

EDINBURGH TRAM PROJECT

MEDIATION

MEDIATION STATEMENT

Submitted by

BSC CONSORTIUM comprising:

BILFINGER BERGER CIVIL UK LIMITED,

SIEMENS PLC,

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES SA

1. INTRODUCTION

1.1 The parties to this mediation are tie Limited and the BSC Consortium (comprising Bilfinger Berger Civil UK Limited, Siemens PLC and Construcciones Y Auxiliar de Ferrocarriles SA). Also involved in this mediation is the project sponsor, City of Edinburgh Council (“**CEC**”), and Transport Scotland who are providing funding for the ETN.

1.2 On 14 May 2008, the parties entered into a contract (the “**Infraco Contract**”) for the construction and delivery of the Edinburgh Tram Network (“**ETN**”) whereby BSC agrees to carry out the Works (defined in the Infraco Contract as the “**Infraco Works**”) and tie is obliged to pay to BSC such capital expenditure and revenue expenditure as is provided for therein.

1.3 The Project has encountered significant difficulties, and the parties to the Infraco Contract have become embroiled in dispute. Despite these difficulties BSC remains fully committed to delivering a tram network that will be appropriate to Edinburgh’s status and role as a European capital city and world heritage site. BSC believes that continuing with the Project as it currently operates is not in the interests of either party, or of the people and City of Edinburgh, or what was intended. The parties need to explore whether a resolution to these difficulties can be found.

BSC has proposed amending the Infraco Contract on the basis of a truncated project scope that can fit within a budget which is available to tie, finding a sustainable solution to the matters which currently divide parties, and proceeding on a new agreed basis (referred to as “**Project Phoenix**”). The focus of the mediation is to explore the possibility of proceeding on the basis of Project Phoenix. The aim of this document is to:

- set out BSC’s main objectives for the mediation;
- summarise the key proposals in Project Phoenix and BSC’s vision for the future of the ETN;
- set out the background to the project and the difficulties that have arisen; and

- consider any other alternative arrangements should the parties not be able to reach agreement on Project Phoenix.

2. **MEDIATION OBJECTIVES FOR BSC**

2.1 The purpose of this mediation is to agree the contractual arrangements and organisation structures to enable the parties to deliver part of the ETN for the City of Edinburgh. The primary objectives for BSC are:

- agreement to a revised scope of the Works – Edinburgh Airport to Haymarket;
- agreement to a price that will be paid for that scope, and all other scope undertaken to date outside the Airport to Haymarket corridor;
- removal of as many price exclusions as possible from the project price and/or transfer of risk/liability from tie to BSC in respect of known and quantifiable risks.
- agreement to a realistic programme for delivery of the revised scope;
- agreement to the revised terms and conditions for the Project;
- agreement to a simplified change mechanism which can provide certainty in relation to payment for the changes and which allows the work to proceed;
- agreement to new methods for working and administration of the Infraco Contract to avoid issues that have arisen to date including (i) appointment of an appropriately qualified Employer Representative with full authority to act on behalf of CEC as client for the Project and (ii) creation of a project board;
- agreement to the appointment of an independent third party intended to avoid or resolve disputes;
- agreement on terms for the novation of Bifinger Berger/Siemens interest in the Tram Supply Agreement and the Tram Maintenance Agreement to tie.

- 2.2 To meet these objectives BSC has prepared a detailed proposal for mediation to tie in the form of Project Phoenix. The details are summarised at Section 3.
- 2.3 As part of Project Phoenix, BSC is committed to a tight programme for delivery of the revised scope and is prepared to agree amendments to the Infraco Contract to give tie as much price certainty as is possible. If Project Phoenix can be agreed, BSC will need assurance that it can be funded by tie and its sponsors, and also that delivery of Project Phoenix will be administered in accordance with agreed principles.
- 2.4 BSC enters into this mediation in good faith with a view to reaching an agreement which is acceptable to all parties. BSC believes that the mediation, together with an agreement based on Project Phoenix, provides an excellent opportunity for the parties to move forward in a positive way and to jointly deliver the ETN for the City of Edinburgh. BSC remains hopeful that agreement can be reached to achieve the defined objectives.
- 2.5 BSC anticipates that much effort will be required to implement Project Phoenix. Further, BSC does not underestimate the work necessary to amend the existing Infraco Contract or the changes required in attitudes and organisational culture. However, the benefits to be derived from mediation and Project Phoenix justify the significant effort required by all parties.
- 2.6 Following discussions between BSC and tie in December 2010 regarding the future of the Project, BSC understands tie's objectives for the mediation are to seek a commitment from BSC to deliver an operational route from Edinburgh Airport to Haymarket for an agreed price and an agreed programme each with a high degree of certainty, with an increased transfer of risk to BSC and to bring an end to the disputes and confrontation surrounding the Project. BSC believes the Project Phoenix proposal can achieve the mediation objectives of both parties.
- 2.7 Progress on construction of the ETN has virtually ground to a halt because the parties are unable to agree a significant number of issues arising out of the interpretation and administration of the Infraco Contract and changes in scope and delays outside the control of BSC. This has led to numerous disputes between the parties, which have resulted in

further delays and additional costs to the Project. As the Project currently stands without a mediated solution, BSC believes that the only way the Works can progress is for each and every disputed matter to be referred to adjudication.

2.8 In contrast, this mediation does not relate to individual disputes that exist but focuses on finding a sustainable solution for the Project scope, price, programme and risk allocation, mindful of the budget which may be available to tie.

3. **PROJECT PHOENIX AND BSC's VISION**

3.1 BSC remains committed to its obligation to deliver the Project. However, given the difficulties to date the parties need to stand back to consider where the project is going. BSC considers that the underlying reason for the difficulties on the Project is tie's approach to administering the Infraco Contract. BSC believes that this issue will be difficult to address under the Infraco Contract as it stands. Given the public awareness of the difficulties tie face with budget constraints, BSC will also need reassurance that any alternative is fully funded.

3.2 The parties have discussed proceeding with works on a truncated scheme. BSC have made a proposal as part of that discussion known as 'Project Phoenix'.

Project Phoenix Proposal

3.3 BSC firmly believes that the best way forward is to agree and implement Project Phoenix, which will provide a revenue generating tram route for the City of Edinburgh. The adoption of Project Phoenix will enable the parties to deliver a tram route for the City of Edinburgh to an agreed timescale and for an agreed price.

3.4 Project Phoenix envisages a reduced scope of works running from Edinburgh Airport to Haymarket Viaduct, including certain 'Enabling work in Section A', in connection with Princes Street, Lindsay Road Retaining Wall, Lindsay Road Lowering and Tower Place Bridge.

3.5 The key programming details for Project Phoenix are as follows:

(a) Section A 16 December 2011

- (b) Section B 24 September 2012
- (c) Section C End of construction 11 March 2013; End of Testing & Commissioning 24 June 2013
- (d) Section D 22 September 2013

3.6 The Project Phoenix Proposal Programme is challenging but achievable and BSC is fully committed to delivering it. It relies on re-mobilisation with full force by **1 May 2011**.

3.7 Project Phoenix will require agreement of a new price to complete the revised scope. The Project Phoenix Proposal Price is **£449,166,366**, made up as follows:

Bilfinger Berger Civil UK Ltd.	£231,837,822
Siemens plc	£136,881,719
C.A.F. S.A.	£65,306,030
SDS	£15,140,795
Total	£449,166,366

3.8 Project Phoenix also proposes significant amendments to the Infraco Contract to reduce the extent of the risk remaining with tie. In particular, Project Phoenix will result in the significantly reduced number of pricing exclusions, qualifications and assumptions and/or a significant transfer of risk from tie/CEC to BSC and a corresponding greater certainty of price.

3.9 In addition, if an agreement in relation to Project Phoenix can be achieved, it shall be essential to have :

- (a) the appointment of an independent certifier whose judgement shall be binding on both parties unless challenged through the official Dispute Resolution Procedure, to determine issues of principle and quantum (money and time) arising from any future disputed Changes;

- (b) the appointment of an appropriately qualified Employer Representative with full authority to act on behalf of CEC as client for the Project;
- (c) creation of a project board comprising representatives of CEC and BSC; and
- (d) assured funding - BSC requires assurance of requisite funding to enable full and complete implementation of Project Phoenix.

3.10 Further, CAF agreed with tie in Autumn 2007 to *inter alia* fulfil a long term role to maintain the Trams. That long term role will, in the context of Project Phoenix, necessitate a flexible approach to the delivery of the services required to manage and maintain tie's fleet. Such flexibility will be facilitated by ensuring that as part of the implementation of Project Phoenix CAF re-establishes its direct relationship with tie. Accordingly, Project Phoenix will need to proceed on the basis that the interest of BSC in the Tram Supply Agreement and the Tram Maintenance Agreement will be novated back to tie and that obligations pertaining to the manufacture, delivery, commissioning and maintenance of the Trams will be excluded from the Infraco Contract. This will allow CAF to work with tie as its partner and develop a Whole Life Asset strategy and plan for the tram fleet. The conclusion of the novation will be dependent on agreement being reached on;

3.10.1 amendments to the Infraco Contract required as a consequence of the required exclusion of obligations relating to the Trams from the Infraco Contract;

3.10.2 CAF's entitlements in respect of delay costs;

3.10.3 CAF's exit from the Infraco Contract and any ancillary bonds, guarantees, warranties etc granted thereunder; and

3.10.4 necessary amendments to the Tram Supply Agreement and Tram Maintenance Agreement and any ancillary bonds, guarantees, warranties etc to reflect the altered circumstances in which CAF will be delivering the remaining obligations under the Tram Supply Agreement and the Tram Maintenance Agreement.

3.11 The adoption of Project Phoenix will also allow the parties to resolve existing differences and disputes, reduce the administrative burden imposed by the existing contractual arrangements and focus on delivery of a tram route for Edinburgh with greater price and time certainty. Ultimately, Project Phoenix will hopefully close a chapter on intractable and costly legal disputes and avoid plunging the parties into what threatens to become a protracted and acrimonious public legal battle, none of which serves to deliver a tram system for the City of Edinburgh.

4. **BACKGROUND TO THE PROJECT**

4.1 The Project was advertised in the Official Journal of the European Union in January 2006. Bilfinger Berger and Siemens responded to the notice as a consortium. Following a competitive tender process, the Bilfinger Berger - Siemens consortium was appointed preferred bidder in September 2007 and contract negotiations concluded in May 2008 when the Infraco Contract was signed.

4.2 As at May 2008, there remained a great number of uncertainties regarding the Project which would have had a major impact on price and programming. These included incomplete design, incomplete approvals, incomplete MUDFA Works (these being the substantial amount of utility diversion and replacement works required in advance of the Infraco Works ('MUDFA' standing for 'Multi Utility Diversionary Framework Agreement')) and uncertainty over ground conditions. In addition, third party input into the design had not been completed and the detail of Accommodation Works required to meet third party requirements had not been fully defined. The design had not been completed to a sufficient degree that would have allowed BSC to accept the novation of the designer's contract from tie and all of the risk for the development and evolution of the remainder of the design. In addition a large proportion of the third party approvals required to deliver the Project had not been obtained by tie.

4.3 The contract negotiations proceeded from September 2007 until May 2008. As time elapsed, items which could not readily be quantified by BSC during negotiations or uncertainties that were identified were baselined into a contract schedule known as

Schedule Part 4. The risks associated with the uncertainties surrounding the Project were detailed within the Infraco Contract (through the vehicle of Schedule Part 4) and retained by tie. Unfortunately many of the risks set out in Schedule Part 4 have materialized.

- 4.4 The risk allocation agreed by the parties arose as a result of the dynamic nature of events leading up to contract signature. The method by which Schedule Part 4 was used to 'fix' the Contract Price, was by the introduction of a number of assumptions, including pricing assumptions. One of these assumptions related to the evolving design. It was agreed that, as the design was continuing to develop, a final price and programme could not be achieved. A decision was therefore made that the contract would be entered into based upon the design "frozen" at 25 November 2007. This allowed the parties to agree the Construction Works Price based on the 'assumption' that the design would not change after this date, clearly reflecting the position that any change in that design would require a change under the Infraco Contract.
- 4.5 A number of other assumptions were introduced reflecting the various uncertainties noted above. The Infraco Contract expressly acknowledges that if any one of the assumptions is not realised/eliminated, BSC may have an entitlement to additional time and money. The Infraco Contract acknowledges that actual facts and circumstances would be different from the assumptions set out in the Infraco Contract and that the Construction Works Price and the Programme would change.
- 4.6 BSC has a concern that the City of Edinburgh Council was not fully appraised, at the time of contract execution, of the extent of risk retained by tie in the Infraco Contract, and the likelihood of that risk manifesting. BSC notes the comments in the "Edinburgh Tram – Financial Close and Notification of Contract Award Report; 1st. May 2008 (CEC/018/08-09/CE)" at para 2.3: *'There has also been a substantial amount of work undertaken to minimise the Council's exposure to financial risk with significant elements of risk being transferred to the private sector. This has resulted in 95% of the combined Tramco and Infraco costs being fixed with the remainder being provisional sums which tie Ltd have confirmed as being adequate.'*

- 4.7 BSC stresses that the statement made in the Contract Award Report is not correct and that the Infraco Contract provides that the price was highly likely to vary going forward as risks materialised (see in particular clause 3.2.1 of Schedule Part 4). BSC has subsequently sought to advise the City of Edinburgh Council directly of the operation of the Infraco Contract, its administration by tie and the difficulties being encountered.¹
- 4.8 Schedule Part 4, lists the risks which rest with tie and which must be administered through the "Notified Departure" mechanism set out therein. This mechanism provides that where there is a change in certain facts or circumstances from those set out in Schedule Part 4, then this will be deemed a Mandatory tie Change, under which BSC will be entitled to additional time and/or money arising from the effects of the change. Clause 4.3 of the Infraco Contract provides that nothing in the Infraco Contract shall prejudice BSC's right to claim additional relief or payment pursuant to Schedule Part 4.
- 4.9 Schedule Part 4 also provides (Clause 5 and Appendix C) for a number of Value Engineering ("VE") initiatives, the unique feature being that the full amount of saving which these VE initiatives may produce, was deducted from the Construction Works Price, with a mechanism being agreed for adding these sums back to the Construction Works Price, should the VE saving not be realised.

5. MATERIAL PROBLEMS ENCOUNTERED

- 5.1 From the outset of the Works, the risks retained by tie and reflected within Schedule Part 4 have materialised to a significant extent, primarily in respect of the impact of change and approvals on the completion of the design and delay to the preceding MUDFA Works.
- 5.2 There are 4 Specified Exclusions from the Construction Works Price and 43 Pricing Assumptions which are at Sections 3.3 and 3.4 of Schedule Part 4. For the purpose of explaining the main issues which have arisen between the parties to date, namely in relation to design and the MUDFA Works, the Pricing Assumptions which are of particular relevance are Pricing Assumptions 1, 24 and 32.

¹ See letter from BSC to City of Edinburgh Council dated 8 March 2010.

Completion of the Design

5.3 Pricing Assumption 1 (Clause 3.4.1 of Schedule Part 4) is paraphrased as follows:

"The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):

1.1 in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information...."

It is further provided that:

"for the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification."

5.4 Base Date Design Information is defined as *"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4"*. Appendix H does not, in fact, list any drawings but provides that Base Date Design Information is *'All of the Drawings available to Infraco up to an including 25th November 2007'*.

5.5 In effect, the Contract Price is based on the design of the ETN at the base line date (25 November 2007) adopted by the parties for pricing purposes. This baseline design has become known as Base Date Design Information ("BDDI").

5.6 Clause 3.2.1 of Schedule Part 4 however acknowledges that certain assumptions such as Clause 3.4.1 would prove to be incorrect following execution of the Infraco Contract. For example, it was known by the parties that the design had already changed from base line date by the time that the Infraco Contract was executed in May 2008 and this would therefore immediately lead to the notification of a Notified Departure following execution of the Infraco Contract.

5.7 The final design issued for construction ("IFC") has differed materially from the BDDI in many respects. On every occasion where this occurs, and subject to the parameters of

Clause 3.4.1 of Schedule Part 4, this is a Notified Departure and Mandatory tie Change which requires to be dealt with in accordance with Clause 80 (tie Change mechanism) of the Infraco Contract, requiring a Change to price and Programme (if necessary).

- 5.8 Disputes have arisen between the parties (described in more detail Section 8) in relation to the operation of this Pricing Assumption, in particular on the interpretation of '*normal development and completion of designs*'.

Delays to the MUDFA Works

- 5.9 The overwhelming cause of delay to the Project to date is the late completion of the MUDFA Works. These works were agreed to have been concluded in various Sections of the Works and in the Designated Working Areas before BSC commenced work in accordance with its Programme.

- 5.10 Pricing Assumption 24 (Section 3.4.1.24) of the Infraco Contract provides as follows:

"That in relation to Utilities the MUDFA Contractor and/or Utility shall have completed the diversion of any utilities in accordance with the requirements of the Programme save for utilities diversions to be carried out by the Infraco pursuant to the expenditure of the Provisional Sums noted in Appendix B."

- 5.11 Accordingly, the Contract Price is based, amongst other things, on the MUDFA Works being completed in accordance with the requirements of the Programme.

- 5.12 Pricing Assumption 32 states:

'That the programming assumptions set out in Schedule Part 15 (Programme) remain true in all respects'

- 5.13 Schedule Part 15 (Programme) includes the following Programming Assumptions (Schedule Part 15 b):

"3.1 The programme is based on MUDFA having completed all works and all utilities being diverted that would conflict with INFRACO operations by the following dates;

<i>1A</i>	<i>31 October 2008</i>
<i>1B</i>	<i>01 August 2008</i>
<i>1C</i>	<i>31 October 2008</i>
<i>1D</i>	<i>19 December 2008</i>
<i>2A</i>	<i>16 May 2008</i>
<i>5A</i>	<i>No Constraint</i>
<i>5B</i>	<i>11 April 2008</i>
<i>5C</i>	<i>16 May 2008</i>
<i>6 (SGN Diversion)</i>	<i>18 April 2008</i>
<i>6 (Watermain Diversion)</i>	<i>30 May 2008</i>
<i>7A</i>	<i>16 May 2008</i>

To date the MUDFA Works still remain incomplete and continue to prevent BSC from commencing its works.

5.14 The MUDFA Works in the Designated Working Areas were to be complete before BSC commenced its Works, and no Works were required to be undertaken by BSC to enable the MUDFA Contractor to proceed. Thus and to the extent that the Utility works carried out by the MUDFA Contractor and/or other utilities works have not been completed in accordance with the requirements of the MUDFA Programme, and to the extent that the Programming Assumptions are not met (the MUDFA and utilities diversion works are not completed by the dates shown in the Programming Assumptions document included at Schedule Part 15 b of the Infraco Contract), then a Notified Departure has occurred which entitles BSC to additional time and money arising from the effects of the failure to complete the utilities works in time.

5.15 The MUDFA Works were not complete in accordance with the requirements of the MUDFA Programme and are still not complete, 34 months into the 38 months initial contract period.

Even today, tie is not giving any certainty as to the sequence and timing for completion of the advance works critically delaying the Works.

5.16 Where Pricing Assumptions have been undermined by events and the associated risk has materialised, this leads to a Notified Departure which, as outlined above, must be dealt with in accordance with Clause 80 (tie Changes) of the Infraco Contract and will in most cases lead to increased costs and an entitlement to an extension of time. All Notified Departures have a further programming impact on the delivery of the Works because BSC is not permitted by the Infraco Contract to carry out any Works which constitute a Notified Departure either until such time as BSC's Estimate has been agreed, or until the matter has been referred to Dispute Resolution Procedure and (if deemed urgent) an appropriate instruction issued by tie (Clauses 80.13 and 80.15). tie has repeatedly rejected this interpretation of Clause 80.13. BSC's position however has been upheld at adjudication (see below). The effect of this is that the Notified Departure mechanism is dependent on the parties reaching agreement on proposed Estimates or making regular use of the Dispute Resolution Procedure, in order to ensure progress of the Works. It is BSC's opinion that one of the major problems encountered on the Project has been tie's failure to administer this procedure as envisaged in the Infraco Contract which has effectively resulted in large areas of the Site becoming sterilised pending agreement of Estimates or referral to/ conclusion of disputes through the Dispute Resolution Procedure.

5.17 The utility works remain incomplete nearly three years later. The effect of this cannot be underestimated - this has deprived BSC, and continues to deprive BSC, of the ability to perform its Works in terms of the Infraco Contract.

Overall Impact on the Works

5.18 The late completion of the MUDFA Works and continuous changes to design and late/missing decisions from tie have delayed progress of the Works and caused increased costs to be incurred. In addition, and critically, tie's approach to the administration of the Infraco Contract has exacerbated the situation. BSC has sought to administer the Infraco Contract in accordance with its terms. As noted above, the Infraco Contract expressly

requires agreement between the parties in respect of Clause 80 Changes to the Works prior to the carrying out of changed Work. To date, BSC has notified some 696 Changes which require to be agreed with tie and tie has notified BSC of a further 102 Changes. 127 of these Changes have been superseded by further Changes and tie has to date agreed 337 Changes and issued tie Change Orders in relation thereto. For the vast majority of Changes notified by BSC, tie has refused to acknowledge that a Notified Departure has occurred and/or has refused to acknowledge the correct value of the Change. tie has disputed the very principles upon which risk has been allocated in the Infraco Contract and in particular the impact of Schedule Part 4. tie has refused to accept the principle that certain matters constitute a Mandatory tie Change as well as the price and time consequences of that Change.

5.19 Where the parties have referred disputed Changes to the Dispute Resolution Procedure set out in the Infraco Contract, BSC's explanation of the fundamental risk allocation in the Infraco Contract has invariably been supported (See Section 8). tie's attempts to limit BSC to the original Contract Price, and limit increases in that price, where entitlement arises, have been uniformly dismissed by a series of adjudicators.

5.20 The delays in preparation of the design apparent on Day 1 of the Infraco Contract, i.e. the change in the design programme between 25 Nov 2007 and May 2008, eventually (after 18 months of communication) resulted in tie agreeing a 7.6 weeks extension of time (designated EOT 1) and an addition of £3,524,000 to the Construction Works Price. In addition BSC has been awarded a 154 day extension of time for the delivery of Section A (Depot) as a result of delays to the MUDFA Works in that area which arose prior to 31 March 2009.

6. **IMPACT OF CURRENT SITUATION ON PROGRESS AND PRICE**

6.1 At the date of this Statement, other than Princes Street, limited work in the roads forming part of the on-street works has started. There is limited off-street work with many off-street areas awaiting tie to progress its administration of the Infraco Contract. The approach currently being taken by tie is adding to the delays caused by the crystallisation of the risks

retained by tie. For example, instructions are issued (pursuant to Clause 80.15) which would allow the Works to progress, but then tie blocks progress by arguing over non-core issues.

6.2 In order to progress the Works, BSC was carrying out some works on a “goodwill” (and without prejudice) basis in off-street areas, which included Changes which had not been agreed by tie and without being instructed under Clause 80.15 of the Infraco Contract. However, tie failed to make interim payments for these “goodwill” works and so BSC was forced to cease these works in October 2010.

6.3 As noted above, the preceding MUDFA Works have been significantly delayed by tie. This has seriously delayed progress of the entire Works. BSC has intimated the effect on progress that delay to the MUDFA Works has had on the Works by way of two Infraco Notifications of tie Change (“INTCs”). The first of these, based on utility delays as at 31st March 2009, was referred to adjudication and BSC was awarded an extension of time of 154 days to Section A (Depot) of the works with certain principles being established on how to assess the impact of the utility delays on other Sections of the works. The second of these INTCs seeks to quantify the impact of the delayed utility works up to and including 31 July 2010. The Estimate for this was submitted by BSC to tie on 17 September 2010². tie has yet to respond or to acknowledge any entitlement on the part of BSC to an extension of time or additional payment in respect of this critical delaying event. BSC has assessed that the impact of this event delays the current completion date for the entire project to 10 December 2012. This INTC is based on the principles established in the adjudication decisions which are summarised at Section 10 below.

6.4 In addition, there have been, and continue to be, further MUDFA delays post 31 July 2010, the impact of which remains to be assessed.

6.5 As noted above, the Infraco Contract requires, at Clause 80.13, that the parties agree the time and money consequences of each Estimate prepared in respect of a Change before BSC is permitted to carry out the work affected by the Change. If the parties cannot agree on the contents of an Estimate, that Estimate can be referred by either party to the Dispute

² BSC's Estimate of 17 September 2010 is produced (in part) herewith

Resolution Procedure. Following referral of an Estimate to the Dispute Resolution Procedure, tie may, if it considers the work is urgent, instruct BSC to progress the Changed Works with BSC being paid its "demonstrable costs" for carrying out such work (Clauses 80.15 and 80.16). Even where Estimates are not agreed, tie may refer any outstanding Estimates to the Dispute Resolution Procedure and issue an instruction in accordance with Clause 80.15. By using the mechanism set out in the Infraco Contract, tie could have secured progress of the Works.

6.6 The interpretation of this provision has been disputed by tie, but BSC's position has been upheld in adjudication as detailed in Section 8 below.

6.7 The consequence of this provision – coupled with (a) the large number of Changes encountered and (b) tie's continuing refusal to accept those Changes and subsequently agree the Estimates - has resulted in the work on the Project all but coming to a standstill. Very little work has been progressing on site since October 2010. The only works currently ongoing are structural backfilling works and work to the superstructure at the Depot Access Bridge as part of Section 5C – Edinburgh Park Central to Gogarburn, the internal fit out and trackworks at the Depot Building and Tram manufacture in Spain.

6.8 BSC's assessment of the revised duration of the Programme as a result of all of the above is:

Original duration: 38 months (July 2011)

Revised duration: 75 months (August 2014) (Ref January 2011 Project Report)

7. **OTHER ANCILLARY DISPUTES**

7.1 To date, there have been 31 matters referred to the Dispute Resolution Procedure.

7.2 Following mediation on EOT1 the parties reached agreement, recorded in a Memorandum of Understanding, on how extensions of time should be valued going forward.

- 7.3 Other areas of disagreement between the parties which, although not formally raised to dispute, have led to difficulties in the day-to-day administration of the Project include the following:
- 7.3.1 tie's continued refusal to recognise Change – in particular, to acknowledge the significance of Schedule Part 4 and the need of the parties to agree Estimates and/or to refer disagreements on Estimates to the Dispute Resolution Procedure to permit works to proceed in the meantime;
 - 7.3.2 tie's delay in dealing with the Estimate submitted in respect of the MUDFA delays up to and including 31 July 2010 (this being the date up to which BSC held the relevant information);
 - 7.3.3 tie's refusal to issue Permits to Work for reasons which are not (in part) supported by the Infraco Contract and are in fact of little importance compared with the impact of delaying the work;
 - 7.3.4 delays in receiving third party (mainly CEC approval) for the design, this being a matter in respect of which tie has retained the risk in terms of the Infraco Contract;
 - 7.3.5 tie's attempts, contrary to the provisions of the Design Review Procedures, to “downgrade” the level of approval given to design deliverables, preventing work being progressed which had previously been approved by tie.
- 7.4 In addition, tie has served a total of 10 Remediable Termination Notices and 3 Under Performance Warning Notices on BSC which relate to alleged material breaches on the part of BSC including an alleged failure to set up an Intranet; a failure to update and work in accordance with the Programme; a failure to manage the SDS Provider; a failure to assist tie in achieving Best Value; and alleged failures in respect of the quality of the works which have been carried out to date on Princes Street, amongst other things.
- 7.5 BSC has rejected the validity of these Remediable Termination Notices and Underperformance Warning Notices, and/or has served Rectification Plans under reservation of its primary position that no material breach of contract has occurred. tie

maintains that the Remediable Termination Notices are valid. tie has rejected all of the Rectification Plans which have been submitted, without providing substantive reasons for doing so. tie claims to have been in a position to terminate the Infraco Contract for many months but has chosen not to do so. BSC considers there are no grounds upon which tie could validly terminate the Infraco Contract. The matters relied upon by tie are repetitive, contain many errors and in certain cases, relate to issues which in fact rest with tie. Having failed for many months to elect to terminate for the many reasons relied upon by them in these Remediable Termination Notice, tie has seriously compromised the credibility of its position.

8. OUTCOME OF DISPUTES – KEY ISSUES

8.1 To date, there have been 11 adjudications between the parties out of the 31 matters referred to the Dispute Resolution Procedure, conducted in accordance with the Dispute Resolution Procedure contained within Schedule Part 9 to the Infraco Contract. One adjudication is currently ongoing as at the date of this Mediation Statement, and the decision in another is still awaited. The decisions in these adjudications are binding on the parties, none yet having been appealed. For the purposes of this mediation, BSC does not consider it necessary to revisit the outcome of each and every one of these disputes, but notes that in all of these adjudications, major issues of principle have been decided in favour of BSC. The issues of principle which have been decided in BSC's favour, and which have a bearing on the issues as they currently sit between the parties, include the following:

8.1.1 That in the absence of an agreed Estimate, BSC is not obliged or permitted to commence or carry out works associated with a tie Change (Mandatory or otherwise) (**Lord Dervaid: Murrayfield Underpass adjudication**);

8.1.2 That there is a distinction between BSC's obligation to complete the Works in accordance with the Employer's Requirements and BSC's entitlement to be paid for these Works – in this regard Schedule Part 4 to the Infraco Contract takes primacy as far as entitlement to payment is concerned (**Hunter: Carrick Knowe and Gogarburn**);

- 8.1.3 That in determining whether there has been a Mandatory tie Change to the design, the starting point is the BDDI information, not the Employer's Requirements. BDDI should be compared with IFC drawings to determine whether there has been a change in facts and circumstances, with changes being established as changes in design principle, shape, form or specification; thereafter the changes should be assessed to establish whether they should be categorised as design development, the latter being determined by what could be construed from the information available to BSC at BDDI. **(Hunter: Carrick Knowe and Gogarburn);**
- 8.1.4 That in respect of Estimates (to be submitted following the occurrence of a Notified Departure) :
- (a) the Infraco Contract does not provide a quality standard for Estimates **(Wilson: Russell Road Retaining Wall)**
 - (b) it is possible (and permissible) to submit 'Part Estimates' **(Wilson: Russell Road Retaining Wall)**
 - (c) compliance with all of the provisions of Clause 80 is not a condition precedent to BSC's right to obtain an extension of time **(Howie: Delays Resulting from Incomplete MUDFA Works).**
- 8.1.5 Where a Notified Departure has occurred, Clause 80 applies and the matter giving rise to the Notified Departure cannot also be a Compensation Event **(Howie: Delays Resulting from Incomplete MUDFA Works).**
- 8.1.6 That the following principles should guide BSC's entitlement to an extension of time as a consequence of preceding delays to the MUDFA works **(Howie: Delays Resulting from Incomplete MUDFA Works):**
- (a) BSC is both bound and entitled to work to the Programme. The Programme remains in Revision 1 and this forms the basis of BSC's analysis of critical delays.

- (b) It is correct to consider the impact of the Notified Departure on the Programme without a full retrospective delay analysis and without consideration of other potential causes of delay.
- (c) BSC is obliged to propose potential mitigation measures in its Estimate but these:
 - (i) do not include acceleration measures (contrary to tie's assertion);
 - (ii) do not require BSC to give up any of its contractual rights including, specifically, the right not to have to work alongside others (including the MUDFA contractor) within a Designated Working Area;
 - (iii) do not make assumptions regarding the possible relaxation of contractual restrictions (again contrary to tie's assertion that in order to mitigate delay, BSC should have sought relaxation from certain 'embargoes' on working).
- (d) Mitigation seeks to limit an over-run on the Programme (a) without increase in overall resources applied to the works or (b) the abandonment of BSC's contractual rights.
- (e) Accelerative measures increase the rate of progress to pull back an already mitigated delay.
- (f) Designated Working Areas are not synonymous with the Intermediate Sections (as BSC had asserted).

8.1.7 BSC is entitled to be paid or reimbursed Landfill Tax for the disposal of contaminated materials (subject to following the Notified Departure procedure). Insofar as any exemptions may be or may have been applicable, it was for tie to

apply for the exemption being the ultimate beneficiary of it (**Lord Dervaid: Landfill Tax**).

- 8.2 The only adjudication decision where an issue of principle has gone against BSC relates to the approval of forms of Sub-Contract. In that adjudication, it was declared that in relation to the obligation of BSC to enter into Sub-Contracts with Key Sub-Contractors, the Infraco Contract requires that all three of the Consortium partners are party to all Key Sub-Contracts (**Howie: Approval of Sub-Contract Terms**).
- 8.3 There have been a number of other disputes between the parties both for and against BSC. One of these related to a minor matter of no contractual significance (Hilton Hotel Car Park). Other disputes have dealt with the valuation to be placed on individual agreed Notified Departures (Tower Place Bridge, Depot Access Bridge, Section 7 Drainage). Copies of all of the adjudication decisions are provided by way of background.
- 8.4 The decisions detailed above have confirmed the extensive caveats from the standard design and build risk allocation which are found in the Infraco Contract, and in particular, have confirmed the unique and far-reaching nature of Schedule Part 4. In addition, the decisions have confirmed that the original position adopted by tie (that the Infraco Contract is a lump sum fixed price contract for all elements of the work as specified in the Employer's Requirements subject to very little change) has been repeatedly shown to be incorrect and unsustainable. Some important principles have been established as a result of these adjudications. Failure by tie to acknowledge that these principles are of universal application has added to the issues facing the Project.

9. **ATTEMPTS TO REACH A SOLUTION**

- 9.1 From the very outset of the Infraco Contract, there have been differences between the parties regarding the administration of the Infraco Contract. The delays to the design (EOT1) apparent at contract execution back in May 2008 took 18 months to agree.
- 9.2 Given the need to cooperate to reach agreement to deliver the Works in a contract where so much remains to be agreed (because of the mechanism adopted and the large range of

contingent risk (Schedule Part 4)) and in the absence of any attempt to reach agreement, the Work has ground to a virtual halt.

9.3 The parties have recognised this and there have been three principal attempts to reach a resolution of the many individual disputes.

9.4 Firstly, there have been numerous meetings regarding the production of a revised programme and a number of revised Contract Programmes have been proposed but rejected by tie. The Contract Programme has been amended only once to take account of the design differences at contract signing and does not reflect what is currently being delivered, although tie still requires progress tracked against it.

9.5 Secondly, and based upon a supplemental agreement which the parties entered into in relation to works on Princes Street (the 'Princes Street Supplemental Agreement') where it was recognised that the extent of the difficulties could effectively lead to the works grinding to a halt, the parties considered an alternative arrangement whereby all of the on-street works would be paid for on a 'demonstrable cost', 'open-book' basis (the 'On Street Supplemental Agreement' or 'OSSA'). On-street works could have proceeded under this arrangement in early 2010; a year ago. However, after 6 months of close working together and negotiations, tie declared that the OSSA would have been a breach of its obligations under EU procurement legislation and it abandoned the discussions.

9.6 Lastly, in May 2010, the parties entered into discussions to reach an agreement whereby the scope of the Works would be reduced, a new programme agreed, risk re-allocated in the Contract and a new price agreed. BSC produced two proposals on this basis ("Project Carlisle 1" and "Project Carlisle 2") which were followed by detailed discussions on how the Project might be completed, but tie failed to respond on the detail of either of BSC's proposals. Carlisle 2 forms the basis of Project Phoenix.

10. **BSC'S POSITION IF AGREEMENT CANNOT BE REACHED**

10.1 If no agreement can be reached at this mediation on how the Works can be progressed to deliver Project Phoenix, the parties are left in a position where the Works can only proceed

(very slowly) on the back of individual decisions at adjudication in relation to particular Changes (as they proceed at present). Alternatively the Infraco Contract could be brought to an end either by tie seeking to terminate the Infraco Contract or the parties reaching mutual agreement on separation, either as part of this mediation or otherwise.

- 10.2 BSC is satisfied that the Infraco Contract satisfactorily protects its commercial interests. BSC's positions on the major issues of principle have been vindicated in successive legally binding adjudication decisions.
- 10.3 BSC is frustrated by the various impasses caused by the way the Infraco Contract is being administered by tie and the reputational damage for all parties concerned.
- 10.4 BSC does not consider that there are any valid grounds for termination of the Infraco Contract. If tie chooses to pursue this route, BSC is confident that tie will be found to be in breach of contract and that BSC will ultimately be entitled to considerable additional payment in respect of additional costs, including loss of profit.

Alternative Outcomes

- 10.5 If no agreement can be reached on Project Phoenix then BSC is prepared to discuss a resolution whereby (a) BSC does not complete the Works and (b) BSC is paid in respect of work done up to the point of stopping and compensated for remaining liabilities and loss of profit (tie referring to this broad proposal as 'Project Separation'). The detail of such an outcome will depend very much on tie's (currently unknown) requirements should tie wish to pursue this alternative, e.g. will tie wish to purchase all of the trams already constructed and other materials and equipment already constructed in contemplation of completion of the entire line.

Bilfinger Berger Siemens CAF Consortium

24 February 2011

APPENDIX ONE – KEY PROJECT FACTS

Construction Works Price (BB and Siemens):	£ 238,607,664
SDS Price:	£ 3,308,815
SDS Provisional Sums:	£ 1,675,000
Tram Supply Price:	£ 55,781,634
Infraco Maintenance Mobilisation:	£ 1,782,292
Tram Maintenance Mobilisation:	£ 2,275,806
Infraco Spare Parts:	£ 1,013,090
Total of Capital Expenditure:	£ 304,444,301
Contract Signature:	14 May 2008
Commencement date:	14 May 2008
Original Completion date (Section C):	17 January 2011.
Project Duration:	38 months
Original Revenue of Tram: (Section D):	16 July 2011
Anticipated Completion date (Section D):	05 August 2014

APPENDIX TWO

ADDITIONAL CONTRACT CLAUSES RELEVANT TO THE DISPUTES BETWEEN THE PARTIES

1. Clauses 6 - Project Partnering and Clause 7 - Duty of Care and General Obligations in Relation to the Infraco Works;
2. Clause 18 – Land Consents, Permanent Land and Temporary Sites (in particular note that BSC has an exclusive licence to enter and remain upon the Designated Working Area for the duration of the time required for completion of the Infraco Works (with reference to the Programme));
3. Clause 28 – Sub-Letting and the Appointment of Sub-Contracts
4. Clause 34 – Work to be to the Satisfaction of tie
5. Clause 41 – Completion of Construction Milestones and Critical Milestones
6. Clause 60 – Programme
7. Clause 61 – Rate of Progress and Acceleration
8. Clause 62 – Liquidated and Ascertained Damages
9. Clause 65 – Compensation Events
10. Clause 66 – Payment of the Contract Price
11. Clause 67 – Payment in Respect of Applications for Milestone Payments
12. Clause 71 – Labour Tax and Landfill Tax Fluctuations
13. Clause 73 – Best Value
14. Clause 80 - tie Changes
15. Clause 90 - Termination on Infraco Default

16. Clause 101 – Confidential Information
17. Clause 104 – Information and Audit Access
18. Clause 119 – Mitigation
19. Clause 120 – Joint and Several Liability
20. Clause 121 – No Double Recovery

APPENDIX THREE

ATTACHED DOCUMENTS

Project Phoenix

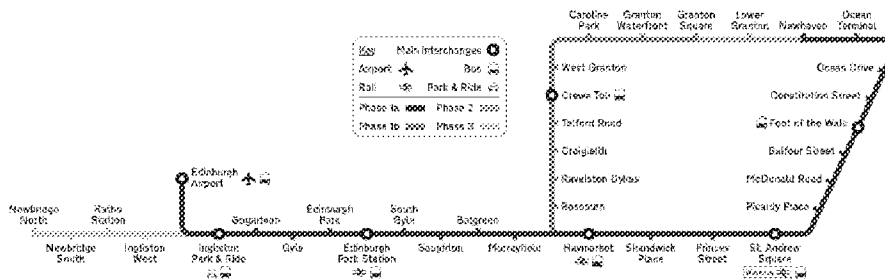
Letter from BSC to City of Edinburgh Council dated 8 March 2010

BSC Estimate in relation to MUDFA 2 dated 17 September 2010 (in part)

APPENDIX FOUR

SUMMARY OF EXISTING PROJECT

1. The Project is for the design, construction and maintenance of a tram system. The purpose of the Project is to have a tram transportation system from Edinburgh Airport through Haymarket, on through the city centre to Newhaven - a total distance of around 18.6 km and including 22 tram stops. This is designated Phase 1a. A proposed Phase 1b, to continue the system (as part of a separate option under the Infraco Contract) from Granton back to Roseburn, was abandoned by tie in mid 2009 due to financial constraints, so the Infraco Contract covers purely Phase 1a (see below).



2. Phase 1a is to be delivered in sections, with various Sectional Completion Dates (summarised at the end of this document). The Sections comprise:

Section A – the Depot (including energisation) and the first Tram delivered to the Site and assembled and the completion of all tests required by the Employer's Requirements in relation to that Section;

Section B – completion of the test track (including energisation), assumed as Depot to the airport, and five Trams delivered to the Site together with testing of all Trams;

Section C – the carrying out and completion of Phase 1a to Newhaven (including energisation) and the spur or delta at Roseburn Junction and the completion of all tests

required by the Employer's Requirements in relation to that Section, including System Acceptance Tests

Section D – commencement of revenue service, and completion of all System Acceptance Tests to enable Service Commencement

3. The Infraco Contract requires the provision of 27 trams. These are housed in a substantial new depot at Gogar, which is also to be constructed under the Infraco Contract. The Project includes the construction of numerous new structures including 15 bridges.
4. A consortium was formed to allow the ETN to be delivered under the contractual arrangements proposed by tie. The BSC Consortium comprises Bilfinger Berger for the civil works; Siemens for the track works and mechanical and electrical works, CAF for the manufacture and delivery of trams.
5. The tram service itself will be run by a separate Operator appointed by tie.
6. In order for the ETN to be constructed by BSC, a substantial amount of utility diversion and replacement works were required in advance (known as the "MUDFA Works", MUDFA standing for 'Multi Utility Diversionary Framework Agreement'). The MUDFA Works were intended to remove obstructions from the line of the tramway to facilitate efficient delivery of the Project. These works were let by tie to Alfred McAlpine (later acquired by Carillion) in October 2006. Carillion was later replaced in December 2009 by Clancy Docwra and by Farrans.
7. Design services are supplied by Parsons Brinckerhoff (defined in the Infraco Contract as the 'SDS (systems design service) Provider). The SDS Provider was appointed by tie in 2005. The design services contract was subsequently novated to BSC at the signing of the Infraco Contract in May 2008. Prior to novation, tie had administered the design services contract for 3 years.
8. CAF was appointed under a Tram Supply Agreement and a Tram Maintenance Agreement by tie in autumn 2007 to supply and maintain the 27 trams, before these contracts were

subsequently novated to BSC at the signing of the Infraco Contract. CAF was also brought into the consortium formed by Bilfinger Berger-Siemens at that time.

9. It can be seen, therefore, that CAF's relationship with tie pre-dates the signing of the Infraco Contract with CAF being a supplier directly selected by tie. In that regard, CAF has worked closely with tie prior to and following the conclusion of the Infraco Contract in relation to the design and manufacture of the 27 Trams. The obligations of CAF were directly agreed with tie and set out in the Tram Supply Agreement and Tram Maintenance Agreements. The Tram Supply Agreement established a programme for the manufacture, delivery and commissioning of the 27 Trams. The manufacture of all 27 Trams is close to completion.