence – We will fix our price in accord with the attached schedule...*

*5) Employer's Requirements – We have submitted our updated compliance matrix which aligns with our proposal."*

- 10 The letter attached a detailed excel schedule (in contra-distinction to the brief schedule attached to the BB letter of 12.12.07). It also attached a revised version of the BBS Assumptions document headed "we have modified your assumptions to a form which we believe is required". Comparing the tie version with the BB version in relation to design, the majority of the BB wording has been scored out:

***"Assumptions***

*In respect of our pricing and programming certainty exercise we have made the following assumptions:*

*Design*

*In those locations where the design is absent, we are not able to fix our price. Typically these include: Picardy Place, St. Andrews Square, London Road, York Place, Forth Ports Area etc.*

*In areas where design is partial, we have made reasonable assumptions based upon our experience and the existing design information provided. Notwithstanding material design changes we have a high level of confidence in our pricing, e.g. Track Slab, Roads and Pavements, Drainage connections, all as identified in our initial main submission. - See attached file "AnticipatedPrice.xls"*

*In respect of pavements, we have assumed full reuse of existing curbs and flags and minimal reinstatement behind curb lines: i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted..."*

- 11 Following this exchange of correspondence, there was a meeting between senior representatives of tie and BB, which took place in Wiesbaden. The meeting commenced on

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<sup>6</sup> Document [ ]

13 December 2007. The discussions at that meeting generated what is known by the parties as the Wiesbaden agreement, executed on 20 December 2007<sup>7</sup>. tie had no external legal input into the drafting or execution of the Wiesbaden agreement. This agreement forms the basis of the pricing assumption wording which eventually found its way into Schedule Part 4, and in particular contains the exclusionary wording in relation to design development.

- 12 In the run up to the Wiesbaden Agreement, an internal briefing note was produced by tie and e-mailed by Geoff Gilbert to Matthew Crosse and Willie Gallagher on 13 December 2007<sup>8</sup>. This was essentially a script for the negotiations which were to take place, formulated as a response to what had been said in BB's letter of 12 December 2007. The key points were:
- 12.1 BB had had access to design information for some time, and had a greater knowledge of the design than was reflected in their proposal;
- 12.2 The BB price based on the preliminary design included "*risk for emerging detailed design changes (accepted not fundamental design changes)*";
- 12.3 tie's proposal for firming up the BB price was BB would provide a firm price for various specific components (structures, highways, tramstops, earthworks). This would "*be for BBS taking the risk of design development to construction stage, excluding changes to design principles and adding scope. This is to include the scope referred to in Normalisations.*" N.B. this appears to be the first use of the phrase "design principle" which eventually found its way into Pricing Assumption 1.
- 12.4 tie recognised that there were "*certain things [that] cannot be included as a fixed price within the deal.*" These were utilities diversions to be transferred from MUDFA, changes to design at Edinburgh Airport, ground conditions risks beyond the agreed baseline, frontage to frontage finishes along Leith Walk and Bernard Street. It was noted that "*this list must be definitive in any final deal*".
- 12.5 Reference was made to the £8m figure in the BB letter of 12.12.07, which tie wanted to reduced to acknowledge, amongst other things, "*the design development contingency allowances in [BB's] original pricing (included in the rates)*".
- 12.6 A list of possible concessions which could be made during the course of the discussions was:
- Exclude St Andrews Square from firm price
  - Take Balgreen Road out of fixed element of structures
  - Firm up of Earthworks price following remeasure of sections from MX Model
  - Accommodation works.
- 13 There was a series of e-mails leading up to the execution of the Wiesbaden agreement<sup>9</sup>.
- 13.1 At 9.48am on Monday 17 December 2007, Stewart Hardy of tie e-mailed Geoff Gilbert a document which was described as "*BB Deal*"<sup>10</sup>. It is not set out as an agreement, but is a series of notes which presumably records the agreement which tie considered that they had reached at Wiesbaden. It included the following:

*"Detailed designs being developed by SDS. BBS included the construction cost risk for the development and completion of detailed designs, save for:-*

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<sup>7</sup> Document G

<sup>8</sup> Document [ ]

<sup>9</sup> Document F

<sup>10</sup> Document [ ]

- a) Any elements of the design for construction works which are substantially different to the those forming the scheme currently being designed.
- b) Items designated provisional in the Price Summary ('Normalisation')
- c) Excluded elements, to the extent they are excluded."

13.2 At 13.47 on the same day, Geoff Gilbert sent an e-mail to Matthew Crosse<sup>11</sup> which attached what appears to have been the first draft of the Wiesbaden Agreement, and which essentially converted the notes which had been e-mailed earlier that day into a draft agreement. Geoff Gilbert asked Matthew Crosse whether he wished to send the draft to BBS.

13.3 An internal tie meeting appears to have been held on 18 December 2007 to discuss the proposed agreement. In an e-mail sent at 10.23 that day<sup>12</sup>, Jim McEwan of tie e-mailed Stewart McGarrity, Alistair Richards, Geoff Gilbert, Matthew Crosse and Steven Bell to say:

*"A meeting has been convened today at 2pm in the Brunel room to discuss and clarify issues with respect to the BBS deal in its current form with especial focus on the overarching position on Risk and the facets of what sits with whom, and the related positions on Employer's requirements and VE. This meeting is a 3 line whip at the express wish of the Executive Chairman."*

13.4 In advance of that meeting, at 10.46 Geoff Gilbert sent to Stewart McGarrity, Alistair Richards and Jim McEwan a copy of the note headed "BB Deal" which Stewart Hardy had e-mailed to him at 9.48am on the morning of 17 December 2007<sup>13</sup>. The e-mail did not attach a copy of the draft agreement itself. The e-mail noted:

*"Enclosed is the latest position on the draft deal for your review and to inform discussions at 2pm. Please note that this is still under discussion with BBS to get full and final agreement to the words. I'll keep you all posted."*

13.5 Stewart McGarrity also circulated an internal e-mail in advance of the meeting addressed to Steven Bell, Jim McEwan, Alistair Richards, Geoff Gilbert and Matthew Crosse<sup>14</sup> in which he said:

*"We've agreed to have a meeting at 2pm this afternoon to discuss the list below. We won't solve all of this afternoon but the end result **must** be a reasonable view of where the numbers fall for the presentation thereof to TPB tomorrow...*

*what level design development risk they are actually taking off our hands...*

*How all of the above impacts upon our view on the prospective outcome on the Infraco line versus base costs budget – we previously told TPB it was £10m+*

*The adequacy of our remaining risk pot to deal with uncertainties to Financial Close and remaining public sector risk thereafter".*

13.6 At 13.47 on 18 December 2007 (and before the 2pm meeting which had been convened by Willie Gallagher), Geoff Gilbert sent a revised draft of the Wiesbaden Agreement dated 18 December 2007 to Richard Walker of Bilfinger Berger<sup>15</sup>, stating *"I have amended the figure to the correct sum and clarified that BBS have not allowed for completion beyond March 2011. Please could you confirm that this is now agreed."* The draft attached was in similar form to that dated 14 December 2007, and the only change in relation to the design development provisions was the addition of the following words after clause 3.3(c) *"in*

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<sup>11</sup> Document [ ]  
<sup>12</sup> Document [ ]  
<sup>13</sup> Document [ ]  
<sup>14</sup> Document [ ]  
<sup>15</sup> Document [ ]

*respect of pavements, full reuse of existing curbs and flags and minimal reinstatement behind curb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted".*

- 13.7 In an e-mail sent at 8.37am on 19 December 2007, BB stated that their "firm price including the additional £8m<sup>16</sup> to fix the 'variable sums noted in our tender is based on all the additional information which we received from SDS via the 4 No. CDs. The last of which was delivered to us on 25th. November 2007. We therefore insist that our contract be related to this." The design information delivered up to 25 November 2007 was what eventually became defined in the contract as the Base Date Design Information. In other words, BB's e-mail links their price with the BDDI.
- 13.8 tie responded initially in terms of Geoff Gilbert's e-mail at 9.11am that morning<sup>17</sup>, in which he noted "don't understand what this really means and will call now to discuss".
- 13.9 An update was sent by Geoff Gilbert at 11.43am on the same date, and in relation to BB's point notes "Scott [of BB] has had a discussion with Matthew [of tie]. Based on that discussion there would be no reason to change the current wording on design – which was acceptable to you yesterday".
- 13.10 It is not clear what the "current wording" was at that stage, but at 1.29pm on the same date tie sent BB a draft version of the Wiesbaden agreement which was "amended...in red italics...for the wording we agreed." The draft appended to that e-mail stated:

"2.1 The negotiated price for Phase 1a is £218,262,426...

2.2 [Value engineering]

2.3 [Provisional sums]

2.4 All other prices are fixed and firm, based on the Basis of the Price as set out below.

### **3.0 Basis of the Price**

3.1 The price is based on the following:

3.2 Employers Requirements Version 3...

3.3 Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-

- (a) Any future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS, as typically represented by the drawings issued to BBS with the design information drop on 25<sup>th</sup> November 2007.
- (b) Items designated as provisional in the Appendix A4.
- (c) Excluded items, to the extent described in 3.4 below.

*In respect of pavements, full reuse of existing curbs and flags and minimal reinstatement behind curb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted.<sup>18</sup>*

<sup>16</sup> i.e. the £8.12m referred to in the schedule to BB's letter of 12 December 2007

<sup>17</sup> Document [ ]

<sup>18</sup> Presumably the blue italics are earlier BB changes

3.4 *Excluded items are:- [list of specific items of work]*

- 13.11 BB responded to this draft in terms of their e-mail of 2.45pm on 19 December 2007, at which point there appeared to be broad agreement, subject to confirmation from Siemens.
- 13.12 At 7.43pm on 19 December 2007, tie circulated a further version of the draft which contained some minor changes following discussion at tie board level.
- 13.13 In their e-mail sent to Geoff Gilbert at 6.07am on 20 December 2008, BB appeared to have undergone a significant shift in approach, stating "*we still have issues with accepting design risk. We have not priced this contract on a design and build basis always believing until very recently that design would be complete upon novation. With the exception of the items marked provisional which we have now fixed by way of the 8 million we cannot accept more drain development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution.*"
- 13.14 Geoff Gilbert forwarded the BB e-mail to Matthew Crosse and Steven Bell at 8.48am this same morning, with only the comment "!!!".
- 13.15 An internal e-mail was sent from Geoff Gilbert to Steven Bell at 13.03 on 20 December 2007. The heading was "*BBS Agreement words*". This contained a substantial re-working of clauses 3.3 and 3.4, and introduced a new 3.5. These new words were in almost identical form to those which were eventually used in the draft sent by Geoff Gilbert to BB at 14.07 on the same day (see below). There are no other words in the e-mail other than the draft wording for the agreement, and it is not clear what the purpose of the e-mail was, nor the genesis of the words – in particular, it is not known whether the words were proffered by tie or by Infracore. It is not known whether tie sought any engineering input in relation to the words.
- 13.16 In a further draft sent by tie to BB at 2.07pm on 20 December 2007, there had been a substantial re-working of clauses 3.3 and 3.4 as follows:

"3.3 The BBS price for civils works includes for any impact on construction cost arising from the normal development and completion of designs based on the design intent for the scheme as represented by the design information drawings issued to BBS up to and including the design information drop on 25<sup>th</sup> November 2007. The price excludes:-

*Detailed designs — BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-*

- a) Any future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS, as typically represented by the drawings issued to BBS with the design information drop on 25<sup>th</sup> November 2007.
- b) a) Items designated as provisional in the Appendix A4.
- b) Any material changes to the design resulting from the impact of the kinematic envelope of the CAF tram vehicle on the civils design.
- c) Excluded items, to the extent described in 3.4 below.

In respect of pavements footways, full reuse of existing kerbs and flags and minimal reinstatement behind curb kerb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted.

For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.

3.4 The BBS price for systems works is fixed save for:-

- a) Items designated as provisional in the Appendix A4.
- b) Any agreed material impact of the CAF tram vehicle specification on the traction power supply system as demonstrated by power simulation modelling.

3.5 In all other respects the BBS price is fixed"

13.17 The agreement was executed later that same day. This appears to have been done some time before 17.49, as at that point Geoff Gilbert e-mailed a copy to Stewart McGarrity and others at tie, noting that BBB had signed it, but not Siemens. At that stage, the document was in the form which had been e-mailed at 14.07, save that it was a clean draft rather than a redlined version. There had been a progress meeting scheduled to take place for 2 hours at 11am on 20 December 2007, which Richard Walker appears to have been intended to attend. The first item on the agenda was the signature of agreements. However, given that a draft was being circulated at 14.07, it appears unlikely that it was executed at that meeting.

13.18 The meeting of City Edinburgh Council at which formal approval for proceeding was given took place on the evening of 20 December 2007, and there was some pressure on tie to have the agreement in place for that meeting.

13.19 On the following day, 21 December 2007, Geoff Gilbert added in a new 3.4(c) in manuscript. The change appears also to have been initialled on behalf of BB, but the initials are not clear on the copy. The manuscript words say:

*"In the event of any conflict between the obligations in the Employer's Requirements and the SDS design the obligations in the Employer's Requirements shall prevail."*

14 At the point at which the Wiesbaden agreement was executed, tie's commercial objective remained to achieve price certainty as far as that was possible. It was recognised by tie that, in certain specific areas, the design was not fully evolved – and in those cases, it would not be possible to achieve price certainty. There therefore required to be some form of contractual mechanism which dealt with that issue.

15 On 7 February 2008, the parties entered into what has become known as the Rutland Square agreement<sup>19</sup>. The rationale for this agreement, from tie's perspective, was to seek to control the continuing growth of the contract price, and to draw a line in that process.

16 During the period from January to April 2008, schedule Part 4 was developed. In its original form (*i.e.* when the preferred bidder agreement was entered into), this schedule took the form of a contract price analysis<sup>20</sup>. tie were seeking as detailed a breakdown as possible in order to assist them in managing change after contract formation, and during the construction phase.

17 BB proposed a significantly different version of schedule part 4, which was predicated on a series of base case assumptions<sup>21</sup>. There followed a series of iterations of Schedule Part 4. There was a proposal to introduce an element of materiality into the exclusionary words into what became pricing assumption 1, but that was resisted on behalf of the Infracore. Beyond

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<sup>19</sup> Document H

<sup>20</sup> See for example the early version of schedule part 4 e-mailed by tie to BB on 16 January 2008 at document I

<sup>21</sup> See for example the e-mail from BB to tie dated 4 February 2008 at document I

that, there does not appear to have been any significant discussion in relation to the wording of pricing assumption 1. Their driver for this was interpreted by DLA, on behalf of tie, as being to reflect an agreement which had already been reached, rather than to address a specific concern. On this basis, they were not prepared to enter into negotiations in relation to the way in which Wiesbaden was imported into Schedule Part 4, other than to agree a concession in relation to the incorporation of the words "*save to the extent caused by a breach of contract by Infraco, an Infraco Change or a Change in Law*" in the definition of Notified Departure<sup>22</sup>.

- 18 During the period that led up to the execution of the contract, there does not appear to have been any specific discussion around the wording of pricing assumption No. 1 (other than in relation to e.g. approval bodies). There were changes in the wording of clause 3.4.1 of Schedule Part 4<sup>23</sup>, and the number of pricing assumptions grew.
- 19 tie's understanding of pricing assumption 1 is that it was intended to address the extent to which the design had developed at contract formation in a way that was fair to both parties:
- 19.1 If a design developed in such a way as to reach what might be called its "normal conclusion", then the cost implications of construction should be neutral. In other words, there might be a saving to BB - in which case BB would retain the benefit of that saving, and tie would not seek to recover it, or there might be additional cost - in which case BB would bear that cost themselves and would not seek to recover it from tie. The consequences of normal design development would be at BB's risk, in the way in which would be expected from any design and build contractor: it ought to be for Infraco to explore more cost effective design solutions, for their own benefit. Beyond that, as part of their due diligence exercise in relation to the design<sup>24</sup>, the Infraco were aware of the extent of the development of the design, and hence ought to have been able to reflect this in their price.
- 19.2 If there were substantial or material changes in the intent of a design from one design to another, then tie would expect that there would be cost consequences flowing. If the changed design was more expensive to execute, then BB would be entitled to recover the additional cost; if the amended design was more cost effective, tie would have the benefit of that saving. An example of what would constitute such a substantial or material change was given by Geoff Gilbert as being a change from one type of bridge (e.g. a suspension bridge) to another (e.g. a slab and beam bridge). BB had not bought out all of the risk in relation to these items. The commercial driver behind this was that the premium which BB would have sought for buying out this risk would have been excessive for tie.
- 19.3 If a design was at a preliminary stage of development, then the development of that design falls within the ambit of normal design development and ought not to be treated as a Notified Departure. As an example, if the design for a particular section is at such a high level that it does not show drainage details, the Infraco ought to include for drainage in their price: any competent design and build contractor ought to make such a provision. This would be part of the design envelope. If, however, a drainage scheme changed from a simple scheme to a complex one, that takes it beyond design development.
- 19.4 If changes to the design were for "buildability" reasons, namely to suit Infraco and for their benefit, then tie would not have expected that Infraco would be able to make any further recovery.
- 19.5 If the design simply did not address a part of the Employer's Requirements, then Infraco would not be entitled to make recovery for constructing the "missing" part of the design, as long as the requirement was expressed in the Employer's Requirements.

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<sup>22</sup> In addition clause 1.4 was inserted into Schedule Part 4 to address tie concerns in relation to Infraco's insistence on giving Schedule Part 4 precedence over the contract conditions, in terms of clause 4.3 of the contract conditions. There were also a few further inconsequential minor revisions

<sup>23</sup> See the iterations of this schedule at document I

<sup>24</sup> Document J

- 19.6 To the extent that design was defective, or negligent, then tie would have expected:
- (a) That SDS would be obliged to rectify the defective design and be responsible for all design associated costs; and
  - (b) That the Infraco would have identified the defect during their design due diligence. To the extent that they had not done so, that would be a matter for them, and the associated construction cost would not be borne by tie.
- 20 tie did not consider that the Infraco's price was tied to the BDDI. If that were the case, there would have been no requirement to have included pricing assumption no. 19, which states that in respect of certain specific areas (e.g. Lindsay Road retaining wall), "*Infraco shall only be obliged to carry out works to be the extent shown in accordance with the Base Date Design Information*". Indeed, if it were to be the case that the price was tied to the BDDI, there would have been no necessity for any pricing assumptions other than no. 1.

**McGrigors LLP**  
**26 February 2010**