

FITCHE COMMENTS 06/07/09

ONLY COMMENTED PAGES ATTACHED

Outline

- Project Progress and Communication/Reputation
- Review of 3 month strategic options workstreams
- Mediated engagement – 30/6 to 6/7
- Princes St Supplemental Agreement
- Utilities programme & costs
- Status of Programme
- Cost estimates review
- Next steps with BSC consortium
- Other scope and funding options

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Costs Review June 09

- Same basis as previous reviews ie the risk allowance has been calculated to deal with a range of known risks including:
 - Design delay at the point of contract award
 - Fair share of delays/programme extensions/acceleration costs
 - Design changes outwith normal development
 - Unforeseen ground conditions or utilities
 - Full road reconstruction where necessary
 - Non delivery of Value Engineering items taken into contract
- As before we also assume:
 - Commercial engagement and delivery impetus improves significantly
 - Principal contractual disagreements found in our favour
- Further informed by:
 - Additional (but not complete) information available regarding nature and extent of design change
 - Additional technical and legal evaluation of the matters in dispute

*requires analysis
for such
assumptions to
be safe.*

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Can we not assume that BSC will have to seek recovery from SDS - they are obliged to recover under clause 65.2

Costs Review June 09

- Overall cost increase from **£527m** to **£575m** (£533m to £581m including Phase 1b costs) an increase of £48m
- Components of increase are:
 - tie PM and other resource costs to meet requirements of more intensive Infraco engagement and programme extension to Feb 2012 (**£7m**)
 - Anticipated saving on Infraco provisional sums (**-£3m**)
 - Utilities risk allowance increase (**£6m**)
 - Design risk allowance increase for design and construction support services post financial close (**£2m**)
 - Infraco risk allowance increase (**£35m**) – next slide
- This cost estimate already reflects an element of compromise based upon proposals made at mediation. The best and worse outcomes are in a very wide range:
 - tie contractual positions hold, no more delays and can-do approach to cost effective delivery of design and construction (**c£560m**)
 - BSC prevail and move substantially to cost plus (**£600m++**)

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Next steps with BSC consortium

- Back to broader commercial options examined in March:

a) **Negotiate settlement of all issues with BSC** – 3 months and mediation has not delivered an outcome which is acceptable in terms of certainty on delivery, engagement, programme and costs

b) **Formal contractual approach** – DRP and other remedies

c) **Reduce BSC scope** – instruct or by negotiation and re-procure

d) **End BSC contract** – termination or by negotiation and re-procure

- In any event b) is what is required to drive out certainty and force the provision of information to tie

carries legal
risk of overhead
and profit claim
and
in the
extreme
Default
by tie
leading to
termination

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Formal Contractual Approach

Elements

- Progress ~~all~~ issues through formal DRP process to adjudication
- Instruct BSC to implement works in the meantime Change
- Drive out information by invoking the **Audit** and **Best Value** clauses – especially in relation to programme and design
- Serve notices of breach on general obligations to mitigate, provide information and manage the project
- [Other]

Selected key high value/high risk factors

[See Foerder letter]

Investigate PCG and Bond Calls

See Foerder letter:

<i>Failure to provide Estimates</i>	<i>80.4, 80.5, 80.2.2, 80.3</i>
<i>Design Review failure</i>	<i>10.2</i>
<i>Progress marks</i>	<i>60.1</i>
<i>No acceleration</i>	<i>61.1</i>
<i>Breach of primary duty</i>	<i>7.2</i>
<i>Best value 7.13.15</i>	
<i>Mitigation failure</i>	<i>10.9</i>
<i>Subcontractors</i>	<i>28</i>
<i>Audit clause</i>	<i>104</i>

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• Protects integrity of decision-making against challenge

Formal Contractual Approach

Pros

- Certainty based upon facts and contract rather than negotiated settlement
- Force the hand of the consortium partners – Siemens and CAF – if replacement of BB in consortium is ever contemplated
- BSC in major/persistent breach if they refuse to continue working

Cons

- Could take many months especially if BSC stick to formal DRP process
- BSC stop work (ie obligation to continue is itself is in dispute) adjudicated
- If BSC don't like the answer they go to court rather than continue
- If the answer still presents an unaffordable project we have spent additional £m's in the meantime

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Reduce BSC scope

*See DCA Piped
Paper*

Elements

- Re-procure time critical elements of the project such as off street earthworks and structures
- Likely to be deliverable only by negotiation with BSC to avoid claims for breach and/or loss of profits *and overheads/demob.*

Pros

- Unseat BSC – break the cycle of commercial bullying
- Take advantage of favourable market conditions

Cons

- Procurement lead time and possible legal challenge
- Additional interface risks to manage
- Costs incurred by BSC on procuring existing sub-contractor arrangements

- X
- *vulnerability to default argument by BSC if ~~project~~ scope cut is large*

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- Replaces failed relationship

- Termination for IntraGs Default could be justified

End BSC contract

if tie wins on key DRPs

Elements

- Only competent with evidence of default/persistent breach – likely to follow adjudication on significant areas of dispute
- Likely to be deliverable only by negotiation with BSC (at significant cost) to avoid claims for breach by tie and/or loss of profits / overheads
- Step into CAF and SDS contracts available

Pros

- Clean sheet with complete design and utility diversions

Cons

- Value of costs incurred by BSC to date is lost – unless BSC default/persistent breach is proved
- Loss of hard won contract – including Siemens, CAF and assembled supply chain
- Prohibitive re-procurement timescales – one year plus
- Loss of political support for project – Grant at risk

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See DLA Piper Paper

Other scope options

Truncation (or more correctly “re phasing”) options examined in March:

- **From the Airport** - not operationally viable - must get at least to depot - and unlikely to meet stakeholder approval
- **Ocean Terminal to Newhaven** - eminently deliverable but theoretical costs delayed £[15]m not huge
- **Foot of Walk/Bernard St to Newhaven** – we believe there is an operation solution through integration with buses but significant stakeholder resistance likely. Theoretical costs delayed £[30]m
- **York Place/Picardy Place** – Primary bus integration opportunities on Leith Walk as per Business case deferred till future phases. No proven Business Case – but still the backbone of a future Tram network. Better than nothing argument? Theoretical costs delayed £[60]m.

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Other scope options

Challenges to re-phasing:

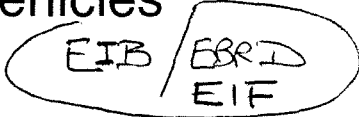
- Realistically only available as a negotiated outcome with BSC
- BSC resistance to giving full value for reduction in scope – same as loss of profits/argument
- Stakeholder resistance including Scottish Ministers (what they get for the £500m Grant) – York / Picardy Place option likely to require giving money back.
- Impact on contributions from 3rd Parties – specifically the FP developers contributions.

Overheads

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Other funding options

Principal options

- CEC Prudential Borrowing against profits of combined Bus and Tram business
- Direct TEL Borrowing
- Leasing of Tram vehicles
- Multilateral aid? 

Challenges

- Maintenance of Dividend to CEC
- Contemplation of borrowing during difficult times for the bus business
- Achieving debt service flexibility in the early years of tram whilst patronage builds

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