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**From:** Williamson, Simona [Simona.Williamson@mcgrigors.com]  
**Sent:** 27 November 2010 11:34  
**To:** rburt@acutus.co.uk  
**Cc:** Steven.Bell@tie.ltd.uk; Susan.Clark@tie.ltd.uk; Sharon.Bateman@tie.ltd.uk; Glover, Joanne; RUSH\_AJ@██████████ Nolan, Brandon  
**Subject:** Re: J086: tie - Infraco: STRICTLY PRIVATE and CONFIDENTIAL and FOISA EXEMPT

Robert - thanks for that update, which is very helpful. We will review, and then we can discuss at our meeting on Monday morning.

Kind regards

Simona

Simona Williamson  
Senior Associate  
for McGrigors LLP

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**From:** Robert Burt <rburt@acutus.co.uk>  
**To:** Williamson, Simona  
**Cc:** Steven Bell <Steven.Bell@tie.ltd.uk>; Susan Clark <Susan.Clark@tie.ltd.uk>; Sharon Bateman <Sharon.Bateman@tie.ltd.uk>; Glover, Joanne <Joanne.Glover@dlapiper.com>  
**Sent:** Sat Nov 27 10:49:21 2010  
**Subject:** J086: tie - Infraco: STRICTLY PRIVATE and CONFIDENTIAL and FOISA EXEMPT

Simona - further to yesterday's telephone discussions, I have included below a brief update on the current exercise which we can discuss in more detail on Monday morning.

Actions / progress to date

We are continuing to work through RTN's 1, 4, 6 & 8 identifying documents for uploading into the Body of Evidence. We are feeding those findings through to Sharon & Kirsty at tie. The initial research has been (and is continuing to be) performed methodically using various 'key word' searches within the Infraco Correspondence folder (database) on the tie intranet. This allows us to identify what are likely to be the main items of correspondence / evidence attaching to the various issues. A review of minutes, INTC data, audit information and the like is also being carried out. We will continue that process during the course of next week. That said, we do recognise that this key word searching will not necessarily catch all of the relevant documentation and as such will revert to a 'manual' review of the remaining documents towards the latter stages of the exercise.

We have also had, and continue to have, meetings with the relevant tie personnel who have been identified as having knowledge of or input into the selected RTN's. That has proved helpful in identifying other key documents and searches.

In addition to the above we are identifying key areas of defence which Infraco have or are likely to rely upon in rebutting those RTN's.

A final exercise of reviewing the documents previously uploaded to the BoE will also be carried out towards the end of this process.

Specific comments regarding the respective RTN's

**RTN 1:** discussions have been held with David Burns, Duncan Fraser and Jim Ritchie; a meeting has been arranged with Phil Dobbin for Monday afternoon. A follow-up meeting has been arranged with David Burns for this afternoon. Those meetings have identified a number of additional documents to be included in the Body of Evidence and other areas worthy of further review.

**RTN 4:** as noted in our email of 18 November 2010, the general consensus appears to be that this RTN presents difficulties in terms of the current wording and level of evidence required to demonstrate the material and adverse impact of same. That said, there are fundamental issues related to 'programme' which do have a material and

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adverse impact on the carrying out and completion of the Works. We have included below comments on the two 'limbs' of RTN 4 (RTN4 paragraphs ref. 2.1.1 & 2.1.2).

(i) *First limb re Infraco failures regarding 'updating' the Programme:* we believe that it is possible to demonstrate the Infraco breaches in this regard. For example, there are discrepancies between the alignment of the construction programme and design programmes which render the contents of the construction programme erroneous; the updated programmes contain no new activities; nor do they contain revised sequencing or impact of INTC's. Note: there may well be a difference between Infraco's obligation to 'update' and the requirement to 'revise' the Programme - this may be something they would refer to / rely upon in subsequent proceedings (ER's Clause 12.2 and Contract clauses 60.2 & 60.3 refer).

The difficulty with this 'limb' however is that it will be difficult to demonstrate the extent to which the absence of a properly updated programme materially and adversely impacts on the carrying out and completion of the Works. There is no doubt whatsoever in our mind that this will have an impact on both Infraco's ability to properly manage the Works and tie's ability to manage and deliver the project (including consideration and instruction of acceleration measures). Demonstration of this effect however could prove to be a subjective exercise. As such we have not progressed evidencing this limb at present (but can do so if required). Perhaps we can discuss further on Monday.

(ii) *Second limb 'failure to mitigate delays' / 'wrongly assuming DWA' means full intermediate section:* we believe that this 'limb' of the RTN contains many areas which can be evidenced both in terms of (i) Infraco breaches (obviously subject to legal analysis of same) and also (ii) the material / adverse impact of same on the carrying out and completion of the Works. We have identified a number of key areas through sections 2, 5, 6 & 7 which can be used to demonstrate material impact on the carrying out and completion of the Works. This will also likely feed into a failure on Infraco's part "... to progress the Infraco Works with due expedition and in a timely and efficient manner without delay ..." (albeit Infraco may attempt to argue that certain areas could progress but 'inefficiently'). This point however may be covered by a separate (yet to be issued?) RTN. As such it would be helpful if we could discuss how the evidencing of this 'limb' should progress.

In practical terms this part of RTN4 will also be linked to the 'success' of the arguments and principles relating to RTN8 (INTC).

**RTN 6:** The main issues within this RTN appear to relate to the following:-

(i) the fact of the absence of a fully integrated and assured design (including the absence of Design Assurance Statements); and

(ii) the absence of third party approvals and other matters, which prevent tie from issuing the necessary "Permits to Commence Work" in the relevant areas.

In this regard, we have met with Duncan Fraser and Damian Sharp this week. We anticipate meeting Willie Biggins next week.

Infraco's key areas of defence appear to relate to the following:-

(i) lack of specification re alleged breach/breaches;

(ii) BSC have been working to Design Management Plan & Systems Integration Plan (and hence no breach);

(iii) designs issued to date endorsed to Level A or B

(iv) absence of DAS does not mean design not integrated and in any event not a condition precedent to issue of Permit to Commence Work.

(v) tie Changes and Infraco Proposals affecting finalisation of design.

As such, we are directing our investigations around all of the key areas, focussing in particular on both the above and also Infraco's obligations under the Contract in respect of same.

Further areas of investigation in respect of RTN 6 include tracking the CEC approvals process for the Trackform design; tracking the IFC issue process

**RTN 8:** As previously noted in our email of 18 November 2010, this is a key issue affecting progress and completion of the Works. We have met with Mike Paterson (the head of the '249' team) re the identification of relevant examples of current INTC's which will serve to evidence the various breaches set out in the RTN. We had hoped to start receiving that information as of yesterday. However unfortunately and unavoidably Mike has been unavailable (hospitalised) over the last few days. He has however arranged in his absence for Chris Bartnyneck to meet with ourselves on Monday/Tuesday to continue to progress this exercise. We are in the meantime however also reviewing the evidence surrounding the principles of this argument (in particular correspondence and DRP decisions relating to both parties' respective positions on same). The example INTC's will also feed into the matters arising under RTN4.

Infraco's key areas of defence appear to relate to the following:-

(i) 'lack of specification re alleged breach/breaches';

(ii) 'DRP decisions support Infraco position regarding INTC process' (e.g. in respect of 'automatic notification of tie Change'; validity of INTC cannot be decided until tie has received a full Estimate' was rejected in adjudication);

(iii) 'timescales taken not unreasonable' / 'tie unreasonable in not extending timescales';

(iv) 'tie refusal to acknowledge change causing delay to process';

#### Meeting on Monday

As noted above we can discuss the above in more detail on Monday morning when we meet. In particular it would be helpful to discuss (i) whether you are in agreement with the direction of the above; (ii) your preference / needs / expectations regarding how we structure any reporting back to yourselves / tie re same; and (iii) the structure of the

evidence being collated and whether explanations of key documents are required (I accept that the latter point '(iii)' is likely to be discussed further on Wednesday at the Dataroom Workshop).

Regards

Robert

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**Robert Burt, Director**

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