Edinburgh Tram Project Peer Review

Date of issue to tie Project Director: 29 June 2009

Review dates: 25-26 June 2009

Peer Review Team Leader: Malcolm Hutchinson

Peer Review Team Members:
Mike Heath
Andrew Sloan
Willie Gillan

Background

The aims of the project:

The objective of the tram network is to help to create the transport infrastructure necessary to promote and support a growing local economy and create a healthy, safe and sustainable environment.

Substantial road traffic growth across the Edinburgh area combined with forecast population and employment increases will lead to significant growth in road congestion. Sustainable growth can only take place with a step change in public transport. Road space must be created by modal shift away from cars, to enable economic growth to take place without aggravating congestion. A tram system will enable new development and continued growth of existing development in a sustainable way. Without it, growing traffic congestion and lack of access to development sites will curb future growth and threaten the economic prosperity of the city as the capital.

The driving force for the project:

The tram project is being promoted by City of Edinburgh Council ("CEC") with the support of the Scottish Government. Capital funding is being provided by CEC and Scottish Government through Transport Scotland ("TS").

Purposes and conduct of the Peer Review

The Team was asked to comment on four areas

- Review of Strategic Options - progress made to date including DRP/Mediation update
- Contract Management – including change, compensation events, relief events and correspondence
- Programme
- Team (Commercial, Operational and Programme) - is the composition of the team the correct size, shape and of adequate experience to meet the needs of the contract given the current environment and behaviours being experienced

The full terms of reference are in Appendix A.

Conduct of the Peer Review

The Review was carried out on 25th June and 26th June 2009 at **tie** offices in Edinburgh. The team members are listed on the front cover.

The team was briefed by and interviewed the people listed in Appendix A.

The review team would like to thank the **tie** team for their support and openness which contributed to the review team's understanding of the Project and the outcome of this review.

Conclusion

The Review Team finds that:

- The projected out-turn costs of the project are approaching the limits of affordability and value for money

- The Bilfinger Siemens CAF Consortium (BSC) has not mobilised to deliver the Project

- BSC has not delivered a valid Programme

- BSC has not engaged constructively with **tie** to deliver the project

- The **tie** team appears to be shell shocked and needs to be reinforced and re-energised

- The mediation process offers a last chance for tie to proceed within the existing scope and framework. Inevitably there will be compromises required from **tie** and its stakeholders and these will need to be carefully managed. However **tie** must ensure stakeholders put aside the questions about how did we get here and concentrate on the project aspects rather than the organisational ones.

Findings and Recommendations

Strategic Options

From the papers we have seen to date and the discussions held we recognise that there has been a growing dissatisfaction and frustration within **tie** over the performance of the Bilfinger Siemens CAF Consortium (BSC).

The frustration relates to inadequate progress against the original programme, failure to provide timely estimates for changes, the excessive prices originally estimated compared with those finally determined and a general failure to adopt the "Partnering" approach compounded by what **tie** perceives as re-opening commercial issues that had been closed notably on changes relating to design and programme.

A number of initiatives have been undertaken to try and achieve a better working relationship between **tie** and BSC, notably the Project Management Panel and also the proposed joint mediation process scheduled for week beginning 29th June. Should this latest initiative not achieve improved working relations between **tie** and BSC, then an alternative will need to be developed.

Joint Mediation

The purpose of this process is to seek to achieve resolutions on the major points of disagreement between the parties to the contract. The subjects for discussion have been split into categories, principal amongst these are;

- agreement on a programme for the works,
- the extent to which the design has changed between pricing and issue for construction drawings
- and whether this represents change or reasonable design development and
- whether BSC assertion that the contract between the parties is in effect a cost reimbursable contract by virtue of Clause 4.3

We have discussed with **tie** senior management team what they see as being a successful outcome to the mediation process. The views expressed indicate that success would be:

- A change in the approach of BSC in its adherence to the requirements of the contract and
- Agreement to expedite the works.

For success to be realised there will have to be a significant change in the behaviour of BSC and the fostering of a more collegiate approach. This change would have to be maintained until completion of the contract

The degree to which relationships have been strained and the strength with which BSC (in particular Bilfinger Berger) hold views on the contractual position, manifest in not progressing the civil engineering works, raises the real possibility that the mediation will be unsuccessful.

We Recommend that Further consideration should be given to the discussions to date regarding both **tie** and BSC's interpretations of the significance of **Clause 4.3** of the Infraco Contract. Although **tie** have already received legal opinion on this clause it may be prudent for **tie** to take the necessary steps to create a situation whereby these interpretations are further tested through the dispute procedure.

We believe that **tie** must plan for this eventuality and explore all options should there be little change post mediation

Options for progressing the works

We consider that there are merits in exploring the possibility of breaking out from the contract elements of the civil engineering works to be constructed as part of the works and tender these such that these are there to be constructed by a contractor other than Bilfinger Berger and **Recommend Accordingly**. This would amount to varying the scope of civils works and obtaining reduction to the contract price and obtaining alternative prices though a competitive process. The merits of this approach are as follows;

- At this time the construction industry is experimenting a period of price deflation as a consequence of the current economic climate. This, augmented by pressure on public expenditure, makes a case for a degree of market testing to demonstrate best value.

- BSC is contesting that modification to the design post contract award amounts to a change under the contract. This is opposed to **tie**'s view that the "change" amounts to no more than reasonable design development. **tie** considers that the costs presented by BSC for these changes / design development are high. Break out of areas where high costs are proposed and retendering them would allow this assertion to be tested.

- **tie** consider that the civil engineering aspects of the project are not progressing as they should be and this is increasing the possibility that the project will not be completed on time. Break out of areas would serve to underscore **tie's** concerns on programme and its intent to complete the project on time. Additionally of particular note is the need to have sufficient areas of the works complete to allow delivery and receipt of the tram vehicles by mid 2010.

- **tie** has indicated that the information provided by BSC when notifying change is less than required by the contract. There is an unwillingness to proceed with the works until the quantum associated with the change is agreed. Break out of sections of the works where such this situation exists would break this impasse.

The Peer Review Group does not have intimate knowledge of the entire scope of the civils works required nor the critical path items on the construction programme. Notwithstanding this it consider that the issues relating to change requests associated with design development / change of earthworks on section 5 and 7 could be areas considered for break out. Inclusion of the tram depot located in this area of the project would reduce risk associated with delay to tram delivery.

The downsides to this process are twofold;

- **tie** would have to ensure that this process is permitted under procurement notes.

- **tie** would inevitably attract a degree of liability associated with the works built under separate contract.

- In relation to areas 5 and 7 this risk to **tie** would distil to the degree of settlement associated with earthworks construction and possible impacts on tracks formation. This does not seem to us, as a significant hazard when compared to the potential upsides offered to overall project risk management.

Contract Management

We note the current difficulties facing the project in respect of cost and programme. On the basis of what we have heard, the projected out-turn costs of the project are approaching the limits of affordability and value for money. We are surprised that the parties are so far apart from the position they thought they reached during the prolonged tender evaluation and award and preferred bidder stages. The mediation must consider this openly and honestly if a sustainable way forward is to emerge. We comment at length in the Strategic Options section on options that could be available to **tie**. In this section we try to set out some matters that require consideration under any scenario.
For matters under **tie**'s direct control, **We recommend** that close attention is paid to the completion of the MUDFA works in view of their impact on programme and the commercial balance between **tie** and BSC. It was extremely disappointing to hear that the overall delay to the balance of the 40% of the works due to be completed between July 2008 and January 2009 will be almost a year in some cases. Given that **tie** had been generally positive about the management of and progress of the

MUDFA works in July 2008, it should assist **tie** to determine the causes of the last delays and see if any revisions to practice are required.

Design is also on the critical path and **We recommend** that remaining design and outstanding drawings are subject to a critical review by an experiences design co-ordinator to ensure a proper balance between 'buildability', programme and cost. We also recommend that tie makes clear to BSC that elements of design which BSC may construe as not fit for purpose or omitted from their pricing are BSC's responsibility, now rather than awaiting the issue to emerge as it will do in the future.

Contractual Issues

We recommend that the following are considered:

- It is acknowledged that the current contract is bespoke and was based on the assumption that design would have been finished before final prices were submitted. This does create issues within contract management itself. However, at present, the contract has no provision for a dispute avoidance mechanism that is central to NEC 3. The introduction of an early warning regime embedded into the contractual arrangements would re-enforce behaviours that PMP is introducing.
- There would also be merit in amending the existing DRP process which although being standard drafting, has a long tail to reach an adjudicated decision. We believe that a process whereby a jointly agreed expert gives a provisional decision within a day of referral is worthy of consideration and would be in both parties interests. It is recognised that BSC may rebuff this approach if **tie** adopts an approach using selective DRP as part of its commercial strategy.
- The change mechanism is also industry standard. We have seen the number of changes awaiting estimates and are aware of issues of value for money in the cost of changes presented. It may be worthwhile to discuss the prospect of either simplifying or streamlining the change process, for example if **tie** gave an indication of the amount it was willing to pay for a change at initiation. The forthcoming mediation sessions might be a good forum to test such ideas.
- In most contracts of this nature one would expect a linkage between matters that relate to the sponsor's statutory obligations, (which cannot be fettered), and the ability to instruct works which might give rise to a compensation event which would be dealt with through a formulaic approach set out in the contract. The formulaic approach and attitude to compensation would also refer to the expectation of mitigation by both parties so that the contractor is no better or worse off by undertaking the change or instruction requested. The contract would then expect both parties to carry on working as normal so that differences are settled "off line." We recommend that this is explored both internally with tie's advisors and in the mediation to provide a way forward.
- Finally, we think that **tie** should embark on a process of "market testing aspects of BSC's work that it thinks are expensive or potentially blocking programme progress. The benefits of this approach would be on cost and timeliness for the project but also fit a commercial strategy challenging BSC's current approach.

Behavioural Issues

There are also a number of behavioural aspects relating to BSC's attitude to Contract Management. In particular the apparently fixed view espoused by BSC that the contract is not fixed price based on tender bids other than through negotiated **tie** changes or compensation events but is (or should be) cost plus based on an interpretation of Clause 4.3 in the contract. We welcome **tie**'s decision to seek Counsel's opinion on this and its commitment to seek to change BSC's attitude. This debate seems to be at the heart of the commercial issues and is linked to BSC's approach to change, design development and programme.

From what we have heard, we doubt whether the forthcoming intensive mediation will bring about the fundamental change in attitude required from BSC. However it would be prudent for **tie** to hope for the best and,if mediation is successful, there needs to be a plan for early engagement between the sides to deliver improved behaviour on a sustainable basis. In this context, BSC's performance on safety and quality management would seem to require urgent attention and some recent positive developments could be capitalised on.

Programme

We understand that there is a fundamental difference of view between **tie** and BSC on the nature of the programme, its logic and, hence, its duration. As this difference would mean a prolongation of around a year with potential costs of up to £20m, programme must be at the heart of the mediation discussions. **<u>We recommend that</u> tie** seeks Counsel's opinion urgently on the requirement in the contract to mitigate delays in the face of BSC's alleged refusal to start work in any section where **tie**'s responsibility for works is still to be completed, regardless of quantum. Armed with a positive opinion **tie** would then be able to enable a dispute on programme using Clause 80.15 with a **tie** change in an area where some works were to be completed. Close attention to the programme remains a critical task for **tie** and we support the strengthening of the Commercial team in this area.

Team

We welcome the recent changes to the **tie** team with the appointment of a Chief Executive. The appointment of a new Head of Communications with very relevant experience of the circumstances **tie** finds itself in, should provide an important strengthening of the top team. The increase in resource in the Commercial team seems to be a timely and appropriate response to the challenges facing the team. We would ask **tie** to satisfy itself that its field team facing the contractors match up to the contractors' in experience.

We note that MUDFA works are coming to a close. Given the recent experience on MUDFA we would expect **tie** to be very selective in determining which members of the team stayed on at a time when there should be a critical examination of the team's costs.

We do feel that **tie** does need to obtain some interim resource as a matter of urgency as follows. **<u>We Recommend the following:</u>**

- The appointment of an experienced design co-ordinator with major civil works experience who would lead on the value for money challenges on design and works to market test packages.
- The establishment of an "advice line" to the commercial team by DLA so that there is proper consideration of what the contract drafting was intended to mean at the outset of discussions so commercial strategies can be more informed from the beginning.
- The establishment of a separate team led by a "disputes heavyweight" who has been through a similar process on a large project at an early stage if mediation is not sufficiently successful.(Running a number of DRP actions and claims will be a considerable task in itself and must not distract the **tie**

team.) By setting up such an independent team within its organisation, **tie** can introduce an element of challenge into matters so that it can enter into DRP confident that it will not trip up on procedural or factual matters. For example we would expect this team to obtain all necessary opinions and advice on the relevant contract provisions that will be used to enforce **tie**'s rights under the contract. The team would possess sufficient knowhow to anticipate BSC's position or reaction to such issues. It will not be good enough to rely on a "they haven't raised this point yet so they won't" position.We highlighted the interpretation of Clause 80.15 and Schedule 9 as an example of a provision that needs to be thoroughly understood and internally tested if a major strategy is to rely on it. The discussion around 80.15 needs to understand any limitations it may have and whether there are any other provisions in the Contract where **tie** can instruct works to be done without relying solely on 80.15). We have not studied the contract in detail but we were told in discussion that Clause 61 relating to programme progress may offer some scope alongside Clause 80.15.

APPENDIX A

Terms of Reference – Peer Review 25-26 June 2009

Peer Review Group: Malcolm Hutchison, Mike Heath, Willie Gillen, Andy Sloan

Internal Attendees: Steven Bell, Susan Clark, Richard Jeffrey, Stewart McGarrity, Dennis Murray, Frank McFadden

Topic: Infraco Contract Management

<u>Proposed Terms of Reference</u>

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- Review of Strategic Options - progress made to date including DRP/Mediation update
- Contract Management – including change, compensation events, relief events and correspondence
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<u>Proposed Timetable</u>

<u>Day One</u>

Overview (inc five key themes)	Steven Bell / Richard Jeffrey	09.00 – 09.30	30mins
Strategic Options, DRP, QC opinion	Steven Bell / Stewart McGarrity / Andrew Fitchie(TBC)	09.30 – 11.30	2 hrs
Contract management	Dennis Murray / Frank McFadden	11.30 – 13.00	1.5hrs
Programme	Susan Clark / Steven Bell	13.30 – 15.00	1.5hrs
Team	Susan Clark / Steven Bell	15.00 – 16.00	1hr
Close	Susan Clark / Steven Bell	16.00 – 16.30	30mins

<u>Day Two</u>

Report writing	Peer Review Team	09.00 – 13.00	4hrs
Report presentation	Peer Review Team / Steven Bell/ Susan Clark	14.00 – 15.00	1hr