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**From:** Damian Sharp  
**Sent:** 26 May 2010 12:01  
**To:** Michael Paterson  
**Cc:** Frank McFadden; Mark Hamill; Colin Neil; Robert Bell  
**Subject:** RE: Clause 11 - Failure to Manage the SDS Provider - Strictly private and confidential and prepared in contemplation of Litigation. FOISA Exempt  
**Attachments:** INF CORR 150.pdf

**Strictly private and confidential and prepared in contemplation of Litigation. FOISA Exempt**

Mike

See below – textual amendment in red (strikethrough for deletions) – commentary in curly brackets and purple text and is not intended for inclusion in any correspondence with BSC

Damian

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**From:** Mark Hamill  
**Sent:** 26 May 2010 09:32  
**To:** Damian Sharp  
**Cc:** Frank McFadden; Michael Paterson  
**Subject:** FW: Clause 11 - Failure to Manage the SDS Provider - Strictly private and confidential and prepared in contemplation of Litigation. FOISA Exempt

**Strictly private and confidential and prepared in contemplation of Litigation. FOISA Exempt**

Damian,

Please see email below from DLA Piper requesting various pieces of information and evidence.

Give me a call if you have any questions,

Thanks

Mark

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**From:** Glover, Joanne [mailto:Joanne.Glover@dlapiper.com]  
**Sent:** 26 May 2010 08:43  
**To:** Susan Clark; Mark Hamill  
**Subject:** Clause 11 - Failure to Manage the SDS Provider

Susan/Mark,

Please could we get verification of the facts, some examples and some detail on the section which you flagged in the folder.

Lack of management of SDS (a separate heading) will follow separately.

Thanks,

Jo

## Clause 11 – SDS

The SDS Agreement (originally between **tie** and the SDS Provider) was novated to the Infraco at Infraco Contract close. Therefore, from the commencement of the Infraco Contract, the Infraco is "client" under that SDS Agreement and SDS Provider is the Infraco's Designer. The Infraco owes contractual duties and responsibilities to **tie** in relation to the SDS Provider, the SDS Services and the SDS Agreement. From the commencement of the Infraco Contract, the Infraco has consistently failed to comply with these obligations.

### **The Infraco has failed to procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement.**

It is clear to **tie** through a combination and accumulation of examples, dialogue with the Infraco and the SDS Provider and others, meetings, audits and correspondence that the Infraco has failed in its contractual obligation to procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. The fact is that the SDS Provider has not carried out and completed the SDS Services in accordance with the SDS Agreement [and this is common ground]. The failure on the part of the Infraco means that the Infraco, and consequently **tie**, does not have a complete [and buildable] design two years into the Infraco Contract and that what has been designed has often been late or of sub-standard quality, all of which materially and adversely affects the carrying out and completion of the Infraco Works.

{Agree with statements in square brackets on basis that this is common ground as evidenced by the very large number of Compensation Events claimed by the Infraco in relation to SDS and not buildable due to lack of fully approved design – in particular the lack of drawings that are mutually consistent across disciplines and between drawings submitted for planning and technical approval. On top of that general point there are specific elements of design where buildability has not adequately been considered.}

#### **Example: Late Delivery of Design**

In relation to the 112 IFC packages contained within v31 of the Design Delivery Programme and Rev 1 of the Programme, the SDS Provider has delivered IFCs late on 53 occasions from the date of commencement of the Infraco Contract; 37 of these late IFC packages related to Phase 1a of the Edinburgh Tram Network which Infraco is contracted to construct. ~~As a representative example of late delivery, we list the following (this is a non-exhaustive list):~~ Significantly this has included late delivery of IFCs for all roads, street lighting, drainage and landscaping packages; for tram stops throughout Section 1; and for drainage at the Depot.

~~\*\*\* [insert a few examples of late delivery of IFCs]~~

{Care is needed here – there are 7 late structures in Phase 1a but my assessment is that approvals delay or other tie/CEC delay is behind all but one of these late structures – S22B Network Rail Access Bridge which is best tackled under Network Rail below}

Following the initial release of IFC packages by the SDS Provider Infraco has notified over 250 Compensation Events in relation to late issue of IFC drawings in each case either for the re-issue of drawings that have previously been IFC or for drawings that were not included in the original IFC packages. Infraco has consistently been unable or unwilling to provide explanations of why these drawings have been reissued or added to the Design Deliverables and has not given advance warning that these drawings would be IFC. This demonstrates a lack of ongoing management of the SDS Provider.

#### **Example: Poor quality design**

SDS has [repeatedly] delivered poor quality design [and design which is not fit for purpose.] As a representative example of poor quality design, we list the following (this is a non-exhaustive list):

\*\*\* [Insert a few examples of poor quality design]

[Record of Review forms]

{This should be compiled from the examples given under Continual and Repeated Errors and being prepared separately}

### **Example: Not best value design**

The SDS Agreement provides that the SDS Provider shall assist **tie** in ensuring that best value has been secured in the performance of the Services (clause 3.3.13 of the SDS Agreement).

The Services which have been provided by the SDS Provider do not satisfy this contractual commitment. As a representative example of design [and actions on the part of the SDS Provider] which illustrate that the SDS Provider has not complied with its obligations, we list the following (this is a non-exhaustive list):

- **Roads/Trackform** - We have had much communication between us on the subject of the design solution for trackslab and its foundation (the current design for which is not acceptable to us). Without re-stating this communication in this section, it is common ground that this proposal does not represent a “best value” solution.
- [insert other examples of not best value]

{I don't have other examples of over engineering to add – these need to come from the PMs – I have been more involved in design failures}

### **Example: NR/BAA/Scottish Water**

\*\*\* [substantiate]

The SDS Agreement provides that the SDS Provider shall obtain and maintain in effect all Consents which may be required for the construction, installation, commissioning, completion and opening of the Edinburgh Tram. This includes consents from Scottish Water for connections to Scottish Water's sewer network. Infraco was slow to manage the SDS Provider in securing these Consents. The SDS Provider did not take the necessary steps to secure these consents timeously and between May 2008 and the end of July 2008 BSC did not take active involvement in resolving this issue whilst **tie** clearly fulfilled its obligations to the Infraco by raising the importance of these Consents at the highest levels within Scottish Water. The failure of Infraco to manage the SDS Provider in this matter led to substantial delays in the submission and securing of Scottish Water consents

{tie wrote to BSC in September 2008 setting out the timeline in more detail – copy attached}

{Commentary on BAA approvals activity would need to come from A Sim / A Scott / L Murphy who were closely involved}

{Network Rail third party approvals were generally sought timeously by SDS so we should not be making that a general issue – see below for some initial text on the Balgreen Road Network Rail Access Bridge where failure to secure access to the site from Network Rail for surveys held up the design. This was followed by a lengthy debate over the height of the bridge between NR and CEC – it is debatable who is het for that debate – but the initial delay was clearly SDS. The text below is an outline in the time available. Chapter and verse would take longer to chase down.}

In the case of the Balgreen Road Network Rail Access Bridge the SDS Provider did not request access to Network Rail property for surveys in good time to complete the design in line with the v31 programme. As a result surveys were not carried out until after the date on which the SDS Provider had been due to submit the design to Network Rail for approval. There was a clear failure to plan the design adequately by the SDS Provider and no evidence has been presented by the Infraco that the Infraco was managing this situation to avoid and then mitigate the delay in securing access to the site for ground investigation works.

**Example: Princes Street Design**

\*\*\* [substantiate]

{Confirmed elsewhere as not a good example to pursue in general terms. The issue that may be worth pursuing is the failure to produce an effective drainage design and the failure of BSC to identify this despite BSC being willing to start work on site.}

Joanne Glover  
Solicitor

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