
From: Buccilli, Claire on behalf of Bowler, Iain
Sent: 03 March 2006 12:00
To: Fitchie, Andrew; Fitzgerald, Sharon
Cc: Feenan, Emily; Smith, Robert (Leeds)
Subject: Edinburgh Tram - Tramco Procurement

Dear Andrew and Sharon

During a meeting yesterday with Emily and Rob, at which they updated me on progress in relation to Tramco, it became clear that I should write to you both, raising a number of issues, about which we are becoming increasingly concerned. The reason for raising these issues with you is that I think we need to have an understanding internally as to how we interface with the **tie** team, in order that we can put these concerns "on the table" for general consideration. Fundamentally, they are likely to impact on the procurement timetable and cannot simply be ignored or dismissed.

Our principal concerns are as follows:

1. Tramco Procurement Programme

As Emily set out in her email to Sharon on 27 February following issue of the Procurement Strategy Document and Procurement Interface Document, we have expressed a considerable concern in relation to the proposed five week period between announcement of candidates for CARP (25 August 2006) and receipt of BAFOs (28 September 2006).

We understand from Sharon that the key driver for the project programme is the requirement to submit the Business Case to the Scottish Executive on 6 October 2006. However, five weeks is, in our view, simply not enough time to allow all of the following steps to occur:

- a meaningful clarification and refinement process, during which all issues can be addressed and improved positions reached from those offered in original tenders;
- assimilation by candidates of the new information released to them on 25 August 2006 and factoring of that information into their BAFOs;
- issue by **tie** of a BAFO Instructions Document, providing guidance on the parameters for BAFO and the information to be contained in candidates' BAFO submissions; and
- preparation by candidates of meaningful BAFOs, which are unqualified and fully priced.

These views were clearly expressed to David Powell on 15 February and we understand that the issue was also raised by Sharon at a meeting on Wednesday 1 March, at which David Powell stated that he had been strongly recommended by the Leeds team that this period was too short. However, we have been given no reassurances that this will lead to any change in the overall programme. In particular, the project timeline issued by **tie**, subsequent to our meeting with David Powell on 15 February, took no account of the concerns that had been raised in this regard. Furthermore, it suggested that the cut-off point for ITN production pre-Red Team Review should be 10 March (rather than 17 March as previously discussed and agreed with David Powell); this shows a lack of joined up thinking within the different elements of the **tie** team on this fundamental issue i.e. project timeline.

Furthermore we understand from Sharon that Ian Kendall had indicated to her that the issue of the ITN could be delayed to allow for the mechanics of the interface between Tramco and Infraco to be fully worked through; whilst it is vitally important to ensure that the interface between Infraco and Tramco is clearly defined, if the 6 October 2006 date cannot be changed, any delay in issuing the ITN is simply going to squeeze the programme even further.

Moving forward with an unrealistic programme at this stage will only lead to problems further on when it becomes clear that 5 weeks is insufficient and the deadline for submission of BAFOs needs to be pushed back.

2. Lack of Evidence of Delivery by SDS

We are becoming increasingly concerned over the lack of input from SDS.

At our meeting with David Powell on 15 February, a document was tabled by SDS which was intended as a list of the information which SDS believed should be in the Tramco ITN and a series of blank boxes to be populated with the dates for delivery of each element of that information. At that meeting it was agreed that SDS would reissue that document, taking into account the content of the Draft ITN circulated by DLA Piper. Following SDS' reissue of the document, Emily significantly revised the document to turn it into an useful ITN Production Tool.

This revised document was discussed in detail at a meeting in Leeds, attended by Emily, Rob, David Powell and Tony Goodyear (PB/SDS) on 20 February. At that meeting, dates for next drafts were agreed for all DLA Piper deliverables on the list (all of which have been met), however, when it came to the SDS deliverables Tony Goodyear was unable to provide dates and agreed with David that the two of them would meet to agree the dates on 22 February. We have yet to receive the completed document showing dates for SDS deliverables. Emily asked David Powell when we would receive the completed document in a telephone conversation yesterday, he was unable to provide a date.

The SDS deliverables include all specifications for the trams, associated equipment and tram maintenance. At our last meeting, no decision had been made on issues as fundamental as (a) length of the tram and (b) number of trams in the fleet. We have only seen one version of the Tram Requirements Specification (dated 10 February 2006), however, this was not an official release of the document to us and we have yet to be asked to comment on the document. The version we have seen will need a considerable amount of joint work between DLA Piper and SDS to bring it up to the necessary standard. We have been given no indication of when such documents will be available for us to review.

In addition, in order for the candidates to put forward comprehensive and properly priced bids (which will be essential if we are not to have significant price "re-openers" later on in the process), a number of "background" specifications are to be provided with the ITN. These documents include Overhead Line, Track Alignment and Non-Functional Specifications, none of which have been issued to us and again no indication has been given as to the current status of such documents.

Furthermore, SDS are required to provide extensive comments on technical sections of the ITN, to date we have received nothing.

Red Team Review for the Tramco ITN is scheduled for 20/21 March. All documents comprising the ITN are required to be 95% ready by 17 March. We are now extremely doubtful that it will be possible to develop the documents sufficiently for them to be 95% ready by that date. Whilst DLA Piper will continue to progress revised drafts, we are rapidly approaching the point, in relation to the ITN, where little more of substance can be done without substantial input from SDS.

We are also concerned that members of the SDS team do not seem to be aware that a number of the schedules which are to be included in the Infraco ITN, will actually be required for the Tramco ITN, which is to be issued on 3 April (3 weeks ahead of the Infraco ITN).

3. Involvement of PWC

As you are aware, **tie** have only this week given permission for PWC to be involved in the production of the Tramco and Infraco ITNs. As yet we have had no contact with PWC. Whilst Rob has included basic drafting in the Tram Maintenance Agreement to provide for an availability based payment mechanism, such mechanism will have to be developed by PWC. In order to finalise the payment mechanism for Tramco, PWC will need to understand the payment mechanism to be adopted for Infraco. We are therefore concerned that **tie's** delay in engaging PWC will result in the payment mechanisms not being fully developed and signed off by the client in time for Red Team Review and possibly ITN issue.

4. Communication of Information to Ian Kendall

David Powell has asked us to include drafting and produce position papers on various aspects of policy in relation to the Tramco procurement. Most notably, David asked us to produce a paper setting out our views on a number of Tram Maintenance Agreement issues, including:

- the date at which maintenance responsibility should hand over from the Tram Supplier to the Tram Maintainer (although it is anticipated that both supply and maintenance will be provided by the same organisation, it is unlikely that performance will be by the same entity within the overarching organisation selected as the Successful Candidate);
- term of the Agreement;
- life cycling; and
- warranties.

This paper was provided to David on 17 February 2006.

David's intention was that he would discuss these issues with Ian Kendall, before submitting a formal paper to him for approval. Whilst we understand from David that had discussed some issues with Ian, he does not appear to have discussed all of the issues or submitted the paper, yet despite this, David has now instructed us to redraft the Agreement in accordance with the positions proposed in the paper.

By way of example, David has asked Rob to draft the Tram Maintenance Agreement on the basis that responsibility for tram maintenance will handover to the Tram Maintenance Contractor following system testing. The Maintenance Contractor will therefore have maintenance responsibility during shadow running and will therefore be fully mobilised at the commencement of passenger carrying operations. Whilst this is DLA Piper's preferred position, we are aware that this is not the position under the Croydon documentation, which as you are aware Ian is particularly wedded to. David has indicated that he has not yet discussed this position with Ian.


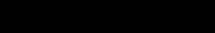
This is a real cause for concern. The constraints of the programme mean that we have to progress the drafting to David's instructions, however, we can envisage a situation whereby we have the contracts in a final form, they go to Ian for final review and all hell breaks loose when Ian discovers that they do not mirror the Croydon documents and DLA Piper are put squarely in the firing line.

Rob, Emily and myself need an urgent discussion with you both, to discuss the issues set out in this email and to discuss how we might, more successfully, ensure that these issues are properly considered by the **tie** team. Whilst I appreciate the significant commercial and political pressures that are being applied, in particular by Ian Kendall, it does not seem sensible to me for these issues to be "fudged" at this stage, resulting in the shit hitting the fan at a later date, when it will be much more difficult to manage any political fallout relating to the timing of the submission of the Business Case to the Scottish Executive. In particular, we are keen to discuss what risk mitigation measures we should all be taking to protect DLA Piper's position and how we can obtain greater visibility of SDS' performance, if only to ensure early warning of problems ahead.

I look forward to speaking with you both about these issues, and I hope that our meeting on Thursday afternoon will give us an opportunity to review these issues in more detail.

Regards

Iain

Iain Bowler
Partner
DLA Piper Rudnick Gray Cary UK LLP
Tel: 
Fax: 
Mob: 