

Carillion Utility Services Limited
and
tie Limited

Post Mediation Report

regarding

Carillion Utility Services Limited's
Schedule 4 Rates and Prices Submission of June 2010

in relation to the

Multi-Utilities Diversion Framework Agreement
for the Edinburgh tram Network

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On behalf of: **tie** Limited

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Draft



Section 1 Introduction

1.1 Generally

1.1.1 This report has been prepared by **Robert Elliot Burt** (BSc(QS) LLM (Const Law) DipArb MRICS MCI Arb), Director of Acutus, Merlin House, Mossland Road, Hillington Park, Glasgow G52 4XZ.

1.1.2 The purpose of this report is to set out and explain the various potential settlement scenarios (including the key variables and risks attaching thereto) which arose during the mediation held on 9 & 10 November 2010 between tie Limited ("tie") and the MUDFA Contractor (Carillion Utility Services Limited - "CUS").

1.1.3 Prior to that mediation CUS had submitted various claims to tie under the heading of its 'Schedule 4 Rates and Prices'. The principle claims submitted were as follows¹:-

1. 28 August 2009 totalling **£2,663,865** (for only 3 nr. Work Sections up to 30 April 2009) which CUS extrapolated at that time to circa **£11M** for all Work Sections^[2];
2. September/October 2009 totalling circa **£9,449,000**^[3] (for 8 nr. Work Sections: 4Nr up to April/May 2009 and 4Nr. up to 31 August 2009) which by November 2009 CUS had extrapolated to **£13.554M**^[4];
3. 21 December 2009 submission totalling **£13,144,871.00** (for 11 nr. Work Sections up to Aug/ November 2009); and finally
4. The CUS submission dated 14 June 2010 which claimed a revised total of **£8,848,839.00** (for 11 nr. Work Sections up to 4 December 2009).

1.1.4 The reduction in the overall sum claimed (which had been reduced from a peak of circa £13.554M to £8.848M by December 2009) was brought about by lengthy dialogue and meetings between tie, CUS and Acutus over the period up to and including December 2009. That said, it remained tie's opinion and our own independent opinion, that the sum

¹ Note: each subsequent claim submission supersedes the earlier submissions, they are not cumulative

² The CUS covering letter had suggested that the extrapolated value anticipated an overall claim sum of £11 million in respect of the relevant work sections.

³ The precise amount claimed at that time is difficult to state with any certainty due to the fact that the claims submitted by CUS were being constantly revised and remained 'fluid' (due to CUS linking same to its recovery under Change Control and other areas such as re-measurement).

⁴ CUS interim application for payment November 2009, again by a process of extrapolation, contends that its overall delay and disruption claims total circa £13.554M.



claimed on 14 June 2010 was still considerably in excess of a level which we could see as having been evidenced by the various CUS submissions.

1.1.5 In effect the CUS claims were global claims for labour and plant disruption (albeit submitted as being claims for revisions to the contractual rates and prices). I should stress that while there are a number of difficulties for a party presenting a global claim (including evidential issues relating to demonstration of cause and effect) it *does not* mean that the claims themselves are invalid. Nor does it mean that those claims will fail. Rather it is the quantification of the loss that can prove difficult to establish and hence can give rise to risks to both the party prosecuting and the party defending such claims.

1.1.6 As a result of the lingering difference between the parties on this matter, and also other areas of the valuation of sums due to CUS, CUS commenced the internal dispute resolution procedure on 3 August 2010.

1.2 Summary of CUS claims

1.2.1 The CUS claim dated 14 June 2010 was essentially split into various heads, the principle elements being:-

Claim Head	Orig. CUS Claim Amt
1 Labour	3,753,466
2 Plant	2,226,801
3 Reinstatement	217,231
4 Prelims	105,272
5 Traffic Management	225,311
6 Fluctuations	434,028
7 MUDFA Markup	583,830
8 Claim Prep. Costs	1,300,000
Totals	8,845,938

Actual claim amount 8,848,839

[minor difference is due to computer rounding]

1.2.2 It was readily apparent that the main elements of the CUS claim which required consideration were the labour and plant heads (rows 1 & 2 in the table above). Those two heads, together with the 'Fluctuations' and 'MUDFA mark-up'⁵ elements of the overall claim, accounted for approximately 80% of the overall sum sought by CUS.

⁵ The 'value of the 'Fluctuations' and 'MUDFA mark-up' elements were in effect dictated by the value of the labour and plant claim heads



1.2.3 The remaining elements⁶ were found to have some validity but at a reduced value from that claimed by CUS. Similarly, the sum claimed for "Claim Preparation Costs" was set aside for separate consideration (section 1.5 below refers).

1.2.4 As a consequence particular focus during the mediation was placed on the factors associated with and risks attaching to the labour and plant elements. Those factors are outlined below. Those factors and risks create a number of possible settlement scenarios. The three principle / likely scenarios discussed at the mediation are included at Appendices 1, 2 & 3 attached.

1.3 Factors affecting CUS Labour claims

1.3.1 The following factors were identified as being key to the success of the CUS labour claim (Appendices 1 to 3 attached refer):-

1. Hiab driver hours: during pre-mediation discussions with CUS, we identified that CUS had over-claimed the Hiab driver hours. CUS accepted an element of the duplication identified by us (representing a minimum agreed **reduction totalling £231,927**). There remained however a difference in respect of additional hours which we considered should also be excluded (a potential further reduction of £197,288).
2. Embargo hours: in a manner similar to 'Hiab driver hours' we had identified duplication in the CUS claim in respect of 'embargo hours'. That is, the CUS claim included embargo hours which it accepted should not have been included. CUS accepted a **reduction of £71,130**. There remained however a difference in respect of additional hours which we considered should also be excluded (a potential further reduction of £197,288).
3. Difference in operative hourly rate: CUS accepted that a **reduction of circa £116,994** was appropriate due to errors in the actual hourly rate claimed.
4. Rate increases (£14.89/hour to £18.80/hr): CUS claimed that tie was responsible for the difference between the tendered operative hourly rate and the actual hourly rate paid by CUS to its sub-contractors. tie had disputed liability. It was our opinion that, based on the evidence presented by CUS, tie was correct in that position. That said, there remained a risk that a third party would decide that the delays incurred

⁶ Reinstatement, Prelims and Traffic Management (rows 3, 4 & 5 in the table at paragraph 1.2.1 above).



(for which tie had accepted responsibility) had caused that increase in rate paid by CUS.

Scenarios 1 & 3 attached proceed on the premise that tie was correct in its position and therefore a reduction in the CUS claim was necessary. Scenario 2 includes for the risk that CUS was successful in its position.

5. Claimed versus paid hours: this factor relates to a potential difference between the hours claimed by CUS and actually paid by it. CUS accepted a minor reduction. Ultimately however this did not translate into a significant reduction in the sum claimed.
6. Disruption found: this 'factor' relates to the question of whether the global claims submitted by CUS demonstrated, or could/would be held to demonstrate, that tie was responsible for the alleged increase in hours claimed (paragraph 1.1.5 above refers). This represented the biggest area of risk to tie. While CUS had limited descriptive records, their records were comprehensive inasmuch as they did indicate the presence of those operatives on site. tie's ability to question / disprove those hours was limited.

The scenarios set out in Appendices 1 to 3 did not reduce the potential top-line claim values for this factor. That was set aside for subsequent 'final' consideration of 'culpability'.

7. Remedials generally: this factor is linked to item '6' above and culpability generally. This relates to whether the deductions made by CUS for remedial works are sufficient or correct. As noted in '6' above, the contemporaneous records lacked descriptive content. It was therefore not possible to establish what the operatives were doing at any given point in time. CUS claimed that they were working on diversion works; the difficulty for tie, and hence the risk to tie, was that it could not demonstrate that the operatives were not working on diversion works. As with item '6' above this was set aside for subsequent 'final' consideration of 'culpability'.

1.3.2 The various potential scenarios presented by the above, before considering underlying culpability, are included as Appendices 1, 2 and 3 to this report. Those scenarios are summarised at 1.5.1 below.



1.4 Factors affecting CUS Plant claims

1.4.1 The following factors were identified as being key to the success of the CUS plant claim (Appendices 1 to 3 attached refer):-

1. Main items of plant derived from CPA: this (along with the factors CUS Small plant claims) represented what was considered to be a significant flaw in the CUS analysis. CUS had previously contended that its plant analysis was taken from its Weekly Summary Sheets. It became apparent during pre-mediation discussions that CUS has used its project cost system ('CPA') to arrive at the plant value. This meant that CUS could not necessarily evidence the precise usage of all of the plant claimed. Again however this was not necessarily 'fatal' to its claims, but did go to the heart of the credibility of same. The risk to tie arising from this method of analysis was that a third party might well accept CUS arguments that the plant would, at least for the most part, have been involved in diversion works.

Scenarios 1 & 3 make varying levels of deduction for the above. Scenario 2 proceeds on the premise that CUS might well succeed in convincing a third party of its entitlement to all plant resources.

2. Excavators & breakers: during pre-mediation investigations it was found that CUS had incorrectly rated the excavators and breakers claimed. This resulted in a minimum reduction of £134,000; the maximum reduction was dependent upon the level of reduction applied to the other factors (see Appendices 1 to 3 attached).
3. Hiab hours overclaim: in a manner similar to item '2' above, it was found that CUS had incorrectly analysed the Hiab hours claimed. This resulted in a minimum reduction of £41,000; the maximum reduction was dependent upon the level of reduction applied to the other factors (see Appendices 1 to 3 attached).
4. Main Plant values/rates - windfall from Values not cost: the CUS method of analysis created a potential windfall value to CUS (because rates claimed were significantly higher than actual cost). This was considered unreasonable, not in accordance with the Contract and hence a deduction was considered to be appropriate. The precise reduction was dependent upon the level of reduction applied to the other factors (see Appendices 1 to 3 attached).



5. Small Plant 'windfall': as with item '4' above the methodology adopted by CUS created a windfall value within its small plant claim somewhere between £400,000 and £700,000. This was considered unreasonable, not in accordance with the Contract and hence a deduction was considered to be appropriate. The precise reduction was dependent upon the level of reduction applied to the other factors (see Appendices 1 to 3 attached).
6. Remedials to be deducted: due to the method of calculation adopted by CUS it became apparent that it had not deducted plant associated with remedial works. As such deductions were both necessary and appropriate.
7. Recovery under measure and change control: this line entry simply reconciles the amounts paid by tie to CUS via the remeasurement and change control processes (since the starting point of the current plant disruption calculation is based on the *total* plant resources used *not* the *additional* resources used). It was accepted by CUS during discussions that the sums reconciled were only representative of payments made by tie at a certain point in time. CUS acknowledged that its claim submissions did not reflect the values most recently certified by tie in respect of measurement and change control items. That said, discussions with tie during the mediation indicated that there had been little movement in the sums certified which rendered any difference to be relatively minor.

1.4.2 The various scenarios presented by the above, before considering underlying culpability, are again included as Appendices 1, 2 and 3 to this report (and are summarised at 1.5.1 below).

1.5 CUS claim for payment of "Claim Preparation costs"

1.5.1 The overall sum claimed by CUS included a line item for Claim Preparation Costs in the amount of **£1,300,000**. CUS consistently failed to provide any evidence or vouching of this claim head both prior to and during the mediation. The position adopted during the mediation was therefore that nothing was due under this head. It has to be borne in mind however that, while the sum appears excessive and contractually difficult to recover, there was an avenue open to CUS to claim sums under this head (namely damages for breach of contract). As such in arriving at any settlement figure it was relevant for tie to consider whether CUS may be successful in respect of even a proportion of this claim head.



Section 2 Summary

2.1 Generally

2.1.1 Appendices 1, 2 & 3 set out the primary scenarios which were thought likely to arise taking into account the major factors identified prior to and at the mediation on 9 & 10 December 2010 (and as summarised in the preceding report sections). Those scenarios were considered to represent more accurate top-line values of the CUS claims *before* considering culpability for those increased costs. The table below summarises the contents of Appendices 1 to 3.

Overall Range:

5,431,375	2,741,566
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Possible Settlement Scenarios	Range:		Key Variables
	From	To	
Scenario 1 Totals	3,854,323	2,741,566	Take rate increase deduction; 50% to 100% deduction off Main plant CPA
Scenario 2 Totals	5,431,375	4,562,277	Concede rate increase deduction; and concede Main plant CPA
Scenario 3 Totals	4,173,843	3,333,031	Take rate increase deduction; take 20% to 20% deduction off Main plant CPA

Note: in each instance Small plant allowed but less windfall

Note: the above shows a slight over-deduction of plant ranging from £82,000 to £164,000 for CUS concessions on Labour hours

2.1.2 The above indicates a range of top-line claim values from £2,741,566 to £5,431,375 (*before* culpability). That said, when considering the parties' respective culpability for the above it has to be borne in mind that much of CUS' culpability will have been stripped out of the overall claim totals listed. In this regard, reference is made to paragraph 1.1.3 above which sets out the various claims submitted by CUS during the course of 2009. The maximum value submitted at one point totalled **£13.554M**. The above values represent a reduction of approximately £8.1M (or 60%) from that maximum claim value.

2.1.3 In this regard, I understand that the final settlement on the Schedule 4 Rates and Prices claim was **£4,645,000**. That equates to 34.27% of the maximum sum claimed by CUS.

2.1.4 In my opinion, given the inherent difficulties and risks (as outlined above) that **tie** would have faced in for example an adjudication forum, this represents a reasonable settlement figure.



Robert Burt

7 December 2010