



For The Attention of Dave Anderson
Director of City Development
The City of Edinburgh Council
Waverley Court
4 East Market Street
Edinburgh
EH8 8BG

Our Ref: INF CORR 7065

Date: 17th January 2011

Dear Dave,

Edinburgh Tram - Comments on Project Resolution

Thank you for your letter of 20th December 2010 sent by e.mail on 23rd December 2010. This covers 4 topics – Resolution, Design Assessment Report , Failure to progress and DRP; each of which i will deal with in turn.

Resolution

Unfortunately, by the time we received your comments a number of the final reports had already been circulated and so we were unable to incorporate any additional comments. I note the comments in your e.mail about leaving it to my judgement about which points to take on board.

Whilst it was not possible to incorporate comments in the final version of the report, we can consider your input should a further report be required following the mediation which is planned. You had previously requested information relating to overhead costs of DRP's and this was provided to Andy Conway on 22nd December 2010.

In respect of Clause 80.20, **tie** is pursuing this approach as part of the ongoing enforced adherence strategy and this will continue. Indeed, we are now progressing legal drafting from McGrigors to prepare a referral to the Dispute Resolution Procedure in respect of BSC's response to such instructions.

You also suggest the issue of a change order to BSC for an amended on street design. **tie** Change Order no. 20 which was issued to BSC on 13/02/09 was intended to achieve this amended design. However, this has not thus far resulted in an economic solution from BSC and so we have been working with Scott Wilson through the TSS contract to investigate more economically efficient solutions. Your Transport team has been actively contributing to this work.

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Design Assessment

tie has already carried out a review of the risks associated with not novating SDS back to **tie** in the event of any termination of the Infraco Contract. A copy of this has been provided to CEC (Nick Smith) and can be provided again under confidential cover if required. As long as the Infraco Contract is in place, Infraco and SDS remain the designer although we could opt to issue a **tie** Change order to exclude the scope of the on-street design from the BSC/SDS scope.

As you point out, the integration risks of such an approach require to be fully explored before opting for this solution. In addition, any such amendment to the scope of the Infraco contract will affect the legal analysis of the opportunity to recover additional costs following a Termination on the grounds of an Infraco Default. There will be a procurement risk should we change designer for all or part of the design. However, **tie** is currently utilising Scott Wilson through the current TSS contract which allows for similar design services to be provided and so we believe that this reduces the potential procurement risks.

Your letter mentions a lack of visibility of the real design process.

tie's management of design is split into 2 legs - Damian Sharp, reporting to Frank McFadden is responsible for the day to day project/contract management of design by Infraco. Damian's role includes this and the management of the approvals interface with CEC. Tony Glazebrook reporting to Bob Cummins is responsible for the review of the Infraco design in accordance with Schedule Part 14 of the Infraco contract and the overall management of design assurance associated with "Deliver a Safe Tram". This includes the interfaces between Infraco, the Independent Competent Person and HMRI.

tie has less visibility of the internal Infraco design process where this is the integration of the Infraco related design elements and the original "SDS" core design. **tie** are not provided with any visibility by BSC of the flow of design information between BSC – SDS in order to complete the overall design. However, integration and assurance is addressed and made visible through the design approval process conducted by **tie** if and when the required completed documentation is submitted by BSC.

We frequently received updated IFC drawings from BSC where revisions are made to drawings. We do not hold all the detailed design information including calculations etc, nor would we expect to as BSC are responsible for providing an assured and integrated design. The Infraco Contract details the IPR rights under the contract which allows **tie** to use the Infraco IPR contained in the Deliverables.

Our programme analysis shows that the lack of a completed integrated design is a principal reason that BSC have not been able to progress construction at a number of locations.

We agree that CEC used informatives as a pragmatic way of assisting with the approvals process where BSC had failed to provide information in original submissions.

There were also a minority of cases where informatives were used where a client decision had not yet been made, e.g. tramstop branding. You refer to a communication from CEC dated 14th September 2010 and I assume that this is the letter referenced SS1.40/AR – can you please confirm this? Assuming that this is the letter to which you refer, **tie** responded to you on 1st October 2010, reference INF CORR 6340/DS. Unfortunately, we still await the response required from BSC and are continuing to pursue this.

Scott Wilson have confirmed that their design timescales include time to obtain consents.

A range of ground investigation information was provided to BSC as Schedule Part 41 of the Infraco Contract. Any ground condition risk from that point was a retained client risk and a risk provision was made in the budget for this risk. We have provided a copy of ground information to your team today (17/01/11).

Failure to Progress

Steven Bell gave a presentation on our overall contract administration process at the TPB on 15th December 2010. Notwithstanding this I do think it would be a good idea to hold a half day workshop on the topic of changes with you and others from CEC who you wish to attend to take you through the details requested. In this session we will cover the specific geographic examples you suggest in your letter. Whilst this will be an intensive use of management time it could be useful as part of the testing and challenge required for future DRPs and will also aid facilitation of the alignment of tie/CEC views in advance of mediation to demonstrate a united "Client" Front. I propose holding this in late January/early February 2011 so that it is complete in advance of mediation and offer the following dates:

26th January – morning
31st January – afternoon
2nd February – all day

Please confirm which date suits your diary best.

Comments on the DRP Summary

The summary of DRP decisions prepared by tie is based on a legal summary produced by DLA. There are in total some 220 pages of decisions and reasons sitting behind the 11 adjudication decisions. This has been condensed into the summary you describe and it is complex to explain concisely the range of arguments in these papers in a simple summary document. This is why CEC legal have been provided with the detailed decision/arguments upon which the summary is based. These papers also form part of the appendices to the Resolution Report.

tie's objectives in referring specific topics to DRP were to:

1. Clarify legal principles
2. Reduce costs
3. Get works started

In this respect we have been successful in objectives 2 and 3. Objective 1 has had a more mixed result but has still provided benefits which we are continuing to develop.

Bearing this in mind, it is not considered particularly helpful to refer to matters as "wins" or "losses".

Your commentary makes the following statement;

"The question of wins and losses therefore very much depends on the definition of "winning" used."

Your summary seems to have reached the conclusion that Shepherd & Wedderburn agree with BSC's interpretation of a 13:2 "win rate" for BSC. **tie** do not concur with this view, but it would aid our understanding of your conclusion, if you would provide me with the criteria you have used for deciding on a "win" or not.

Yours sincerely



Richard Jeffrey
Chief Executive