

Privileged and strictly confidential – prepared in contemplation of litigation, FOISA exempt

Richard Jeffrey
tie ltd
City Point
65 Haymarket Terrace
EDINBURGH
EH12 5HD

Date 20 December 2010
Your ref JS/RJ/21
Our ref SS1/1/AC

Dear Richard

EDINBURGH TRAM – COMMENTS ON PROJECT RESOLUTION

Thank you for your presentation to the tram project board on 14 December 2010 and for providing the opportunity to comment on the draft Project Resolution report. I have set out my comments below along with some general points which relate to the INTCs and Scott Wilson's report on the Design Assessment Summary.

Draft Project Resolution Report dated December 2010

Firstly, I would like to state that the Project Resolution Report is well structured, comprehensive and provides a good summary of the challenges being faced. It would have been helpful to have the opportunity to review the Appendices, but I do appreciate the scale of the workload required in pulling this together.

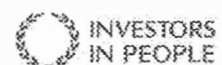
Page 10 – Recommendation 6 (bullet point two)

I would prefer that all consents (including 3rd parties) were in place prior to awarding any new construction contracts.

Page 28 – 4.2.1 General Overview

I think there would be merit in expanding table 7 (DRP) to include the costs associated with each DRP and whether, on balance, each decision was considered to be a success. Whilst I agree that there has been a significant saving to the public purse through the application of the DRP process it appears that a fair number of the decisions taken were not made in the favour of tie ltd. I have, for your information attached the Council's view on a review of the tie summary of DRP decisions as Appendix 1.

Dave Anderson, Director, City Development
Transport, City Chambers, High Street, Edinburgh EH1 1YJ



Pages 30 to 35 – Narrative of each DRP

Similar to the point above it would be helpful to have a description around the decision taken and whether it was considered a success.

Page 36 – DRP Outcome (last paragraph)

It would be helpful to include summary background information as to the overhead costs associated with the DRP process and I would be grateful if you could provide that.

Page 48 – Notice Preparation (third paragraph)

The report notes that preparation of evidence of breach of contract began in March 2010 and that tie ltd received detailed legal advice on this aspect. I am therefore perplexed as to statement that the Council exerted pressure to issue the RTN's as it is described in the report. Indeed, I do recall the discussions at various TPB's when tie ltd required additional time to ensure the RTNs were completed with sufficient detail, and that Richard Keen QC had been fully involved in their preparation.

Page 58 – Legal Opinion on grounds for termination

The Council has taken independent legal advice on termination, and this was previously summarised in an e mail that Nick Smith sent to you on 26th November.

Page 64 – Enforced Adherence (first paragraph)

Whilst I do appreciate the efforts being made by tie ltd, I do not think it is yet appropriate to state that tie ltd have exhausted all the courses of action open to us. The Council has asked tie ltd to pursue clause 80.20 instructions and sought detail on contract enforcement matters for some time now.

Page 68 – Summary evaluation of Option (last bullet point)

From reviewing the TSS report on design, I think it would be more appropriate to state that the design is now between 80-90% complete.

Page 74 – Re-procurement (second last paragraph)

Given the views about the on-street design, I had wondered if tie ltd had considered issuing a Change to BSC to instruct them to carry out a value engineering exercise for the roads design?

Page 77 – Operational readiness planning (second bullet point)

Whilst I missed this section of the presentation at the TPB on 15 December, as I had to leave early, I would prefer to minimise the risks going forward and would suggest that this contract is not awarded until there is more certainty on delivering the remainder of the project. I would also prefer to ensure that the project obtains all the necessary statutory consents, prior to awarding the ticket vending contracts.

Page 85 – Recommendations

As noted above, I would prefer to expand recommendation number 8 to include the project obtaining all necessary consents (including 3rd party) prior to awarding any new construction contracts.

Scott Wilson's Design Assessment Summary dated November 2010

Whilst I appreciate that Scott Wilson have taken the opportunity within their report to recommend that they could complete the design, should a third party be required, I believe that the SDS position should be explored in greater detail due to the integration risks that would be incurred should the contractual position be split between the designer and the contractor. I also believe that further detailed explanation is required as to why SDS should not be novated back to tie ltd. Procurement requirements should also explained in greater detail.

At the point of issue of the brief to Scott Wilson, initiating the report, enforced project termination was envisaged by tie ltd. Does tie ltd consider that the conclusions and recommendations proposed by Scott Wilson would have differed in the light of current proposals for mediation?

From the key issues that arise from the report, I have the following comments;

I find it difficult to understand why tie ltd appears to have a lack of visibility of the real design process, and I would be grateful if you can confirm how and who in tie ltd manages the design process? I understand that this is an overall BSC responsibility, but I would have expected there to be monitoring processes in place to manage that.

Scott Wilson note that very little design information is held by tie ltd. This suggests that proposals are required to address this omission going forward either with BSC or through another provider. The lack of design information also gives cause for concern in relation to the validity of the current construction.

The report also notes a lack of ground investigation information relating to the design of the trackform. Who is responsible for the adequacy of ground investigation information? Is the lack of a completed design a reason for failure to progress?

Scott Wilson has misinterpreted the term 'informatives' with regard to the roads technical design process. The Council has placed informatives on areas of design because those areas were omitted from the initial submission. Had all the correct information been supplied initially, there would have been no requirement to create this process.

On page 18, Scott Wilson have confirmed that the design process continues after the statutory consents have been given. I understand that my staff have already raised this issue directly with Steven Bell (on 14 September) and that these concerns have continued to grow. I would be grateful if you could confirm what tie ltd is doing to address those concerns and manage this situation?

Scott Wilson have provided estimated timescales to complete the design, but do not mention the need to secure new or varied statutory consents, or consents/licences from third parties. I would be grateful if further information could be provided on this, particularly around the size, scale and timescales of these.

There is limited information about procurement law implications of appointing a third party and I would be grateful if this could be developed further.

Failure to Progress

The Resolution Report states that BSC's decision to stop work resulted from a list of some 99 changes which had not been agreed and, in addition, to failure of third parties to grant various consents. Indeed the BSC value associated with INTC's totals some £100m. Whilst accepting that the BSC value is likely to be inflated and that many changes may not prove to be valid, this does represent a considerable degree of uncertainty. The report also states that, in the light of Clause 80 advice, tie Ltd are examining the INTC issues. Elsewhere, the lack of an assured integrated design relating to the on-street section is cited by tie Ltd as a cause of failure to progress, in addition to BSC's failure to obtain all relevant consents. In conclusion the reasons for the failure to progress do appear to be many and varied.

From reviewing the change register, the table below details the status of the changes as at 22 November 2010.

Total - Estimates Received	406
Total - Incomplete Estimates (BSC Action)	-49
Change Orders Issued against INTC's raised	-194
Clause 22.5/65 Letters Issued with Estimate	-16
Live Estimates	147
Estimates Issued – Disputed as a Change by tie	56
Outstanding BSC Action - Estimates submitted	56
Outstanding tie Action	35

Infraco Notice of Tie Change (INTC)

Given the current contractual difficulties, and in the absence of any meaningful construction activity, I believe it would be prudent for the Council to obtain a better and fuller understanding of the reasons for the lack of progress and, in particular, the INTC's and reasons behind the failure in agreeing them. I do appreciate that some estimates have not been forthcoming for many proposed changes, but I think it would be of assistance for me, and other senior Council officials, to review the progress to date on the changes that do have estimates and the remedies which have been utilised to progress and to agree or dispute those proposed changes.

Once the Council has had the opportunity to review the information, I would suggest that tie Ltd make a presentation to the Council officials and that there be time allocated for a workshop to review the detail.

The information will also provide useful background information for the mediation with BSC.

Scope of the Review

Given the timescales involved, I do appreciate that it may take a considerable amount of time to take Council Officials through all the changes, therefore I would suggest that you focus your efforts to certain sample sections. I would like to suggest the following areas:

Section 2A (Haymarket to Roseburn Delta),

Section 5B (Balgreen to Edinburgh Park Central) and;

A system wide issue, such as the 'UTC associated with delivery of alignment' (civils and system - change numbered 121a/b).

Where there is an inter-relationship with design or work packages associated with other sections of the work which contributes to the current impasse at either sections 2A, 5B or UTC, I believe this should be explained.

In addition to the contract documentation, reference should be made to the change register and any related correspondence. The current programme (albeit unapproved) should also be referenced.

I recognise that this letter does seek a substantial amount of additional information. However, as we move to mediation the "devil will be in the details". I would be grateful therefore if you could let me know when you will be able to provide the information I have sought.

Yours sincerely

A solid black rectangular box used to redact the signature of the sender.

Dave Anderson
Director of City Development

cc Donald McGougan – Director of Finance

Appendix 1 – Comments on DRP summary prepared by tie Limited

Comments on DRP summary prepared by tie Limited

The purpose of this note is to summarise the analysis carried out by CEC Legal, City Development and Shepherd & Wedderburn ("S&W") of the DRP adjudication decisions when compared to the briefing document provided by tie limited for CEC.

The June Council report referred to 15 matters at DRP. These included:

Three disputed matters resolved by negotiation:

Haymarket – This was agreed at £195k versus a £400k BSC initial position and a £96k tie position.

Baird Drive – This was agreed at £915k versus a £3.9m (later £1.9m) BSC position and a £600k tie position.

Balgreen Road – This was agreed at £295k versus an £800k BSC position and a £300k tie position.

and three resolved by mediation:

Princes street bus lane – Whilst no figures were supplied, this was to be dealt with as part of Princes Street Supplemental arrangements

Percentage uplift in prelims – No figures were provided.

Extension of time 1 – This was agreed at £3.52m versus a £7.09m BSC position and a £3.52m tie position.

The remaining nine matters were resolved by formal adjudication:

Hilton Car park – This was decided in tie's favour with a saving of £90k as the BSC position was £90k and tie's position was zero. tie found liable for one third of the fees and expenses with BSC liable for two thirds.

Gogarburn Bridge – This was decided in BSC's favour and tie were unsuccessful in the redress sought. In terms of cost it was determined at £176k against a tie estimate of £72.5k and a BSC estimate of £313k. tie were found liable for all the fees and expenses.

Carricknowe Bridge – This was decided in BSC's favour and tie were unsuccessful in the redress sought. In terms of cost it was determined at £138k against a tie estimate of £99.5k and a BSC estimate of £392k. tie were found liable for 75% of the fees and expenses.

Russell Road Retaining Wall – This was decided in BSC's favour and tie were unsuccessful in the redress sought. In terms of cost the issue in dispute was determined at £1.46m against a tie estimate of £701k and a BSC estimate of £1.84m (cited as £4.6m in the summary but this included a further two issues not taken to adjudication). tie were found liable for the fees and expenses. The commentary was not clear that tie were unsuccessful in the redress sought.

Section 7 track drainage – This was decided in BSC's favour. In terms of cost it was determined at £997k against a tie estimate of £25k and a BSC estimate of £1.35m. tie were found liable for 80% of the fees and expenses.

Tower Bridge Place – This was decided in tie's favour at -£261k, representing a saving of over £700k as BSC's position was +£456k and tie position was -£305k.

Depot Access Bridge - This was decided in BSC's favour. In terms of cost it was determined at +£1.23m against a tie estimate of -£4.83m and a BSC estimate of +£2.48m (later reduced to +£1.82m). However tie's position (and estimate) was based on the fact that an associated wall required to be taken into account. The adjudicator rejected this argument, although any sums relating to this wall could still be recoverable via a further DRP. tie were found liable for all the fees and expenses.

Mudfa Rev 8 – This was decided in BSC's favour, but for an extension to Section A only of 154 days. The overall value of this was not provided but tie's defences stood up for much of the case. Each party were found liable for one half of the expenses.

Murrayfield underpass – This was decided in BSC's favour. The value was relatively insignificant (less than £50k) but it was an important result as tie are unable to instruct works in such scenarios. This DRP should likely never have proceeded on the basis it did as on later examination of the detail it was clearly going to fail from the outset as no estimate was agreed and the clause tie relied upon required an estimate to have been agreed. tie were found liable for all the fees and expenses.

In terms of looking at which party has ultimately succeeded at DRP then you will see from the above that the three negotiated settlements and three mediations all increased the overall base project cost, meaning that BSC "won". Seven of the adjudications went to BSC and two went to tie. Therefore an overall 13:2 BSC versus tie win/lose ratio is correct. However, it is also true to say that there has been a significant saving to the public purse through the application of the DRP process. Such savings do, however, have to be offset against any additional legal and management costs required to achieve such savings. These have not been provided (nor asked for to date). The question of wins and losses therefore very much depends on the definition of "winning" used.

It should also be noted that the value of the "saving" as described by tie/DLA is also a grey area as the value of claim submitted by Infracore at point of adjudication is in some cases reduced from their opening claim value. It should also be noted that the interpretation of the pricing schedule is not clear from the decisions to date (Adjudicators Hunter and Wilson coming to broadly different conclusions). However, regardless of their views on the pricing principle, both adjudicators found against tie in terms of the issues before them.

S&W also reviewed the decisions from a legal perspective. They were simply reviewing tie's summary of the decisions against the actual decisions and they were not asked to expand into commenting on the rights or wrongs of the decisions themselves. Their comments on the summary which tie provided were that:

Overall, the commentary identifies the "main issues" raised in each adjudication.

The commentary did not include any reference to award of expenses (now included above);

The commentary did not clearly summarise the arguments advanced by the parties nor was it clear who had ultimately been successful.

The overall impression is that, whilst not inaccurate, the commentary conveyed surprisingly little hard information.

With regard to at least three of the adjudications, they noted that the commentary was not clear that tie were unsuccessful in the redress sought.

In conclusion, whilst tie's summary is not inaccurate, it appears to present the DRP findings in the best possible light as opposed to giving a clear and concise presentation of the facts. We would agree that BSC are indeed entitled to claim a 13:2 win rate, the overall increase in project costs has been reduced by taking these matters to DRP.

Although we have not seen the decision yet, it appears that tie have also lost the latest Landfill Tax DRP.