

1 Client Relations

1.1 tie

With Willie Gallagher on leave client relations this week have again been concerned with the intensive effort on negotiations surrounding the SDS Contract Novation Agreement. Constructive meetings have been held with Jim McEwan, (Gallagher's deputy), Steven Bell, Matthew Crosse, Geoff Gilbert, DLA Legal, Richard Walker, (MD Bilfinger Berger), Michael Flynn, (Bid Director Siemens), BBS's legal team, and PB represented by Chris Atkins, me & Roddy Gordon from Watson Burton.

1.2 City of Edinburgh Council (CEC)

I took the opportunity to talk with Duncan Fraser, senior representative of CEC on the project, on Tuesday on the subject of the Employer's Requirements being amended and the need for any amendments to be with the agreement of CEC. Duncan confirmed what I had suspected that he has not been kept fully in the picture on the evolution of the Requirements. This represents a significant risk to securing firm agreement to an acceptable construction programme.

1.3 BBS

The proposal for post-novation Construction Supervision services to BBS is now to be prepared by PB for submission next week.

2 Commercial

2.1 Novation of the SDS Contract

2.1.1 Novation Agreement

Substantial progress was made at a meeting on Tuesday in relation to the misalignment between the Employer's Requirements, the SDS Design, and the BBS Offer. We succeeded in securing a change of stance from **tie** in that any changes required to achieve alignment – pre or post novation - will now be instructed and paid for. On Monday **tie**'s position had been that any changes should be at PB's cost and that a blanket statement of compliance between the SDS Design and the Employer's Requirements (yet to be finalised) would be required. Finally on Tuesday, and only after PB digging its heels in for a prolonged period, (virtually all of Monday had been lost on the topic), Jim McEwan for **tie** recognised that this was an untenable position and overruled Gilbert. **tie** had been seeking to rely on the provisions of clause 3.3.10 of the SDS Agreement which reads:-

3.3 The SDS Provider shall (each as distinct and separate obligations) perform the Services and its other obligations under this Agreement (exercising the level of skill, care and diligence set out in Clause 3.2)

....

3.3.10 so as to permit compliance with the Code of Construction Practice and with the Construction Proposals;

The most cursory inspection of the procurement strategy set out in detail in the Final Business Case, (which was submitted to CEC as recently as 07 Dec 2007), demonstrates that clause 3.3.10 was never intended to be used in the way **tie** was suggesting.

The Tuesday meeting was finally adjourned after nine hours during discussion on the possible introduction of Liquidated Damages against deliverables to be completed under the SDS Agreement. **tie**'s proposals at the meeting proved wholly unacceptable and PB requested an adjournment to allow detailed internal PB review.

The **tie** notes of the meeting provide a reasonable record of proceedings and are reproduced here:-



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Underpinning the finalisation of an acceptable Novation Agreement is a clear understanding of technical scope. It became clear at the Tuesday meeting that information from BBS on the Civils proposal had been withheld from PB by **tie**. At a meeting in late January with Matthew Crosse PB had been advised that a BBS Civils proposal did not exist, the reason being that BBS was proposing to utilise the SDS Design in full and had priced that design. (That this statement even sounded plausible is an indication of the extent to which **tie** has lost control of the negotiation process). As reported previously, the proceedings of a number of technical review meetings have cast doubt on Matthew's assertion and any lingering doubts were removed last week with **tie**'s admission that a Civils proposal was indeed to be submitted by BBS. That proposal was received by PB from **tie** on Tuesday evening. It is reproduced here to demonstrate the lack of substance provided:-



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What is clear is that significant changes to the SDS Design are being proposed, notably to the vertical alignment which has potential significant knock-on to roads and track design. Add to this the already known differences between the SDS and BBS Trackform proposals and the extent to which changes may be required to accommodate the BBS proposals becomes clearer. During Tuesday's meeting a number of references had been made to Schedule 4 of the Infracore Contract. To date **tie** had advised that Schedule 4 was a pricing document and intimated that it was of no relevance to PB's review of the novation proposals. At Tuesday's meeting it became clear that Civils design issues were also addressed in Schedule 4 so as part of the closing remarks that day PB requested that a copy of Schedule 4 be provided. Rather than attempting to summarise the extensive proposals contained in Schedule 4 the document is reproduced here in full:-



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Leaving to one side for the moment the apparent attempt by **tie** to misrepresent to PB the true status of the BBS Civils proposals, it is now clear (a) that significant areas of the BBS Offer remain to be negotiated, and (b), that depending upon the outcome of those negotiations significant changes may be required to the SDS Design.

In light of these developments PB has responded today, Friday, to **tie**'s request for an update on our internal review. The email is reproduced here:-



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For its part **tie** is to re-commence detailed commercial review meetings with BBS on Monday with a view to closing our remaining issues quickly.

With regard to the technical scope, **tie** concluded from a separate meeting on Thursday convened to review the Civils proposals that the current state of the BBS Offer was seriously incomplete and therefore unacceptable. BBS's commercial manager stated that for BBS to comply fully with the SDS design could inflate the offer price by an amount in excess of £10m.

An attempt was then made to water this statement down but in separate discussions with Richard Walker he has mused that if **tie** understood the likely true cost of building the scheme then it would be cancelled. This is not idle chat:- it is Richard's view of the strategy he has adopted to retain as much flexibility pre-contract with a view to securing substantial variations post-contract. On a related note, Richard has also informed me that he and his manager (from Wiesbaden) have seriously discussed withdrawing from the bid. The main factor preventing this is the desire to build a business in the UK and the ETN contract would be the foundation for any future developments. Against that BBS has other emerging opportunities and is becoming increasingly frustrated at the time and cost impact of the current bid process.

tie's conclusion from Thursday's meeting was that **tie** should now review the Civils proposal and the content of Schedule 4 with a view to producing a composite proposal document for BBS's review. The rather perverse approach of **tie** volunteering to write the BBS proposal was limited somewhat by **tie** requesting that BBS also provide a reworked document and that the two drafts would be compared at a follow-up technical meeting to be held Monday next week.

tie's management of the procurement process clearly has to be called into question given that BBS was declared Preferred Bidder at the end of October last year and a final Civils offer has yet to be agreed. Willie Gallagher returns on Monday next week and this will be uppermost on his agenda.

2.1.2 Employer's Requirements

This issue can now be considered closed out. The stance presented in last week's report, "..... **tie** should not expect that PB will be prepared to sign up to any form of blanket "compliance" between the SDS Design and the ERs", has been successfully defended.

2.1.3 BBS Proposals

As reported above PB is now to receive an instruction to determine the degree of misalignment between the SDS Design and the BBS Offer – once the BBS offer has been negotiated to the point of completion by **tie**.

2.1.3 Infraco Contract Terms & Conditions

As reported above.

2.1.4 Separate Contract between **tie and PB**

On the subject of a separate contractual arrangement between *tie* and PB for the provision of services not subject to novation there has still been no progress.

2.2 Change Requests

A small number of change requests remains to be agreed. These more difficult issues are to be addressed at a special commercial meeting which has been convened by Damian Sharp on Monday afternoon next week.

2.3 Claims for Prolongation

As reported last week *tie* is clearly holding signature of the Legal Agreement for the outstanding prolongation claim whilst negotiations continue on the conclusion of a Novation Agreement. This has now been confirmed with reference to Geoff Gilbert’s notes provided above at clause 4.6.

On the subject of the claim for Additional Management Services dated February 08 and totalling £598k this topic was also discussed at Tuesday’s meeting and a commitment received from *tie* that the claim will be negotiated and then paid as agreed prior to novation.

2.4 Cashflow

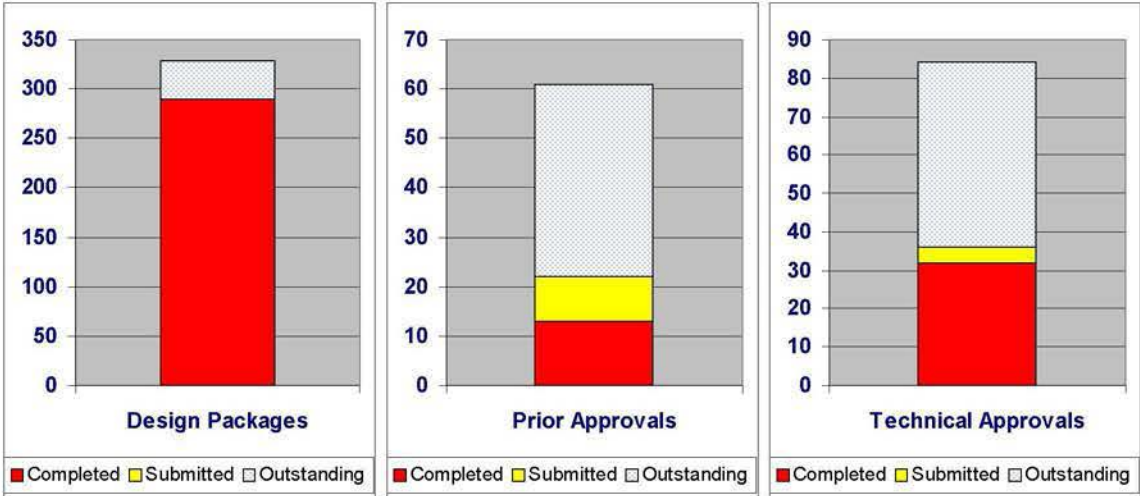
Negotiations on the January AFP this week secured agreement from *tie* to certify £2,250,000, (inc VAT). This sum is contractually due for payment into the bank towards the end of March, or at the point of novation if earlier.

The AFP for February is to be submitted early next week.

3 Operations

3.1 Edinburgh Tram Network

Current status on design package submission to *tie*; prior approvals secured from CEC; and statutory technical approvals¹ secured from the Approval Bodies is as follows:-



¹ Note that this chart has been revised from previous reports to remove from the total of Technical Approvals those Approvals which were secured during the Preliminary Design Phase.

3.2 MUDFA

Section 6 (Depot) was submitted this week. Section 5C will be submitted early next week. That leaves only Section 2A to be completed from the total of 19 sub-sections required for MUDFA. This is expected to be completed and submitted by 13 March.

The only remaining issue to be dealt with is *tie*'s instruction to audit and if necessary rework the drawings provided in March 2007 for the three subsections which constitute Phase 1B. Depending on reaching commercial agreement on the change this will require up to six weeks additional work, but from Halcrow in this case.

4 Other Issues

The date for the meeting with Stuart Glenn and Willie remains provisioned for Wednesday 12 March, starting at 1600.

5 Weekly Look-ahead

- All next week as required. Infraco Contract close-out meetings with *tie* and BBS
- Monday. Commercial meeting with *tie* and PB to address the small number of remaining change control issues.

6 Timetable to Infraco Contract Award – *tie* Update

Last week's report included the following schedule of key dates:-

- | | |
|----------------|---|
| ▪ 29 February. | Final Report to Council from <i>tie</i> . |
| ▪ 13 March. | Novation of the SDS Contract. |
| ▪ 13 March | Infraco contract award |

With the failure to meet the 29 February target the whole process shifts by at least two weeks. This dictates an earliest date of 27 March for Infraco Contract Award and Novation.