

EDINBURGH TRAM PROJECT ASSESSMENT OF RISK OF SUCCESSFUL PROCUREMENT CHALLENGE

Background

A decision is imminent on the issue of the Intention to Award notice, which will be followed 10+ days later by contract award. The purpose of this paper is to summarise tie's assessment of the risk of a successful challenge under procurement regulations. Technically, a challenge could emerge from many quarters, but the most likely source in any procurement is from unsuccessful bidders, especially those who reached a late stage in the process. It is this threat which is addressed in this paper.

It must be borne in mind that the source and basis for a challenge cannot be predicted with certainty. This paper is not a substitute for the documentation that may be required to defend tie's actions in the event of a challenge.

Analysis

Process employed

A review of the procurement process was performed by Jim McEwan which covered the period from selection of the preferred bidders in October 2007 through to the end of January 2008. This was independent of those who had been involved in the procurement process and concluded that the processes and documentation were in order. This review is included in the Close Report which supports the decision-making on Financial Close. Because the Close Report is potentially a public document, the more commercially confidential information contained in this paper will not be reflected in the Close Report.

Overall outcome

The current position was summarised for the Tram Project Board on 12th March 2008, which concluded that the outcome of the contractual negotiations was in line in all material respects with the Business Case which supported the selection of the Preferred Bidders in October 2007. This does not of itself support a conclusion that principal Infracore / Tramco terms are materially unchanged. However, these contracts represent the core of the project and the majority of the funding. Compliance of the final position with the business case is therefore valid and influential background.

Elapse of time

The considerable elapse of time since selection is an unhelpful factor as it is prima facie indicative of a lengthy period of post-selection negotiation. The reality has been that the delay and most of the effort since October 2007 has been caused by the difficulty of aligning the SDS provider with its novation responsibilities under their contract, coupled with the volume of work involved in the alignment of the SDS design with critical interface documents including the Employer's Requirements and the BBS Proposal. It is considered unlikely that selection of a different bidder would have reduced the time required to reach today's position. All bidders were on notice that SDS Novation was a

prerequisite to completion. A draft Novation agreement was incorporated in the tender documents. Both bidders had commercial and contractual qualifications on their offers.

Price

[EXISTING WORDING TO BE AMENDED / REPLACED BY TEXT FROM MATTHEW]

In the period post the selection of preferred Infraco bidder, there has, as normal and expected, been movement in the commercial pricing of the contract based on a number of key drivers:

- Both parties in the preferred bidder review had lodged substantial and material qualifications to their bids and it was a key requirement in the ensuing months and prior to contract close that these were understood and resolved/removed, leading inevitably to change in contract terms.
- The substantial revision of the Employer's requirements, which are now at version 3.5 (Version 2.4 at conclusion of preferred bidder selection). These changes in requirements have been crystallised as both parties went through a process of harmonising and clarifying the requisite specifications. Included amongst these were the CEC's requirement for tapered poles in the heritage areas.
- Completion of further elements of the overall design which were not available at the time of the preferred bidder selection.
- Following the recognised changes to employer requirements and the completion and refinement of further aspects of the overall design, a review of the programme timescale has seen the programme move from delivery at the end of March 2011 to 16th July 2011 with concomitant effect on price.
- Review of the Depot equipment base with the TRAMCO preferred bidder has seen a number of changes to said base to assure compliance.

It is not considered that this price movement from £xxxm to £xxxm represents an issue which requires review of the selected party, the volume of change as described was to be expected and would have occasioned similar price movement, ceteris paribus, with other competing suppliers]

[Comment on the trail from bids to final price composition, allowing for normalisation, application of contingency allowance and scope changes]

Programme

The programme to project completion has moved out by c3 months from the basis on which selection was made. The primary reason for this is the same as that described under elapse of time above, which affects the anticipated commencement of construction. The construction programme itself has not materially extended. It is

considered that the delayed commencement and completion dates would have similarly arisen with alternative bidders.

Risk profile

It would be normal to expect that the risk profile will change as contracts are concluded, but only to a marginal degree. This is the case for the Infraco / Tramco contracts and risk profile. One specific area requires more detailed assessment – the risks arising from the overlap of design and construction.

This was anticipated at the time of bidder selection, but the detailed mechanics of dealing with the issue have been developed since selection. The issue of overlap would almost certainly have arisen in the same form with any bidder and it is believed that the solution would have been similarly concluded. This covers both the legal process and protections and the management processes.

Contract security terms

These terms could be relevant if any changes implied that the perceived risk were materially different from the basis of selection.

In substance the only material change in security terms between Preferred Bidder stage and the final negotiated deal is that the previous 30% liability cap during the construction phase (with no performance bond) on Infraco is now a 20% liability cap plus two separate on-demand bonds of a further c25% which is over and above the liability cap – therefore amounting to the same cover. There have been alterations to the duration and function of the liability cap post-construction, but within acceptable bounds. All security terms have been negotiated within the range of expected market terms.

Intimations

We have had no indications from any party that they are considering a challenge. Reaction to selection was normal although it should be noted that the losing bidder in Infraco has formally requested a de-brief and will take a close interest in the final terms of award, particularly final price, given the investment made in the bid process.

It is also worth noting that there may be a legal defect in the unsuccessful bidder's tender which would offer defensive material if a challenge is made.

DLA Letter

An accompanying letter from DLA provides their view of the content of this paper.

Conclusion

Tie considers that the conduct of the procurement process and the management of contract completion since selection of preferred bidders have been in line with procurement regulation. Should a challenge be made, tie would be in a strong position

to resist successfully. Accordingly, there should be no concern about issuing a notice of intention to award nor about contract award in due course.

**tie Limited
12 March 2008**