

Edinburgh Tram Network

Bilfinger Berger/ Siemens Joint Venture

Legal Submission
23 October 2006

Introduction

This document accompanies our response to the Infraco Contract issued by **tie** on 3 October 2006 and highlights key issues from that document.

Our response provides detailed comments on the terms of the Infraco Contract where possible, given the information which has been made available by **tie** to date and the current stage in development of our technical and financial response (including due diligence) to the ITN due to be submitted to **tie** in January 2007.

Key Issues

Our detailed review has highlighted some key points of principle in relation to the project which we would wish to discuss with **tie** before final submission of our tender. In highlighting these issues we would stress that we raise them with a view to finding a workable solution for all parties involved in the delivery of the Edinburgh Tram Network. Some are concerned with the general approach to documenting the agreement between the Parties. We believe high level agreement on these issues would facilitate early agreement on the detail of the contract terms.

1. **Structure Overview:** We would like to discuss aspects of the overall deal structure. In particular, structures to help manage interface risk and affordability. Issues such as liability when the caps under the novated agreements have been exceeded will have an impact on project cost. We believe lessons learnt from other light rail deals (successful and unsuccessful) throughout the UK could usefully be used in this project.
2. **Approach to negotiation of the agreements to be novated:** These contracts will be fundamental to management of many of the key risks under the Infraco agreement. We need to understand how negotiations on the terms of these contracts will be managed.
3. **Interface with the Operator:** We would like to discuss how the interface with the Operator will be managed. This is a key concern for us and due diligence on the terms of the agreement with Transdev is required.

4. **Objective tests for compliance with the terms of the Agreement:** Although we accept that in some circumstances it is appropriate for one party to determine whether a term of the Agreement has been complied with, this should be the exception rather than the rule and decisions should only be taken "in tie's opinion" exceptionally . This is particularly important in relation to the Certification Procedure, which we would also like to discuss with you.
5. **Partnering/ Aspirational Provisions:** A partnering ethos will be vital to successful delivery of this contract and the management of the complex interfaces it involves. However Infraco's performance must be measured in relation to the contractual terms and obligations set out in the Employer's Requirements.
6. **Time to Respond:** Can we agree that both Parties should be given a reasonable period to respond under the contract, given the type of information required and consequences of failure to respond.
7. **Covenant:** As previously discussed we will require **tie's** obligations to be guaranteed by CEC. We would like to discuss the mechanism for delivering that guarantee.
8. **Existing Structure Risk:** Under the agreement Infraco will be required to take existing structure risk. We would like to discuss the implications of passing that risk to the private sector with you, particularly in relation to overall traffic management.
9. **Access Rights:** We would like to clarify the position in relation to non-exclusive access rights and the rights which third parties will have in relation to those areas. We also need to clarify areas to which exclusive access rights will be granted. Please also confirm the contractual structure for the granting of Access Rights to Infraco.
10. **Accommodation Works:** We note the provisions in Clause 79 in relation to Accommodation Works. Can we clarify the practicalities of how Accommodation Works will be instructed, given potential overall impact on the project timetable.
11. **Arrangements in relation to the Depot:** The agreement provides for non-exclusive access. We need clarity in relation to how interfaces will be managed at the Depot, who will have responsibility for maintenance/ malicious damage etc.
12. **Change in Law Risk:** We would like to discuss your approach to Change in Law risk. There is no sharing of General Change in Law risk.

13. Change Procedure: Can we agree in principle the process for ascertaining the cost of carrying out a Change and that in relation to **tie** Changes at least the mechanism should result in Infraco being in no better or worse position. Agreed rates will not necessarily cover off all risks.

14. Building Fixing Agreements: We were previously informed that tie would obtain the Building Fixing Agreements. Can you advise why this position has changed?

Deleted: A pragmatic approach to the risk in relation to Building Fixing Agreements needs to be developed

15. Payment Process: We would like to discuss timings in relation to payment, ideally achieving a 28 day turn around.

16. Insurance: We have a number of concerns in relation to the insurance provisions as currently drafted. Infraco will need comfort in relation to the covenant of the insurer, deductibles and a continuing obligation on **tie** to maintain those insurances. Please see our detailed comments in the table attached.

17. Performance Bond: See separate proposal.

Deleted: BB PROPOSAL TO BE INSERTED

18. Caps on Liability: We will require caps on liability to be included in the agreement.

19. Definition of Indirect Losses: As currently drafted this makes the compensation on termination provisions unworkable as it cuts across Infraco's ability to recover subcontractor losses etc on termination on the grounds of **tie's** default.

20. Liquidated Damages: Can we be clear that aside from termination rights this is the only remedy in relation to late delivery of the Infraco Works.

21. Interface with Network Rail: We would like to discuss how the interface with Network Rail will be managed, particularly in relation to programme delay and possessions.