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Subject: Thoughts on Mediation - legally privileged - FOI(S)A exempt

To give a flavour of my reaction to the Infraco's Mediation Statement I set out my thoughts on the basis that I would use in framing the opening speech if I was giving it.

I am waiting for Jim to arrive with a hard copy of what I see on screen as being an emboldened version of Project Carlisle and I will comment further later today.

Tony

In responding to the Infraco's Mediation Statement I suggest that our Opening Speech expresses disappointment with Infraco's proposal.

The Infraco, or as it seems from the Mediation Statement its Project Management vehicle BSC, which in reality is Bilfinger Berger and Siemens, have complained that "nobody is listening to us". Following the collapse of the Project Carlisle Initiative the City of Edinburgh Council has obliged the Infraco Members by holding meetings with them at the highest level and the Cabinet Secretary has also met representatives of Bilfinger Berger and Siemens. There has been a joint meeting with the German Consul General who highlighted the reputational damage being done to the reputation of German companies and to the individual companies.

The Mediation Statement and the Project Phoenix Proposal does nothing to improve that reputation, if anything it damages it even further.

The sting can be seen to be in the tail. The Infraco says that if no agreement can be reached the Works can only proceed (very slowly) on the basis of individual decisions at adjudication. This confirms that the Infraco have managed the contract in an uncooperative manner. There has always been another way, but the Infraco members jointly set their faces against it on the basis that the Infraco Contract didn't permit them to agree to an alternative way. The fact that we are all attending this mediation contradicts this flawed argument.

In their statement the Infraco refers to their Vision. They make no reference to the Project Vision they signed up to in May 2008. They pledged to work in a spirit of partnership from the start. The City of Edinburgh Council bears the heavy responsibility of acting in the public interest and in doing so has approached this mediation and our discussions with the Infraco beforehand with an open mind. We excluded tie from such meetings, but that should not be seen as agreement with the accusations the Infraco make and repeat to this Mediation.

What the Infraco says is offensive, not just to tie but also to the City of Edinburgh. The accusation that the City of Edinburgh wasn't aware of the intentions behind the procurement philosophy suggests that the CEC themselves didn't take steps to protect public interest. In fact the statement confirms what the Infraco agreed to and restate – 95% of the Contract Price was fixed within the parameters defined by Schedule Part 4. The differences between the parties do not arise from willful misrepresentation, they arise from disagreements as to what Schedule Part 4 means.

The Infraco refer selectively to adjudicators' decisions. They do not point out that the Adjudicators do not agree on the question of meaning of Schedule Part 4. Nor do they explain how many notices of departure they have raised and the significant proportion they have withdrawn and those which have been settled without Adjudication. It would not be in the public interest for CEC to agree that tie have refused to reach agreement with the Infraco. What is at question here today is whether the parties could have worked better together and how they can in the future.

The Infraco claim that the dominant delay to the project is the delays to the utility diversions. It is true that the MUDFA Works have been massively delayed, but to suggest that they have dominated the whole project is an exaggeration. They substantially only affect the on-street works – 7.5 out of 18 kms of track and the section which the Infraco now wishes to exclude. But their proposal cannot be because the utilities haven't been diverted. CEC are left agreeing with tie that the dominant cause of delay is more likely for the same reason that the Infraco have not completed the Design.

The Infraco refers to EOT1 which took account of the state of the Design they accepted responsibility for at day one. What they do not say is that they had carried out a very full and detailed due diligence as part of the process of agreeing a Contract Price and that price included additional payments to reflect the additional effort they would have to put in to manage and accept responsibility for the Design. The effects of changes from BDDI to IFC were de facto settled by EOT 1 and the payment of £3.524 million. There are still significant sections of the Infraco works which are not complete. Yet the Infraco propose that CEC should trust them to complete the Design without being able to exercise approval in the public interest.

It is the Infraco who have decided on a unilateral basis to effectively suspend large parts of the Works. To justify it they suggest that they had no option. Frankly, this can never be accepted by CEC. Where tie are in default the Infraco can suspend work by written notice and it is subject to timescale to permit a considered response and resolution. Yet now the Infraco are proposing that CEC acting in the public interest should trust them to act in a more considered and frankly mature manner than they did last September, when most observers would say that the Infraco acted against the interests of the public by taking a provocative and threatening action. We look forward to hearing from the Infraco today that they will immediately remobilize their activities whilst this mediation is in progress and thus remove the threatening behavior they seek to hang over proceedings.

It is gratuitous to suggest that CEC should remove tie when they have been tackling the enormity of the Infraco submitting 800 INTC's. If the Infraco is prepared to agree to true price certainty the need for tie in its present state would evaporate overnight. What is proposed by the Infraco would require CEC to place a massive amount of trust in the Infraco and this submission does not convince us that they have earned that trust even if was possible for us to agree to what they propose.

Whilst CEC and tie are ready to enter into this Mediation with an open mind, including a change in management on both sides and the establishment of a joint forum to resolve differences we cannot shrink from our obligations we owe to the public. It would be foolhardy to believe that there is not a tipping point where battling on with what we've got is better than compromising to save face and reputations.

{Then sell our proposal}

Ends

Some relevant extracts from the Mediation Statement:

Reference paragraph	Infraco claim	Response
10.1	If no agreement can be reachedthe Works can only proceed (very slowly) on	But there was an alternative way and that is what tie have offered the Infraco since the middle of 2009 – proceed on a

	the basis of individual decisions at adjudication.....	reimbursable cost basis. Such a basis only put tie at risk. The position taken by the Infraco is that the Infraco Contract does not permit them to proceed without an agreement on each Notified Departure – this is not only mistaken but it is also absurd as any agreement is capable of being revised by the parties. If the Infraco’s position is right then this mediation couldn’t succeed.
4.4	The risk allocation agreed by the parties The method by which Schedule Part 4 was used to ‘fix’ the Contract Price	Under the explanation given under 4.4 the comment referred to in 4.6 is factually correct. The doubt about the accuracy of the statement is how could Schedule Part 4 be interpreted. Clearly the Infraco agreed that the intention of Schedule Part 4 (paragraph 3.2.1) was intended to ‘fix’ the price “at a certain date”.
4.6	BSC has concerns that the City of Edinburgh Council was not fully appraised This has resulted in 95% of the combined Tramco and Infraco Costs being fixed with the remainder being provisional sums....	The issue is not whether CEC were fully appraised but whether the parties had the same understanding of what Schedule Part 4 and other related terms of the Infraco Contract meant. It should be noted that the adjudicators referred to by the Infraco had different meanings of Schedule Part 4.
2.1 (7) (i)	appointment of an appropriately qualified Employer Representative with full authority to act on behalf of CEC...	As tie are given authority as far as CEC can delegate authority this implies that tie should be removed.
2.1.(7) (ii)	creation of a project board.	Suggesting that tie should be replaced by a project board with the Infraco as members of the project board. Such a suggestion is flawed for two reasons. CEC are a public authority and could not delegate authority to the party they had contracted with to influence decisions. The Infraco members would be constantly in conflict. Moreover, for the reasons given above the Infraco have shown that they cannot be relied upon. Such a solution would be unlikely to obtain stakeholder approval.
2.1 (6)	agreement of a simplified change mechanism	What they propose in the PPP does not achieve this mutual requirement – it lists assumption s and qualifications.
2.1 (8)	agreement to the appointment of an independent third party intended to avoid or resolve disputes	This is a contradictory proposal and serves only to reduce the burden on the Infraco to prove each claim on its merits.
2.7	Progress on construction has virtually ground to a halt because the parties are unable to agree a significant number of issues	The truth is that the progress has virtually ground to a halt because the Infraco has suspended work on parts of the Infraco Contract and that they are now in Infraco Default (i).
3	Project Phoenix and BSC’s Vision	The Infraco ignore and have ignored the Project Vision they signed up to: <i>“It is intended that this goal be achieved in a spirit of partnership, utilising modern design and construction methods and standards.”</i> Note: The Mediation Statement quotes BSC. The Infraco Members are joint and severally bound – BSC are an SPV

		managing the project on behalf of the Infraco members.
5.20	The delays in preparation of the design apparent on Day 1 of the Infraco Contract ... resulted in tie agreeing a 7.6 weeks extension (designated EOT 1) and addition of £3,524 million.	<p>Section 5 is headed "Material Problems Encountered" and refers only to two issues – MUDFA delays and design. The detail it refers to in respect of MUDFA is more comprehensive than the design and it concludes that the MUDFA delays are dominant. However, the delays to completing the design (it is a matter of fact that it isn't complete and as it was apparent day 1 as they admit it is by all measures the dominant cause of delay). Only honest disclosure of the timing of the Infraco (Siemens) design would demonstrate the reasons for delay.</p> <p>The Infraco ignore the fact that EOT 1 was agreed in full knowledge of Infraco's own due diligence on the state of the SDS Design ("BDDI")– any delays in excess of EOT 1 are the responsibility of Infraco management other than a change in Employer's Requirements properly instructed by tie.</p>
6.2	...tie has failed to make interim payments for these goodwill works	What is the truth about this statement?