

FOISA EXEMPT – Strictly Private & Confidential
Prepared in Contemplation of Litigation

tie Limited – Edinburgh Trams Project
Note of Key Points Arising at Mediation Preparation Meeting
on 28 February 2011

During a meeting at tie's offices in relation to the Mediation, the following issues were identified as potential threshold tests. Each of the issues outlined below, should undergo considerable examination in the week prior to Mediation, in order for tie to finalise its position in advance of the Mediation. tie should also seek to prioritise each of these, in order to ascertain which are the key issues which will drive its negotiating position.

1 **Design Certainty/Design Management**

- Infraco has produced a price based on what is required by the drawings.
- tie has to decide whether it is satisfied with the current content of the drawings.
- tie should confirm whether they want to proceed on a Design and Build basis.
- tie should look to put the Design risk back on Infraco. tie has to confirm whether this is a "non-mover" issue.
- tie has to decide whether it wants to start from the position that requires Infraco to warrant that carrying out the works in line with the drawings, will allow them to achieve the Employer Requirements.
- tie has to avoid the situation where it takes on what should be the Contractors risk, namely that the drawings satisfy the Employer's Requirements.
- The Employer Requirements should be reflected in the drawings. It may be that an independent expert is required to verify this, though there may not be sufficient time for this exercise in advance of the Mediation.
- tie has to decide the extent to which it needs everything in the Employer Requirements – i.e. what can be conceded.
- tie should look to achieve an integrated design process.
- tie should be clear how they want the design process to be completed – and what the complete process should achieve.
- tie should not approve the drawings in their incomplete form.
- tie should require assurances about future management of Design (e.g. a responsible individual), although the responsibility to manage Design should remain with Infraco.

2 **Price Certainty**

- As a fundamental starting point, tie needs to understand what the price should be for Airport to Haymarket.
- tie needs to be clear about the financial line, beyond which it will not cross.
- Infraco has started from the position "here is a price for carrying out the works on the drawings" (see comments re 'Design' above).
- tie needs to be clear on what exactly is being priced by Infraco in their proposals.

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- in order to analyse the true value of Infraco's proposal, tie needs to understand and form its own view, on the costs of carrying out each part of the works;
- tie needs to avoid the scope for Infraco to 'gold plate' the works.
- Analysis should be:-
 - What is the actual total price on offer;
 - What are the qualifications?; and
 - What is the benchmark against which tie measures its own financial analysis?
- tie needs to finalise its financial predictions, and starting position.
- tie needs to take a view on the extent to which non BSC costs can be constrained, including the cost of operating tie.
- tie requires the Siemens costs figures to be granulated in order to take a view on the above.
- tie needs to take account of the final Cyril Sweett analysis of costs
- the current financial forecast includes £20 million for future risk. This figure has not been based on an exact science and the potential fluctuation of this should be borne in mind (see 'Allocation of Risk' below).
- tie needs to consider how confident it is in its numbers, in light of what Infraco has put forward.
- tie needs to understand the additional costs which may arise in the event that Project Separation requires to be implemented.

3 Allocation of Risk

- This links in to both Design and Price Certainty.
- tie needs to evaluate the risks which exist within each part of the works.
- tie needs to consider the cost of putting these risks back on Infraco. This relates particularly to design, in respect of the fact that tie may require Infraco to warrant that carrying out the works in line with the drawings will result in them achieving the Employer's Requirements.
- It should also be borne in mind what it would cost to allocate these risks to a new contractor, based on current market conditions, and the fact contractors nowadays are generally more risk averse.
- Whilst there will always be a residual risk, the general consensus is that as much risk should be put back on to Infraco. It is understood, that this may have an effect on the price aspect.
- tie should be clear as to:-
 - (i) what level of risk allocation is not acceptable

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- (ii) what may be acceptable and can be reduced at a later date;
and
- (iii) what they may have to accept or "take on the chin" by certain milestone dates in the future.

- tie needs to understand the extent of the risk which will need to be allocated in the event of Project Separation being implemented.
- tie will need to take a view on the extent (if any) of risk which they are prepared to assume themselves, in relation to both Project Phoenix and Project Separation.

4 Time/Programme

- There is some proximity between the parties in terms of programme.
- This is not a "non-mover" for tie – there is some scope to move/concede ground.
- Analysis should be:-
 - What is the programme on offer set out to achieve; and
 - What are the qualifications?
- tie needs to clearly understand the additional time constraints with which it will be faced in the event that Project Separation requires to be implemented.

5 DRP Management

- tie needs to decide whether it is seeking to implement an independent person/engineer/ panel to manage disputes as they arise.

6 Structures/Future Management

- tie, as Employer, should promote the structure it sees best placed to move matters forward.
- tie needs to decide what this best structure is.
- tie has to approach the Mediation with clear ideas for a new structure, rather than allowing it to be lead by Infraco suggestions.
- tie has to be ready to drive home behavioural issues with Infraco, as Infraco does not seem to have addressed these in terms of the Mediation, thus far.

7 Project Separation/Termination

- tie needs to finalise its Heads of Terms for Project Separation.
- tie needs to finalise its negotiating position, in terms of the "the threat of termination".
- tie should carry out risk assessment in order to be fully informed for both Project Separation and in relation to the threat of termination.
- tie should consider the time constraints in relation to both of the above.
- Reputational issues should also be considered.

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