

IN THE MATTER OF A MEDIATION

BEFORE MICHAEL B SHANE

BETWEEN:

tie Limited ("tie")

and

**Bilfinger Berger Civil UK Limited, Siemens plc and
Construcciones y Auxiliar de Ferrocarriles S.A.,
together the Infraco ("Infraco")**

tie's Mediation Statement

WITHOUT PREJUDICE

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1 Introduction

The Edinburgh trams project is the highest profile public capital project in Scotland. Unfortunately this profile is largely as a result of the notoriety which the project has achieved, primarily due to very substantial cost and time issues. The Parties are perceived to be in deadlock. Divided by a host of contractual issues, mutual confidence and trust is vanishingly small. Physical progress of the work has effectively ground to a halt and the On-street trackform constructed by Infracore at Princes Street is patently defective. Reputational fall out affects all who are involved.

Recourse to contractual dispute resolution procedures has occurred regularly and frequently. Eleven Adjudication decisions have been issued to date and others are in the pipeline.

A number of the key issues that divide the Parties are referred to and examined in sections 3 to 10, below.

The number and range of disputes and differences are having a hugely detrimental impact on the delivery of the project and in the normal course would require to be determined through judicial proceedings which would be complex, lengthy and costly. Legal recourse is unlikely to mitigate against reputational damage and this is commented upon further in section 11 below.

This situation led Parties to explore the possibility of a solution through what was named Project Carlisle in June through to September 2010. Brief details of Project Carlisle are contained in section 12 below. Project Carlisle did not result in agreement. Parties now desire to re-visit the possibility of finding a solution and this fresh initiative is called Project Phoenix in terms of which Parties would put behind them their differences, and they would move forward on a new basis. tie's essential requirements in relation to Project Phoenix are referred to in section 13 below.

In the event that Project Phoenix cannot be achieved Parties wish to explore whether the Infraco Contract can be brought to an end on an agreed basis ("Project Separation") as referred to in section 14 below.

Absent an agreed solution the Parties fall back to the current position, where the project is effectively at a standstill and a number of fundamental differences will remain to be determined through judicial proceedings.

2 Background

- 2.1 The background to the development of the Edinburgh Tram Network is set out in the summary and introduction of the Interim Report produced by Audit Scotland in February 2011¹.
- 2.2 tie and Infraco entered into the Infraco Contract for the delivery of the Edinburgh Tram Network on 14 May 2008². At the date of contract formation, the Infraco consisted of BBCUK and Siemens. On the same date that the contract was formed, a Minute of Variation was entered into, in terms of which CAF became a member of Infraco and a party to the Infraco Contract.
- 2.3 On 19 November 2005, tie had entered into the SDS Agreement with SDS, in terms of which SDS were appointed to provide design services. On the same date that the Infraco Contract was entered into, namely 14 May 2008, tie's interest in the SDS Agreement was novated to Infraco in terms of the SDS Novation Agreement.

¹ tie Exhibit 5

² Core Bundle tabs 1, 2, 3, 4, 5 and 19

- 2.4 In March 2009, tie and Infraco entered into the PSSA³; that supplemental agreement essentially carved out certain works at Princes Street from the Infraco Contract, and provided that they would be governed by the PSSA.
- 2.5 tie and Infraco have been, and remain, in dispute in relation to a number of issues in connection with the Infraco Contract and the PSSA. Some of those disputes have been referred to DRP, where they have been variously resolved by agreement (at mediation or otherwise), subject to a decision issued by an adjudicator, or remain ongoing. Furthermore, there are a number of issues where the Parties are in disagreement or dispute where a referral has not yet been made to DRP, but is imminent.⁴
- 2.6 tie has issued a number of RTNs on the basis of various Infraco Defaults, as well as UWNs.

3 **Key issues that divide the Parties**

- 3.1 Infraco claims to be entitled to cease work as a consequence of its interpretation of a number of key contractual provisions, all of which inter-relate to produce the current situation, where work has all but ground to a halt, namely:
- (a) the allocation of risk, in terms of time and money, in relation to the development of Design, and in particular the proper interpretation of Pricing Assumption No. 1; and
 - (b) Infraco's obligation to progress the Infraco Works, and in particular its obligations in terms of Clauses 34.1 and 80.20 of the Infraco Contract.

- 3.2 Other issues which divide the Parties, include:

³ Core Bundle tab 6

⁴ An overview of the issues which have entered the contract dispute resolution procedure is at Exhibit 7

- (a) the interaction of Clauses 65 (Compensation Events) and 80 (tie Changes) of the Infraco Contract;
- (b) Infraco's claim to be entitled to an extension of time and associated loss and expense in relation to MUDFA Works;
- (c) the existence of a number of Infraco Defaults, entitling tie to issue RTNs and UWNs ; and
- (d) Infraco Conduct issues which are commented upon in section 10 below.

3.3 These issues are examined in the following sections of this statement.

4 **Design development**

4.1 Infraco has advanced a number of claims to be entitled to additional time and money as a consequence of a Notified Departure said to have arisen because the facts or circumstances differ from Pricing Assumption No. 1. tie takes issue with Infraco's interpretation of Pricing Assumption No.1 as being fundamentally misconceived for the reasons set out below.

4.2 The interpretation to be given to Pricing Assumption No.1 has been ventilated to a certain extent in adjudications between the Parties as follows:

Gogarburn Bridge and Carrick Knowe Bridge - John Hunter⁵;

Russell Road Retaining Wall - Alan Wilson; and

Section 7A track drainage - Gordon Coutts QC.

⁵ These adjudications ran in parallel, and the decisions are, in all relevant respects, identical.

- 4.3 Each of these decisions is binding only in relation to the particular INTC and Estimate to which it relates. No general principles have been established in these decisions which would bind the Parties in subsequent adjudications. Indeed, the Parties took care to frame the referrals to adjudication in such a way as to ensure that the decisions would not have general applicability.
- 4.4 Furthermore, the adjudicators have reached differing views on the proper interpretation to be given to Pricing Assumption No. 1.
- 4.5 tie understands Infraco's position to be that Pricing Assumption No.1 ought to be interpreted in such a way as to mean that "[tie] *assumes the commercial risk for changes to design between the Base Date Design Information Drawings and Issued for Construction Drawings which fall into the categories of design principle, shape, form or specification*".⁶
- 4.6 Infraco's approach has been to ascertain "*...whether each change between BDDI to IFC falls within one or more of the four categories of para. 3.4.1.1. - design principle, shape, form or specification. If a change falls within one or more of the above categories, then expressly by contractual definition, it cannot be normal development and completion of the design because para. 3.4.1 excludes these categories from what might otherwise be understood as normal development and completion of design*".⁷
- 4.7 On the basis of Infraco's approach the development of design from BDDI to IFC in effect invariably gives rise to a Notified Departure which triggers the change mechanism set out in Clause 80.
- 4.8 To date a total of 842 INTCs have been intimated by Infraco. 236 Estimates remain to be agreed. Details of these are set out in tie Exhibit 8. The delay caused by this volume of change has been exacerbated by the length of time it has taken Infraco to produce estimates. By way of example reference is made to Exhibit 9 which shows the "top ten"

⁶ Paragraph 4.5 of Infraco's Referral Notice in the adjudication before Alan Wilson in relation to the Russell Road retaining wall no. 2 (the "Wilson Adjudication")

⁷ Paragraph 5.8.8 of Infraco's Referral Notice in the Wilson Adjudication

longest periods for the production of estimates. This shows estimates taking several hundred days to be produced (compared with the contractually stipulated 18 days).

- 4.9 Infraco's interpretation is fundamentally misconceived. Reference is made to tie's letter⁸ to Infraco dated 24 May 2010 and to the detailed analysis set out in tie's Exhibit 1.

5 Progress of the works

- 5.1 A Notified Departure is deemed to be a Mandatory tie Change (Clause 3.5 of Schedule Part 4). The significance which arises from a Notified Departure is set out in Clause 80 which contains the contractual mechanism dealing with tie Changes.
- 5.2 In essence Clause 80 requires Infraco to deliver an Estimate (Clause 80.4) which deals with *inter alia* price and time.
- 5.3 Infraco's position is that Clause 80 is applicable once it intimates a Notified Departure (an INTC) even if tie dispute that a Notified Departure has occurred.
- 5.4 Furthermore, Infraco's position is that unless and until the Estimate is agreed and tie has issued a tie Change Order, Infraco is obliged (by the concluding words of Clause 80.13) not to commence work in respect of a tie Change. Exhibit 9 provides examples of the time that it has taken to produce estimates in several instances.
- 5.5 The result is that the physical progress of the work has effectively ground to a halt to the extent that work is only continuing in a meaningful sense at the Gogarburn depot (see section 6 below).
- 5.6 Not only do tie disagree with Infraco on what constitutes a Notified Departure (as is explained in section 4 above) but tie contends that where a Notified Departure is disputed Infraco is obligated to proceed with the work in question pursuant to instructions under Clause 34.1 and in accordance with Clause 80.20. There is no risk to Infraco in doing so.

⁸ tie Exhibit 10

In the event that Infraco's contention for a Notified Departure was upheld Infraco would be entitled to the time and cost consequences arising from the Notified Departure under Clause 34.3 and Clause 80.20.

5.7 tie's position has been set out in *inter alia* its letters to Infraco of 24 May 2010⁹ and 10 August 2010¹⁰. A detailed analysis is also set out in Exhibit 2.

5.8 Infraco could be carrying out works across a significant portion of the route – but are not. tie Exhibit 13 shows those areas.

5.9 Reference is made to Exhibit 11 which compares the current estimates for completions with those originally programmed for. There is a minimum 15 month slippage.

6 Cessation of work

6.1 On the 29 September 2010 Infraco wrote to tie explaining that it was ceasing work associated with 99 INTCs on the basis that it was not required to carry out the works covered by those INTCs until such time as it received a tie Change Order. Infraco asserted that it had been carrying out the said works on a "goodwill basis". Within a few days of the aforementioned letter Infraco systematically started to demobilise its own resources and those of a number of its sub-contractors. The result of this action *de facto* suspended progress to the Infraco Works notwithstanding that Infraco did continue with some other works.

6.2 Not all of the INTCs in question fall into a straightforward category where there is simply a need to agree Estimates and issue tie Change Orders. Some of the INTCs had been withdrawn; some had been satisfied by the issue of a tie Change Order; some were in respect of INTCs where no Estimate had been provided; some related to completed work and a very large proportion relate to circumstances where tie disputed that a Notified

⁹ tie Exhibit 10

¹⁰ tie Exhibit 12

Departure had arisen or there were queries on the Estimates submitted by the Infraco. Moreover, Infraco ceased works which were not referred to by any of the 99 INTCs and in some cases tie had issued instructions pursuant to Clause 34.1 requiring the Infraco to proceed with the works with due expedition.¹¹ Reference is made to tie's Exhibit 6 for further details.

- 6.3 There is no contractual basis for the cessation. Infraco could be continuing work in a number of areas¹² Infraco's obligation was to continue with works in question. Its failure to do so constitutes an Infraco Default. Clauses 34.3 and 80.20 protect Infraco's position in relation to entitlement in respect of a tie Change. Infraco was exposed to no financial risk in relation to the works which constitute a tie Change.

7 The interaction of Clauses 65 and 80

- 7.1 It can be seen from the foregoing that Infraco takes the view that if it is able to bring itself within the parameters of Clause 80, it is protected from an obligation to proceed with the Infraco Works until a tie Change Order is issued (although in many cases, even though a tie Change Order has been issued, work has not yet commenced) or within the narrow circumstances envisaged by Clause 80.15. It is also evident from the foregoing that tie takes issue with Infraco's position.
- 7.2 Infraco has adopted the position that it is entitled exclusively to elect to treat certain events as tie Changes, rather than Compensation Events, in order to bring itself within the ambit of Clause 80, rather than the ambit of Clause 65. That approach is misconceived.
- 7.3 Infraco's motivation for this would appear to be clear: it considers the provisions of Clause 80 to be more favourable to it than the provisions of Clause 65. By way of example.

¹¹ A breakdown of the 99 INTCs is contained at tie Exhibit 14

¹² Reference is made to the photographs at Exhibit 13

- 7.3.1 Clause 65.11 provides that "*notwithstanding the occurrence of a Compensation Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 65 (Compensation Events).*"
- 7.3.2 Clauses 65.2, 65.3 and 65.4 provide for a series of conditions precedent which, in nearly all cases, would act as a time bar to any entitlement and which, if they are not met by Infraco, are fatal to its claim to be entitled to additional time and money.
- 7.3.3 Clause 65.8 provides that "*tie shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (Compensation Events) not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties*".
- 7.4 For the reasons explained in the detailed analysis contained in tie Exhibit 3, Infraco is not entitled to elect which route it may follow. It must comply with the provisions of Clause 65 and satisfy the requirements laid down therein.

8 **Time**

- 8.1 Infraco has sought an extension of time in relation to one issue alone: completion of work in relation to Utilities by other contractors. That claim has been advanced in two separate tranches: under INTC 429 and INTC 536, both of which are addressed below. INTC 429 has been the subject matter of an adjudication before Robert Howie QC. Infraco's claims in relation to INTC 536 are rejected in their entirety.
- 8.2 The true causes of delay in connection with the project are the responsibility of Infraco. They include matters such as:
- (a) Infraco's own delays in connection with design (addressed in more detail below in the context of Infraco Default);

- (b) Infraco's own delays in connection with procurement, manufacture, delivery, testing and commissioning;
- (c) Infraco's own delays in connection with third party consents and approvals;
- (d) Infraco's failure to progress the works, notwithstanding instructions issued to it pursuant to Clauses 34.1, 80.13 and 80.15 (see sections [6 and 7] above).

8.3 **INTC 429** was Infraco's claim to be entitled to the following extension of time:

Section A: 195 calendar days to 13 December 2010;

Section B: 193 calendar days to 10 January 2010;

Section C: 257 calendar days to 22 November 2011;

Section D: 257 calendar days to 20 May 2012¹³.

8.4 Infraco's claim covered the period to 28 March 2009. It was said by Infraco to be prosecuted on the basis that a Notified Departure had occurred in connection with two Pricing Assumptions¹⁴, namely:

- (a) Pricing Assumption 24: "*That in relation to Utilities the MUDFA Contractor and/or Utility [sic] 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*"; and
- (b) Pricing Assumption 32: "*That the programming assumptions set out in Schedule Part 15 (Programme) remain true in all respects.*"

¹³ Issues in relation to additional payment remain unresolved between the Parties, and are currently under discussion

¹⁴ Although Infraco shifted its case during the course of the adjudication, and effectively abandoned its initial position that the claim was prosecuted on the basis of purported breach by tie of its obligations under Clause 18.1.2

- 8.5 Programming assumption 3 in Schedule part 15 contains a number of assumptions in relation to the completion by the MUDFA Contractor of its works by certain dates. Programme assumption 3.1 provides that *"The programme is based on MUDFA having completed all works and all utilities being diverted that would conflict with the INFRACO operations by the following dates;..."* Programming assumption 3.2 provides that *"no enabling works shall be required to be undertaken by INFRACO before MUDFA (or other Utilities) can complete their works."*
- 8.6 INTC 429 was submitted to DRP, and Robert Howie QC was appointed as adjudicator in relation to Infraco's claim. He decided that Infraco were entitled to an extension of only 154 days in relation to Section A, and no extension in relation to Sections B, C and D, all as defined in the Infraco Contract. Although Mr Howie made certain comments in connection with Section B, those comments do not form part of his Decision.
- 8.7 One of the principal reasons for Infraco's failure to obtain the redress which it had sought was in relation to its refusal to commence work until an entire intermediate section of the work was clear of utility activity, meaning that it did not progress the Infraco Works even where it was possible for it to do so. Infraco's approach was rejected by Mr Howie, who disagreed with Infraco's interpretation of Designated Works Areas.
- 8.8 **INTC 536:** Infraco now seeks a further extension of time in relation to Utilities for the period from 1 April 2009 to 31 July 2010. The extension of time sought is as follows:
- Section A: 241 calendar days to 28 January 2011
- Section B: 286 calendar days to 13 April 2011
- Section C: 461 calendar days to 13 June 2011
- Section D: 461 calendar days to 10 December 2012.
- 8.9 Infraco also seeks payment of c. £40m and €5m in relation to INTC 536. This latter figure has now been reduced downwards by CAF.

- 8.10 The basis of the Estimate in relation to INTC 536 is said by Infraco to be the same as in connection with INTC 429, namely Pricing Assumptions 24 and 32. Infraco has referred the issue of INTC 536 to DRP.
- 8.11 tie takes issue with INTC 536 for a number of reasons, which are set out in tie Exhibit 4.
- 8.12 Furthermore, Infraco should take account of the decision of Mr Howie: in other words, an extension for Section A of 154 days and "nil" days for Sections B, C and D should be reflected for the utilities delays up to 28 March 2009. Infraco has sought to re-analyse all utilities delays from commencement of the Infraco Contract, including all of those dealt with in Mr Howie's decision.
- 8.13 In addition, pending Court proceedings or agreement, Infraco is not entitled to have matters that were the subject matter of Mr Howie's Decision revisited and reopened in the context of INTC 536. Infraco's Estimate in relation to INTC 536 subsumes a number of INTCs which had in turn earlier been subsumed into INTC 429, namely INTCs 14, 15, 16, 18, 70, 131, 241 and 358. The subject matter of those INTCs was decided upon by Mr Howie, and his decision remains binding in relation to them. Furthermore, Schedule Part 9 at Clause 33 specifically requires an Adjudicator to resign where "*a dispute referred to him is the same or substantially the same which has previously been referred to adjudication*".
- 8.14 The programme which Infraco has used to carry out its delay analysis in connection with INTC 536 contains significant projections of delay arising from matters referred to Mr Howie and decided upon by him as warranting no extension of time.
- 8.15 Infraco has also sought to include matters in its Estimate for INTC 536 which were not included in its original INTC, and which post date the submission of that INTC, namely INTCs 556, 557, 564, 570 and 571. These are not validly included in the Estimate and fall to be disregarded.

8.16 If the INTCs referred to in the two foregoing paragraphs are excluded (as they should properly be), the scope of INTC 536 is significantly restricted. It is that restricted basis alone that falls to be considered in connection with Infraco's claim.

8.17 The slides produced at Exhibit 15 summarises tie's analysis of INTC 536 and its criticisms of Infraco's position more generally. In addition, the narratives at Exhibits 16 and 17 (which cross refer to the slides at Exhibit 15) set out tie's position in relation to its criticisms of Infraco's Programming.

9 **Infraco Default**

9.1 Beyond the issues already identified in this statement, Infraco is in default in relation to a number of its obligations under the Infraco Contract. A total of 10 RTNs has been issued by tie. A summary of these and related correspondence is produced in tie Exhibit 18. The RTNs and related correspondence is produced in the Core Bundle tab18. The areas of default include the matters referred to in the following paragraphs.

9.2 **On-street trackform:** Infraco has breached its obligations in relation to the design of the On-street trackform in a number of ways, including the following:

- (a) Infraco delayed in developing and completing the design of the On-street trackform following formation of the Infraco Contract on 14 May 2008;
- (b) Infraco delayed in producing its report on the trackform following the ground investigations which took place in June 2008;
- (c) Infraco delayed in holding the development workshop provided for by clause 4.7 of the SDS Novation Agreement in relation to On-street trackform design;
- (d) Infraco delayed in producing its report following the development workshop;

- (e) Infraco delayed in producing the first drawings showing its trackform design until May 2009, a full year after contract formation;
- (f) Infraco further delayed in producing the Issued for Construction Drawings in relation to On-street trackform until April 2010. Moreover, these drawings have still not been approved by CEC;
- (g) the introduction into the trackform design of a reinforced concrete slab track improvement layer to span across voids of up to 1 metre in any direction as part of the trackform design was unnecessary and superfluous;
- (h) the design of the duct banks which run adjacent to the tram system requires excessive excavation; and
- (i) the design which has been produced by Infraco is not compliant with the requirements of the Infraco Contract, and is therefore not complete

Further details of tie's position are set out in tie Exhibits 19, 20 and 21.

9.3 **Princes Street:** the On-street trackform constructed by Infraco at Princes Street in terms of the PSSA is subject to a number of significant defects, including the following:

- (a) the asphalt surface course adjacent to the tracks has deteriorated;
- (b) longitudinal cracks have formed parallel with the tracks;
- (c) the wearing course between the cracks and the resilient material on either side of the track has broken up;
- (d) the bituminous bound pavement materials have cracked and broken;
- (e) there is poor compaction in and around the rail flange;
- (f) there are a number of locations where there is a significant step down form the top of the rail and wearing surface;

- (g) the regularity and application of the joint sealant is unsatisfactory;
- (h) the road surfacing is not compatible and integrated with the trackform installation.;
- (i) the setts around the tracks are in substandard condition; and
- (j) the drainage channels between the tracks are to be replaced.

Further detail of the Princes Street Defects are contained at tie Exhibit 22 and in the Conditions Report at tie Exhibit 23. Further photographs showing defects are at Exhibit 24 and a note on the Princes Street position is at tie Exhibit 25.

- 9.4 These defects have been caused by Infraco's defective and incompetent design and/or workmanship. By way of example, Infraco's design for the On-street trackform does not contain any measures to provide a transition between the rigid trackform and the adjacent flexible pavements.
- 9.5 **Failure to progress the Infraco Works:** as referred to at sections 4, 5 and 6 above, Infraco has failed to progress the Infraco Works in compliance with its obligations under Clauses 34.1, 80.13 and 80.20.
- 9.6 **Structures in section 5A of the Infraco Works:** there are a number of Infraco Defaults associated with a group of structures in section 5A of the Infraco Works, namely:
- (a) Structure S21C Murrayfield Stadium Underpass;
 - (b) Structure S21B Murrayfield (Stadium) Retaining Wall;
 - (c) Structure S21D Murrayfield (Pitches) Retaining Wall;
 - (d) Structure W8 Baird Drive Retaining Wall; and
 - (e) Structure S21E Water of Leith Bridge.

Further details of tie's position are set out at tie Exhibits 26 and 27.

- 9.7 The Infraco Defaults associated with these structures include the following:
- (a) failure to progress and resolve issues in connection with the Track Monitoring Plan between Haymarket Station and Edinburgh Park;
 - (b) Infraco's failures to comply with its obligations in terms of Clause 80 in connection with the production and content of Estimates in relation to INTCs 106, 109, 138, 147, 479C, 625, 667, 667a and 694;
 - (c) Infraco's failures to comply with its obligations to proceed with the work which is the subject matter of the foregoing INTCs;
 - (d) late release by Infraco of the Work Package Plans;
 - (e) late release and incomplete provision of the Form C information;
 - (f) failure to progress the works associated with diverting the Scottish Power utility cable to Murrayfield Underpass S21C;
 - (g) failure to satisfy outstanding CEC informatives;
 - (h) failure to produce a complete approved design to IFC status and with all necessary consents;
 - (i) failure to conclude a sub-contract with Expanded Limited in relation to Murrayfield retaining wall S21D;
 - (j) failure to obtain Scottish Water approval and provide an Estimate for the additional manhole works in connection with INTC 479B;
 - (k) Infraco's failure to comply with the Construction Phase Plan in relation to all railway corridor works;
 - (l) failure properly to manage issues in relation to utility diversions at Water of Leith Bridge (S21E); and

- (m) Infraco demobilised an engineer for Network Rail which has led to the relevant health and safety plans not being progressed and agreed with Network Rail.

These issues are described in more detail at tie Exhibit 28.

9.8 **Gogarburn retaining wall:** Infraco has failed to progress the design of the retaining walls in the vicinity of Edinburgh Airport at Gogarburn properly and/or expeditiously, in that:

- (a) Infraco failed to alert tie and/or Edinburgh Airport Limited to the increased floodwater levels associated with the proposed scheme in June 2008, or to take steps to eliminate this increase;
- (b) even though Infraco had prepared what it considered to be IFC Drawings in October 2008 (which proved in the event not to be the case), Infraco failed to initiate the procedure under Schedule Part 44 (EAL Works) for obtaining the approval of British Airports Authority and/or Edinburgh Airport Limited to its proposals until the end of May 2009;
- (c) at the end of May 2009 Infraco submitted a proposal for British Airports Authority and/or Edinburgh Airport Limited to review for a type of retaining wall that Infraco knew was out of date, and failed to include the relevant flood risk assessment produced by Scott Wilson Halcrow in March 2005;
- (d) the design of the retaining walls was changed from the reinforced concrete cantilever retaining walls shown on the BDDI drawings to a concrete-faced sheet piled wall, and then changed again to a secant piled wall; and
- (e) Infraco has still failed to devise a scheme that will meet the requirements of British Airports Authority and/or Edinburgh Airport Limited, including the requirement not to increase the flood risk to the airport land, without works having to be carried out outside the Limits of Deviation (which will require tie having to make special arrangements), and/or an increased risk of flooding elsewhere.

Further details in respect of this Default are set out at tie Exhibit 29.

- 9.9 In terms of Schedule Part 1 (Definitions and Interpretation), "a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works" constitutes Infraco Default (a)¹⁵.
- 9.10 The matters referred to in the foregoing paragraphs, both individually and collectively, constitute Infraco Default and have been the subject matter of RTNs as hereinbefore referred to.
- 9.11 As it is entitled to, Infraco has submitted rectification plans to tie in response to four of the RTNs which have been issued whilst denying that there is any default. In accordance with its obligations under Clause 90.2, tie has considered those rectification plans to determine, at "tie's absolute discretion...whether the rectification plan is acceptable"¹⁶. Those rectification plans are not acceptable to tie and have been formally rejected.
- 9.12 Accordingly, tie is entitled to terminate the Infraco Contract upon giving 5 Business Days' written notice¹⁷, and thereafter expel Infraco from the Infraco Works and the Site¹⁸. That entitlement has not yet been exercised, but it remains one of the contractual options available to tie.
- 9.13 In the event that tie exercises its entitlement to terminate the Infraco Contract, tie will be entitled to complete the Infraco Works using other contractors¹⁹, as well as certain other entitlements in relation to Infraco's Equipment, Temporary Works, goods and materials, sub-contracts as well as drawings and design information.
- 9.14 In terms of Clause 90.14, tie will also be entitled to recover from Infraco:

"the costs of completing the Infraco Works, not including any amount calculated as due to the Infraco pursuant to Clause 90.12 up to and including the Service Commencement Date

¹⁵ Page 255 of Schedule part 1

¹⁶ Clause 90.2

¹⁷ Clause 90.4

¹⁸ Clause 90.6

¹⁹ Clause 90.7

in accordance with the terms of this Agreement (whether or not the Infraco Works are completed under a separate contract) and all other costs and expenses properly incurred by tie, less such sums as would have been due to the Infraco if the Infraco had completed the Infraco Works up to and including the Service Commencement Date..."²⁰

9.15 Where other or further instances of Infraco Default arise, tie is entitled to issue further RTNs. Any rectification plans produced by Infraco in response will be considered by tie in accordance with its obligations under Clause 90.

10 **Infraco Conduct**

10.1 By letter dated 30 September 2010 tie intimated an RTN with the headnote: "Infraco Default (A): Breaches Evincing Course of Conduct". Schedule A contains a (non exhaustive) list of the contractual provisions which tie asserts have been breached by Infraco (extending to 100 instances). In relation to these breaches the RTN asserts:

- (a) "[paragraph 1.3] Individually and cumulatively, these breaches materially and adversely affect the carrying out and completion of the Infraco Works"; and
- (b) "[paragraph 2.1] The Infraco has demonstrated, and continues to demonstrate, an ongoing course of conduct which constitutes multiple repeated and unremedied breaches of Infraco's obligations under the Infraco Contract, to the level that this course of conduct is materially and adversely affecting the carrying out and completion of the Infraco Works".

10.2 Infraco responded to the abovementioned RTN by letter dated 10 November 2010. The response highlights the point that the Parties are divided on virtually every issue.

10.3 What is common ground, as stated at the outset of this statement, is that mutual confidence and trust is vanishingly small. Just the day before tie's abovementioned letter dated 30

²⁰ There is a broadly equivalent provision in relation to the additional costs of the Maintenance Services in terms of Clause 90.14.2

September 2010 Infraco intimated it was ceasing work (as commented upon in section 6 above) which it asserted was being carried out on a goodwill basis.

10.4 Central to tie's concerns in relation to Infraco's conduct is Infraco's behaviour and continuing failure to progress the Infraco Works. Sections of Infraco Works unaffected by any contractual or other issues could, but have not been advanced. As has been indicated in section 5 above even where Parties are in dispute over the existence of Notified Departures no risk attaches to progressing the Infraco Works in question in the event that Infraco establishes that a Notified Departure existed – the Infraco Contract provides full protection in respect of time and money. However, by failing to progress the work the project falls into ever increasing delay and disrepute. To move forward with Project Phoenix will require a fundamental reappraisal of behaviours by the Parties.

10.5 Alongside, and intrinsically linked to, the core issues of progress is the failure by Infraco to accept accountability for managing the completion of an integrated, assured and approved design.

11 **Reputational Damage**

11.1 Recital F of the Infraco Contract states:

"..This Project Vision involves the development of a tramway which will stand favourable comparison with the best in Europe...It is intended that this goal be achieved in a spirit of partnership, utilising modern design and construction methods and standards."

11.2 Clause 6 of the Infraco Contract has the title "Project Partnering" and the opening sub clauses state:

"6.1 The Parties agree to work in mutual co-operation to fulfil their agreed roles and responsibilities and apply their expertise to carry out and complete the Infraco Works in accordance with this Agreement.

6.2 tie and Infraco shall procure that each tie Party and each Infraco Party (as appropriate) shall work in accordance with the principles set out in Clause 6.1."

11.3 With work effectively having ground to a halt showing "abandoned" construction sites whilst retaining disruptive traffic and pedestrian diversions to key business areas, with visible defects on Princes Street, with constant media coverage highlighting massive cost growth, ongoing disruption with no end date in sight and a war of attrition in terms of dispute it would be difficult to find any support for the proposition that the Project Vision is being fulfilled or that the obligations in Clause 6.1 are being met.

11.4 The above issues and concerns have resulted in the very unusual step of the Auditor General for Scotland and the Accounts Commission producing an interim report (hereinbefore referred to) on the Project and presenting that to the Scottish Parliament's Public Audit Committee, with appearances for CEC and tie before the committee as recently as 23 February 2011.

11.5 Reputational fall out is certainly affecting all involved, and the City of Edinburgh and Scotland now look to the Parties to find a solution.

12 Project Carlisle

12.1 A meeting took place in Carlisle on 21 April 2010 at which it was agreed that the Parties would investigate a way forward on the basis of the Terminal Point at or about the East end of Princes Street (expected to be St Andrews Square) with a guaranteed maximum price with a new completion date. This initiative was taken forward by way of meetings between the Parties agreed representatives and by way of correspondence details of which are shown in the table below:

12.2

Offers	Date	GMP	Programme	Scope	Reference
BSC	29/7/10	£443.3m &	19/11/12	Airport to	25.1.201/EKI/6338

		Euro 5.8m		Princes Street east plus Newhaven Enabling Works	
tie	24/08/10	£267.3m	06/06/12	Airport to St Andrew Square plus Enabling Works at Newhaven	INF CORR 5858 Part A – excludes SDS/PSSA costs
BSC	11/09/10	£405.5M 7 Euro 5.8m	18/12/12	Airport to Haymarket plus Newhaven Enabling Works	25.1.201/EKI/6682
tie	24/09/10	£282.3m	06/06/12	Airport to St Andrew Square plus enabling Works at Newhaven	INF CORR 6275 (Appendix 11, p.10) + £8m for contamination

12.3 The key Project Carlisle correspondence is contained in tie Exhibit 30.

13 **Project Phoenix**

Project Phoenix is predicated on the achievement of an operational tramway from the Airport to St Andrew Square at a guaranteed maximum price for the scope of works required (the "GMP Scope of Works") as described in the Project Phoenix Statement (tie Exhibit 31). The essential requirements of the GMP Scope of Works and the objectives and guiding principles of the agreement to be entered into between the Parties to achieve Project Phoenix are set out in the Project Phoenix Statement and are not rehearsed here.

14 **Project Separation**

In the event that Project Phoenix cannot be achieved Parties have agreed to explore whether Project Separation can be agreed.

15 Mediation Aim

15.1 This mediation provides an opportunity for the Parties to reflect self-critically upon the current state of the project, to acknowledge failures of performance and conduct, and to draw a line under this history by settling their differences. To proceed with Project Phoenix, Infracore will need to demonstrate a different approach combined with a willingness to accept responsibility for delivering the section between Airport and St Andrew Square within an acceptable guaranteed maximum price ("GMP") and timescale. tie and CEC are committed to taking the appropriate steps to share, and fulfil their responsibilities, in meeting this objective.

15.2 This is an unusual mediation in that it is essentially a facilitated negotiation of a revision to an existing contract. The issues to be addressed are not only complex, technically, factually and financially, but they are also extremely sensitive given the public interest. During the period set aside for the mediation commencing upon 8th March tie and CEC wish to achieve the following outcomes:

- agreed figure in principle in full and final settlement of all claims from or on behalf of Infracore;
- agreed GMP, completion date and Heads of Terms for Airport to Haymarket, to enable the earliest recommencement of the works;
- agreed process, with timetabled deliverables, to ensure an agreed GMP and completion date for Haymarket to St Andrew Square, by 2nd September 2011; and
- agreed and signed agreement to reflect the above by 2nd September 2011.

Privileged and confidential

FOISA exempt

- 15.3 The firm resolve to complete the tram project from Airport to St Andrew Square is explicit. There is a huge amount of work necessary by all involved to ensure this objective is achieved, which will serve to restore the reputation of the project and of those involved. Parties must work together to meet this challenge.

24 February 2011

16 **Glossary of terms and definitions**

BBCUK	Bilfinger Berger Civil UK Limited
BDDI	Base Date Design Information – defined at Clause 2.3 of Schedule Part 4 (Pricing) of the Infraco Contract
CAF	Construcciones Y Auxiliar de Ferrocarriles S.A.
CEC	City of Edinburgh Council
DRP	The Dispute Resolution Procedure provided for by the Infraco Contract
Estimate	The estimate to be provided by Infraco pursuant to Clause 80 (tie Change) of the Infraco Contract
IFC	Issued for Construction – this is not a contractually defined term
Infraco	An unincorporated joint venture among: <ul style="list-style-type: none"> • BBCUK; • Siemens ; and • CAF
IFC Drawings	Issued for Construction Drawings – as defined on page 259 of Schedule Part 1 (Definitions and Interpretation) of the Infraco Contract
Infraco Contract	The contract between tie and Infraco dated 14 May 2008 in relation to the Edinburgh Tram Network as amended by the PSSA and by the following minutes of variation <ul style="list-style-type: none"> • minute of variation between tie, BBCUK, Siemens and CAF dated 14

	<p>May 2008;</p> <ul style="list-style-type: none"> • minute of variation between tie, BBCUK, Siemens and CAF dated 3 June 2009; and • minute of variation between tie, BBCUK, Siemens and CAF dated 23 April 2010
INTC	Infraco Notification of tie Change – this is not a contractually defined term. It is understood to be used by Infraco to refer to the notification envisaged in line 7 of Clause 3.5 of Schedule Part 4 (pricing) of the Infraco Contract
MUDFA	Multi Utilities Diversion Framework Agreement. The MUDFA Works are works carried out by a third party (Alfred McAlpine Infrastructure Services Ltd now known as Carillion) in contract with tie.
Notified Departure	Has the meaning given in Schedule Part 4 (Pricing) of the Infraco Contract
On-street trackform	The tram track and its supporting infrastructure in areas where the rails run in a paved surface shared with other traffic
Party	a Party to the Infraco Contract, and "Parties" shall be construed accordingly
Pricing Assumption No.1	the Pricing Assumption set out in paragraph 1 of Section 3.4 of Schedule Part 4 (Pricing) of the Infraco Contract
PSSA	The Princes Street Supplemental Agreement entered into between tie and Infraco in March 2009 and re-executed in May 2009
RTN	Remediable Termination Notice issued pursuant to Clause 90 of the

	Infraco Contract in connection with Infraco Default
tie	tie Limited, a private limited company and wholly owned subsidiary of Transport Edinburgh Limited which in turn is a wholly owned subsidiary of CEC
SDS	Parsons Brinckerhoff Limited, defined in the Infraco Contract as the SDS Provider
SDS Agreement	The agreement between SDS and tie dated 19 November 2005 (Schedule Part 22 of the Infraco Contract)
SDS Novation Agreement	The agreement between Infraco and SDS dated 14 May 2008 in terms of which tie's interest in the SDS Agreement was novated to Infraco (Schedule Part 23 of the Infraco Contract)
Siemens	Siemens PLC
Utility	a Utility is defined in the Infraco Contract and "Utilities" shall be construed accordingly
UWN	Underperformance Warning Notice issued by tie to Infraco pursuant to Clause 56.7.2 of the Infraco Contract

