

## SDS Agreement

### Issues

The SDS Agreement appears to be between tie and PB. tie isn't defined as acting as agent for CEC.

The SDS Agreement is between tie and PB. No reference is made to CEC in this Agreement as a contracting party (as is the case in all of tie's consultancy appointments.) The SDS Agreement is different from the other consultancy agreements and third party agreements which tie has entered recently because the SDS Agreement will be novated to the Infraco.

That may mean that D+W is conflicted from acting for PB, in respect of TROs for example. Has this/can this be checked? If it is a problem, can a solution be found?

PB's role with regard to Consents (including TROs and planning consents) will be carried out pre and post novation of the SDS Agreement. Therefore, we suggest that there is a potential conflict of interest if tie's advisers act for both PB/Infraco and tie. Also, the risk of obtaining and maintaining Consents (at its own cost) has been passed to PB, and this risk will also be passed to the Infraco. If tie and/or its advisers become involved in obtaining Consents on behalf of PB, then risk is potentially passed back to tie. It was not anticipated in the drafting of the SDS Agreement that D+W would be acting at any point for PB. Our original instruction at the time of drafting the SDS Agreement was that the full risk of obtaining planning consents and TROs should be passed to the SDS Provider/Infraco. PB has priced for this risk, if tie is to take back all or part of this risk, then a variation and price reduction to the SDS Agreement should be secured.

The Agreement doesn't include a duty of care to CEC. Given the history with other consultancy appointments is there a need to secure a duty of care letter from PB now.

As stated above, the SDS Agreement is different from the other consultancy agreements which tie has entered recently because the SDS Agreement will be novated to the Infraco. The Agreement has been carefully set up to ensure that the SDS Provider is aware from the outset that it is to be novated to the Infraco and that it owes a duty of care to tie/Infraco. We were asked to advise on this issue and recommended that no duty of care should be set up to CEC as this could potentially affect the acceptability of the novation arrangement to the Infraco - an Infraco will look for the duty of care being provided to the Infraco as if the Infraco was the contracting party from the outset.

If a duty of care is to be provided to CEC, it should only be done so pre-novation - after novation, tie will be given a collateral warranty by PB - if required, this could be assigned by tie to CEC, although this will mean that tie will not have a collateral warranty from PB.

We need to develop a MM and FM (and teams) disengagement procedure to secure maximum effective transfer of knowledge in a positive way. Do we need to retain FM and MM in a residual role to input to PB?

Agree that there needs to be a disengagement procedure - continued involvement of FM/MM could "muddy" the design risk transfer to PB if MM/FM had continued involvement. tie would also not want to be paying for TSS, SDS and FM/MM to be carrying out the same/similar roles.

We'll need to be particularly careful with MM on TL1 doing work for Parliament in parallel with PB doing design work on the same sectors. Communication will be especially important if we are to avoid getting in knots and giving the Committee misleading information.

We need to download the sum of the history of CLGs and commitments given if **tie** and PB are to avoid looking as if we don't know what we're about.

We and CEC are involved in developing a post Royal Assent/post CLG community liaison strategy. It's a sensitive issue. This will need to be merged with the elements in Scope 3.3.

Ditto - Communications protocol for all stakeholders.

Agree - compliance with requirements has been priced as part of SDS scope (para 3.3.1)

We need to download the sum of the commitments given to objectors/former objectors in the process of Parliamentary objection resolution.

Agree - compliance with requirements has been priced as part of SDS scope (para 3.3.1 and Clause 3.3.8 of the Agreement)

We need to download the sum of the commitments given to the Parliamentary Committees in the course of the Hearings and in supplementary papers.

Agree - compliance with requirements has been priced as part of SDS scope (para 3.3.1 and Clause 3.3.8 of the Agreement)

CoCP, L&WHMP, N&VP and the SIS will need to be taken into account in the design process.

Compliance with the Code of Construction Practice is covered by Clause 3.3.10. Not sure what the other acronyms are.

We need to download the sum of any other commitments given.

The Design Manual is currently being revised by CEC following consultation. It won't be approved in its revised state by the Planning Committee until early December. PB will need to take account of this developing situation.

Compliance with the Design Manual is covered by Clause 3.3.5. Definition of Design Manual takes account that the Manual may be amended from time to time.

There will be a need to manage the potential tension between tie/PB and CEC Planning in respect of the extent to which the latter may desire to maximise its powers under 'Prior Approvals' to secure wide area Public Realm improvements. This will be particularly acute at locations with wide LoD; for example at Picardy Place.

There will be a need to manage the potential tension between tie/PB and CEC Planning in respect of the extent to which the latter may desire to maximise change at Haymarket. Aspirations will need to be managed in a way that does not import delay/cost to Tram.

As stated above, PB/Infraco have been given the risk of obtaining and maintaining (at its own cost) planning consents, building fixing agreement approvals etc (all Consents required for construction, installation, commissioning etc of the Edinburgh Tram Network). As with TROs, given that PB will novated to the Infraco and that the above risk will also be given to the Infraco, tie's role needs to be carefully managed so as not to attract any risk back to tie. When drafting the SDS Agreement, our instructions were that tie/TSS would fulfil a support role to CEC Planning not a support role to SDS/Infraco.

The Scope includes at 2.7.1.2 the St Andrew Square south chord. We are not seeking Parliamentary powers for this and there is no realistic prospect of the promoter securing such powers in the foreseeable future.

PB to be instructed that this is not required now - but suggest leave in as a feasibility study on this issue may be required some time in the future ?

The outcome of the proposed Bill Amendments at Gyle and Haymarket Yards will need to be accommodated.

Depot(s) development will need to parallel the Parliamentary process without being seen to pre-empt or prejudice it.

It is likely that the Parliamentary Committees (and possibly Parliament itself) will themselves introduce Bill amendments. It is likely that these will only become known late in the Parliamentary process. PB will need to take account of this.

In terms of Clause 3.3.6 of the Agreement, the SDS Provider is to comply with Tram Legislation in the provision of its Services. Having further studied the Change in Law drafting following our SDS workshop last Wednesday, amendments to the Tram Bills would not trigger a Change in Law given that the definition of Change in Law does not include legislation which has been published in the Tram Bills prior to the date of execution of the Agreement. Any reference to legislative instruments (eg the Tram Bills) is that instrument as amended.

Slides, presentations, etc should show the Newbridge spur. PB need to understand why.

The complex relationship between CEC, **tie** and PB will require to be taken account of the in the development of the traffic management proposals (Scope 2.1.8.3 – bp4, 2.7.1.1 bp3, 3.5.10 bp2, etc).

See also Clause 3.27 of the Agreement which obliges the SDS Provider to develop a traffic management protocol (which will become part of the Infraco Contract) and to attend all meetings with tie, Infraco, CEC and other Relevant Authorities.

The roles of CEC and its agent, **tie**, in the TRO process will need to be understood fully. This is especially so in the expectation of the need for Public Inquiry/Hearings.

The need for robust and experienced Legal input to the TRO process (and to a lesser extent TTRO) will need to be understood.

Given the comments above, the role of the SDS Provider/Infraco in this process will need to be further examined. If it is considered to be more expedient for tie and its legal advisers to play a role in this process, then the SDS Agreement/scope should be varied and there should be an appropriate price reduction. The anticipation is that only TTROs will be required in relation to the advance utilities diversions but that TROs will be required for the main infraco works.

There will be a need to manage the potential tension between tie/PB and CEC Transport in respect of the extent to which ‘wide area’ traffic management is addressed (and funded). Aspirations will need to be managed.

This will also potentially impact on the work carried out by the JRC.

BC  
5 October 2005