

# **ETN MEDIATION**

**INFRACO PRESENTATION**

**8 March 2011**

# INFRACO OBJECTIVES

- Agreement to Project Phoenix
- Agreement to revised terms & conditions to allow Phoenix to operate
- Agreement of a mechanism to allow future extension to St Andrew Square
- Consideration of alternatives in event of failure, i.e. Project Separation

# WHERE WE'D ALL LIKE TO BE



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# WHY PHOENIX ?

- Fundamental differences of interpretation
- Conflict between client and project manager roles
- **The problem is tie: to move forward there has to be a change**
- Adjudications (13 of them) have not given closure on a broader basis: currently all are still disputed by tie
- Breaks the Deadlock
- Absence of any real alternatives

# PHOENIX - BENEFITS

- Does not waste CEC's £400 m invested to date
- Provides greater price/time certainty to CEC
- Provides a revenue earning service to CEC
- Avoids a costly and very protracted public dispute



# SUCCESSFUL PROJECTS HAVE .....

- Defined and agreed scope
- Defined and agreed programme
- Clear terms and conditions
- Identified price and funding, and
- Effective delivery mechanism

# PROJECT FUNDING

● Published budget	£545	
● Spent to date	<u>£405</u>	
Remaining		£140*
● Paid to Infraco	£179	
● Remaining for PHOENIX		£270

*\* Includes tie & Utilities*

# TENDER CONCEPT

- Project secured by competitive tender and based upon:
  - Build-Only contract
  - Utilities complete by date of Award (2007)
  - Design complete (IFC) by 2007



# BACKDROP TO AWARD

- Utilities Incomplete
- Design Incomplete
- Third Party Approvals Absent

tie's Options were

- Delay Award (Infraco's Advice)
- Accept large Infraco contingency
- tie to take Risk on Changes (tie's selected option)

# HISTORY - COMMENCEMENT

- Works commenced despite restricted or no access due to Utilities (Infraco's flexibility)
- tie refused to acknowledge Infraco entitlements
- By Jan 2009 Infraco rigorously apply Contract
- Agreement on Princes St. provided future platform, *but* tie now disputes the open book payment (in a formal Adjudication)
- Off-Street entitlements also refused

# THE CONTRACT

- Concept is Design and Build
- However tie retained risk – Schedule Part 4
- Specified Exclusions and Pricing Assumptions
- If facts / circumstances differ – Notified Departure occurs
- Parties aware that Notified Departures were inevitable:

*“In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply...”*

# THE CONTRACT

- Impact of Clause 4.3 of the Contract – primacy of Schedule Part 4

*“Nothing in this Agreement shall prejudice the Infraco’s right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing)”*

- Sched. Part 4, Clause 3.2.1:

*“.....the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply (CI 80)”.*

# MAJOR DIFFERENCES

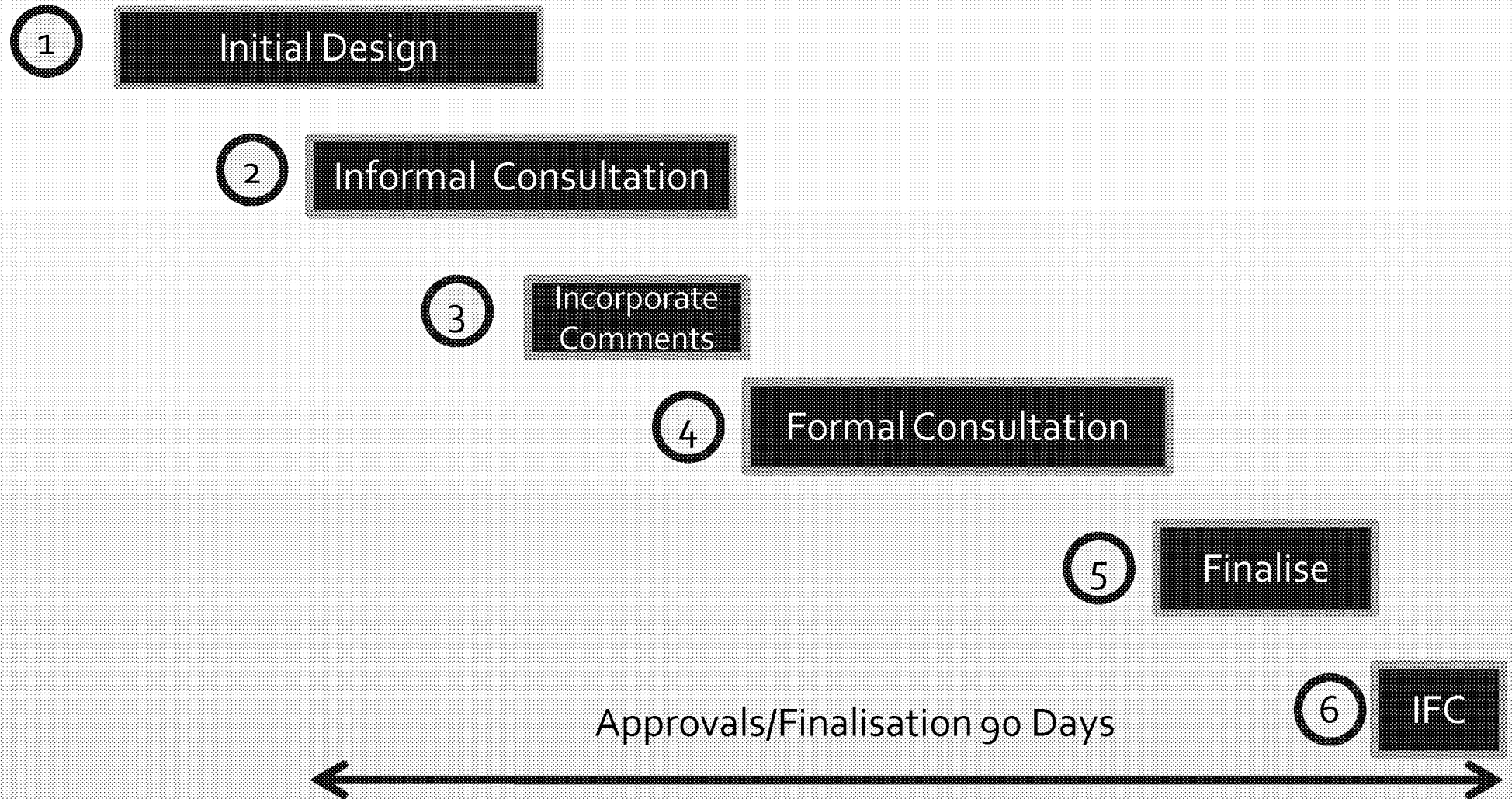
- Primacy of Schedule Part 4.
- Payment for Differences – BDDI to IFC
- Exclusive Access (Designated Working Areas) – MUDFA Works
- Application of Clause 80 *per se* (not CI 65)
- Operation of Clause 80 mechanisms (CI 80.13)



# SCOPE CHANGE

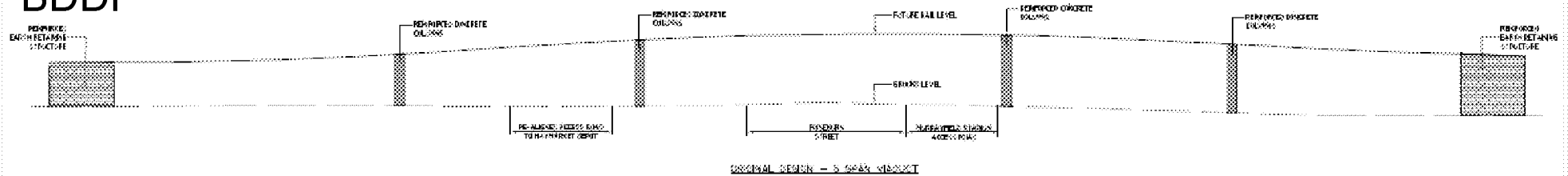
- Design development excludes:  
*“changes of design principle, shape, form and outline specification”*
- Consequence : Change = Notified Departure
- Change mechanism Clause 80
- tie persistently refuses to recognise ‘change’ when it occurs

# DESIGN APPROVAL PROCESS

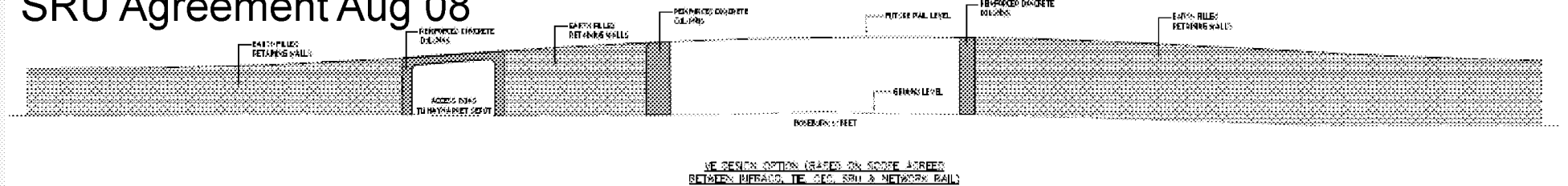


# ROSEBURN VIADUCT

## BDDI



## SRU Agreement Aug 08



## Outstanding Issues:

- Alignment of CEC Planning Requirements with Current Design
- No formal tie Change Order to finalise Design yet
- 30 Months Delay

# DESIGN APPROVAL PROCESS

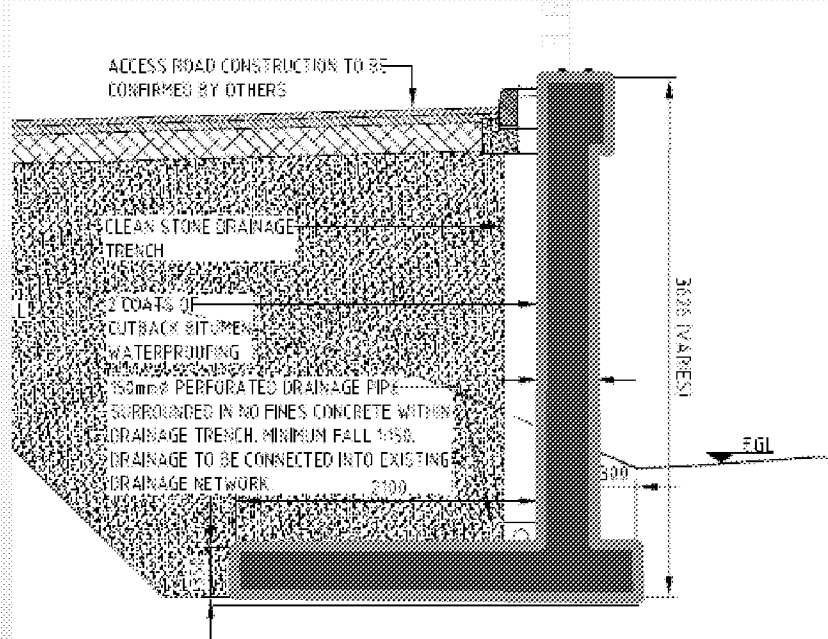
## Core Messages:

- Delay to Roseburn Viaduct is currently 30 months.
- Conflicting planning technical and 3<sup>rd</sup> party requirements - (outside Infraco control).
- tie to drive process – (outside Infraco control)
- These issues apply further e.g. Picardy Place, Airport Kiosk, RBS Gogarburn, Tram Stops ....
- Inevitable delay to submission of Estimates

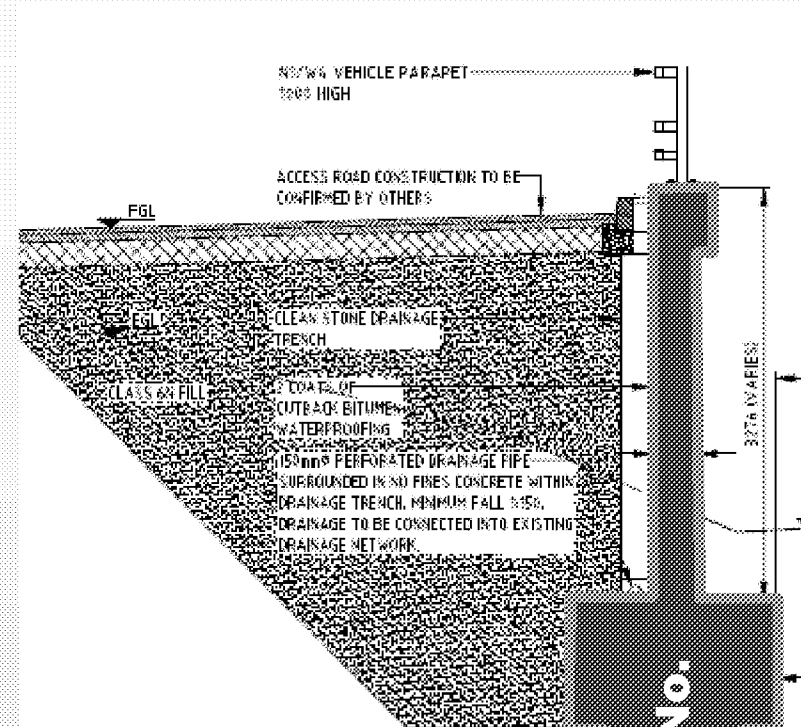
# RUSSELL ROAD RETAINING WALL

Priced BDDI

IFC Change



**SECTION B-B  
(CHAINAGE 65m)**  
SCALE 1:50



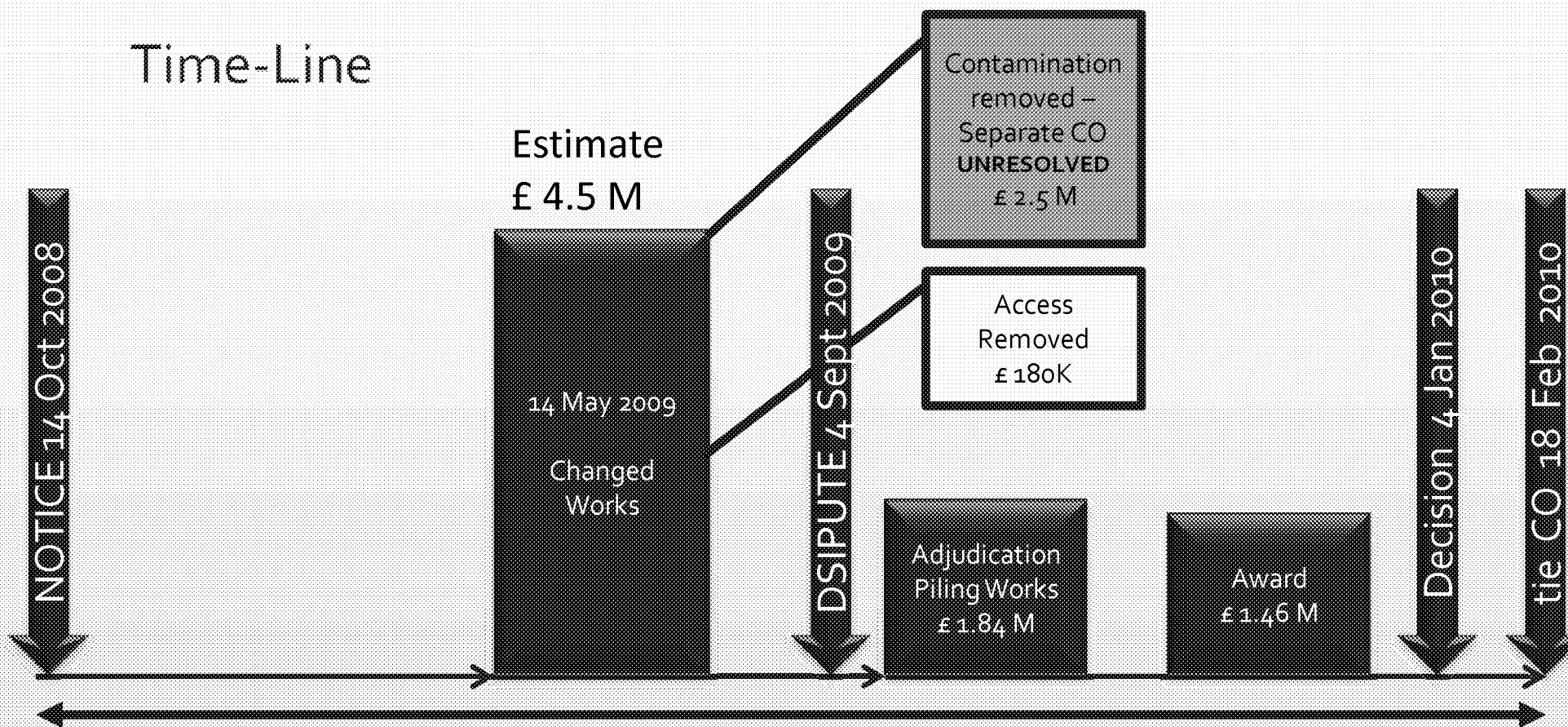
**SECTION B-B  
(CHAINAGE 65m)**  
SCALE 1:50

13m Piling - 125 No.



# RUSSELL ROAD RETAINING WALL

Time-Line



**tie Position = Rejected**

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# RUSSELL ROAD RETAINING WALL

## Core Messages

- Dispute about Principle, Not Amount
- Diff. £ 1.84m to £ 1.46m i.e. 15% difference
- 16 months squandered: EoT tie responsibility (Sch.Part 4 Cl. 3.5)
- Change should have been acknowledged and negotiated

# ACCESS TO DEPOT

Schedule Part 4, PA 21 states:

*'(ii) the depot excavation will be handed over to Infracore pumped dry with a firm sound formation'.*

tie letter dated 12 Dec 2008 states access available since 14 May 2008.

# ACCESS TO DEPOT

3 January 2009

East end of Depot Area



3rd January 2009

West end of Depot Area,  
incomplete water main diversion.





# ACCESS TO DEPOT

3 February 2009

West end of Depot Area.



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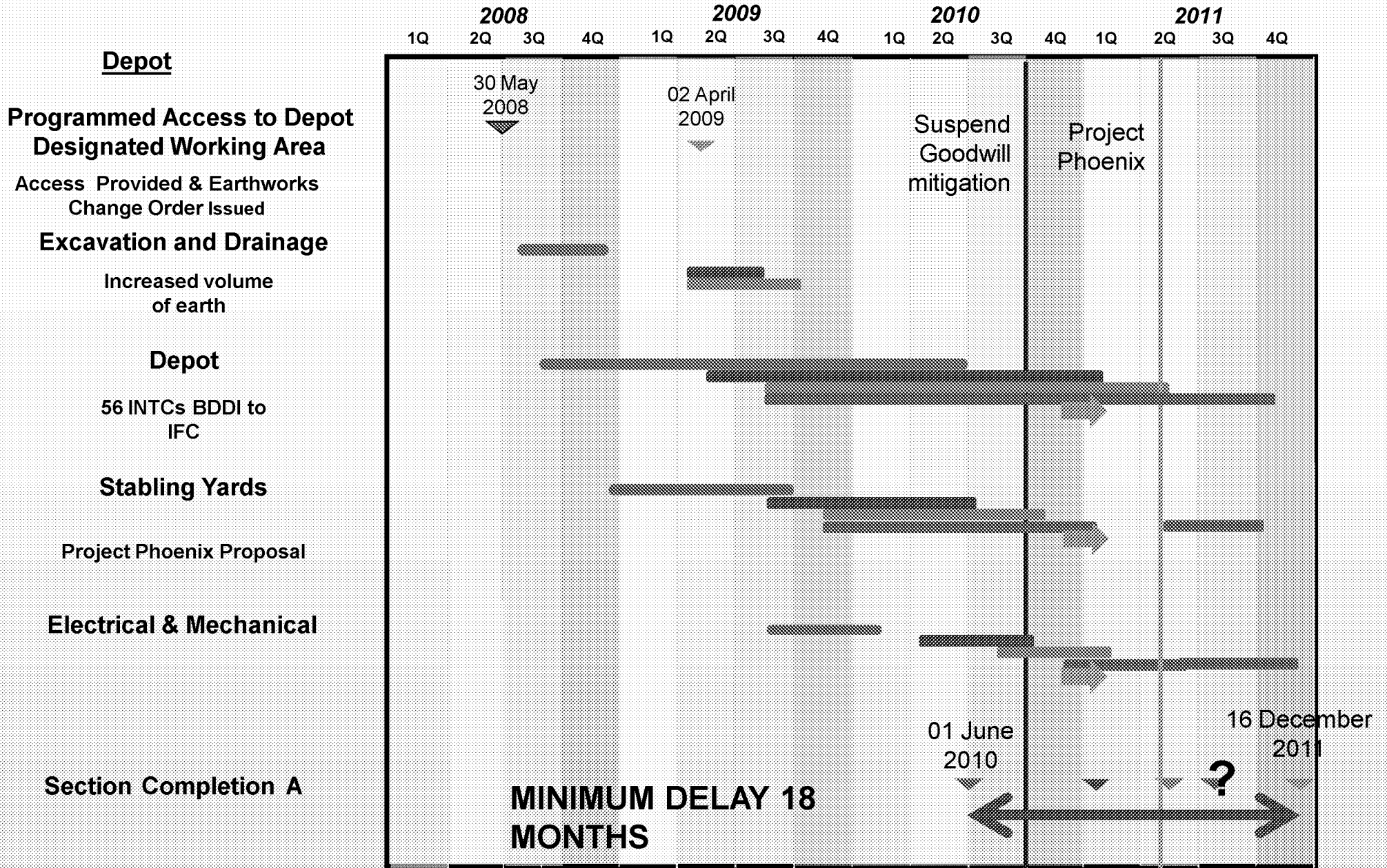


# ACCESS TO DEPOT

## Core Messages:

- tCO No 28 agreed on 02 April 2009
- Total time delay 11 months
- Infraco Entitlement to EOT & costs
- MUDFA occupying Depot – Cl. 18.1.2 & Sch.Part 4 PA 24
- tie refused to recognise Pricing Assumptions

# DEPOT - DELAYS

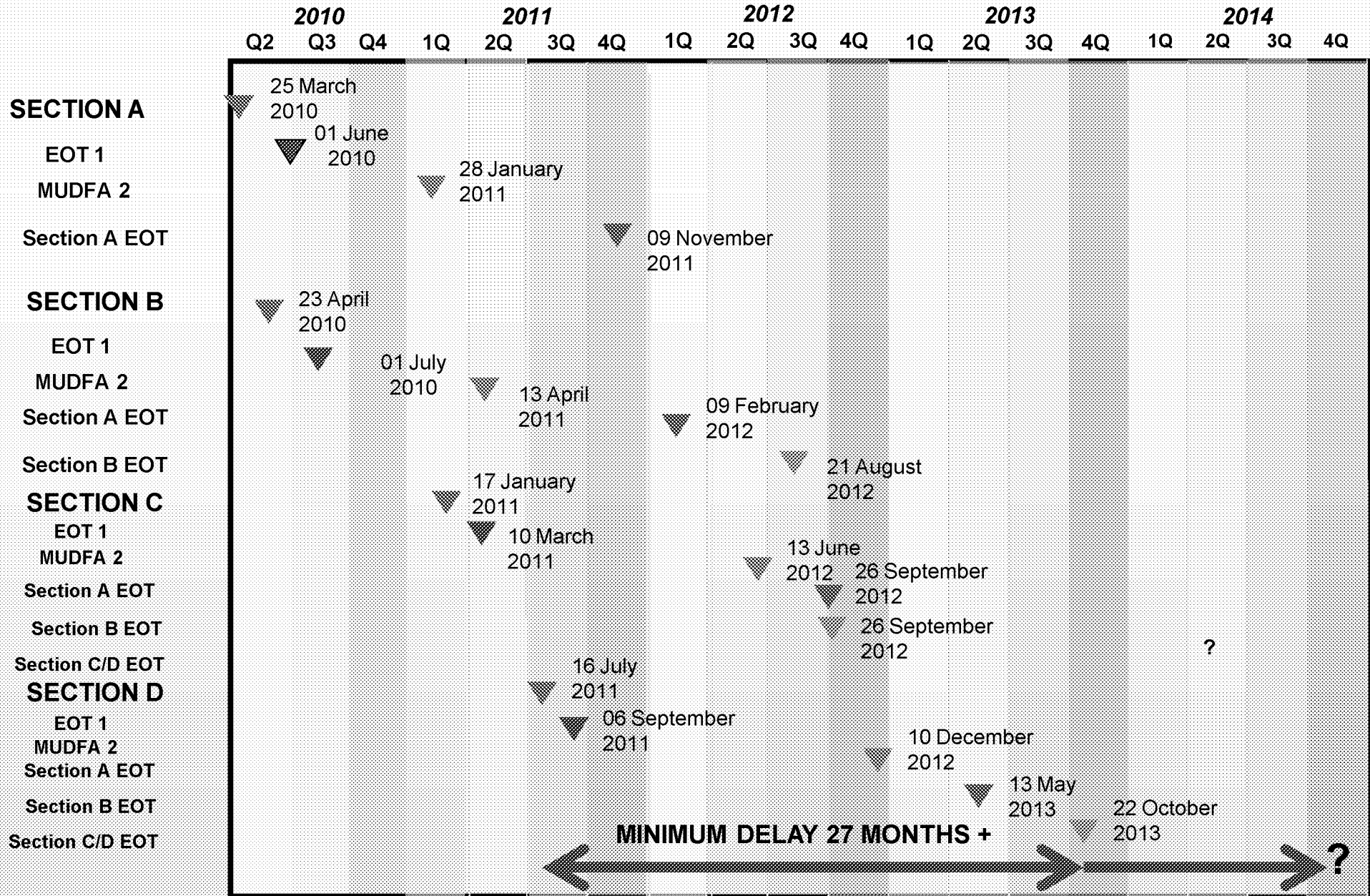


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# CURRENT DELAYS



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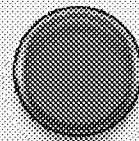
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# DELAYS

- EOT 1 (INTC 1): 2 months
- MUDFA 2 Delays: 15 Months
- INTC Delays: 27 Months +
- tie still refuses to acknowledge entitlements

# ON-STREET WORKS

- Joint Development of OSSA (with tie)
- Nov. 09 to Feb 10 to overcome schedule critical issues
- Yet rejected by tie Mar 10
- On Street works could have commenced  
1 year ago





# tie MEDIATION STATEMENT

Exhibit No. 5: Audit Scotland Report para. 44 &54

No new arguments – same old points

*The other party must respect and accept the outcome of the decision and put the nation first.* James Baker, US Sec of State

tie's Mediation Statement doesn't do that.  
Continues to argue the same old points – why do they think they are entitled to do that?

# PROPOSED DELIVERY STRUCTURE

- CEC becomes the Client
- Professional Project Manager replaces tie
- Infracore is contracted to CEC
- Project Board – City, Project Manager, Infracore, TS and; independent chairman

# SUMMARY

- Accept principles set in independent and binding Adjudications - put the City of Edinburgh first
- Infraco's Project Phoenix proposal – the way forward
- NO Trams is not an option, unless there is no money
- More to discuss, but the solution starts here
- A confidential process - calls for imagination and bravery from all of the right people on the job



**We are ready**

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