



DLA PIPER SCOTLAND LLP

ADVICE NOTE

relating to

The works authorised by the *Edinburgh Tram (Line One) Act 2006*

and the *Edinburgh Tram (Line Two) Act 2006*

**PROVISIONS REGULATING CLAIMS BY TIE UNDER THE COLLATERAL WARRANTY
GRANTED IN THEIR FAVOUR BY THE SDS PROVIDER**

3 July 2009



1. INTRODUCTION

- 1.1 **tie** Limited (hereinafter referred to as "**tie**") requested DLA Piper Scotland LLP (hereinafter referred to as "**DLA**") to provide advice in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* to be carried out in terms of (1) the agreement dated 19 September 2005 (hereinafter referred to as the "**SDS Agreement**") between **tie** and Parsons Brinckerhoff Limited (hereinafter referred to as the "**SDS Provider**") for the provision of certain services (hereinafter referred to as "**Services**") by the SDS Provider; and (2) the contract dated 14 May 2008 (hereinafter referred to as the "**Infraco Contract**") between **tie** and (1) Bilfinger Berger UK Limited; (2) Siemens plc; and (3) Construcciones Y Auxiliar De Ferrocarriles S.A. (hereinafter collectively referred to as "**Infraco**") for the provision of the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* on or affecting areas of ground at or near Edinburgh Airport and all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it (hereinafter referred to as the "**Infraco Works**").
- 1.2 Specifically, DLA were asked to consider the following issue in the context of the above mentioned contractual matrix.
- 1.2.1 the provisions regulating claims by **tie** as the beneficiary under the collateral warranty granted in their favour by the SDS Provider.

2. ISSUE

2.1 THE PROVISIONS REGULATING CLAIMS BY TIE AS THE BENEFICIARY UNDER THE COLLATERAL WARRANTY GRANTED IN THEIR FAVOUR BY THE SDS PROVIDER

- 2.1.1 *Clause 11.1* of the Infraco Contract provides for the entering into of a novation agreement. A novation agreement dated 14 May 2008 (hereinafter referred to as the "**Novation Agreement**") was entered into among **tie**, Infraco and the SDS Provider.
- 2.1.2 In terms of the Novation Agreement, the Infraco adopts all the rights and liabilities of **tie** as if the Infraco had been the contracting party from the outset. The SDS Provider warrants to the Infraco that it is liable for any loss or damage suffered or incurred by the Infraco arising out of negligent act, default or breach by the SDS Provider prior to the date of the Novation Agreement (*Clause 4.2*). All rights of action against the SDS Provider under the SDS Agreement vested in **tie** shall from the date of the Novation Agreement vest in the Infraco.
- 2.1.3 It can therefore be said that the Infraco Contract and the Novation Agreement taken together constitute an arrangement whereby Infraco steps into the shoes of **tie** in all questions of the provision of the SDS Services and a default on the part of the SDS Provider, even before the date of the Infraco Contract and Novation Agreement, would be deemed a default on the part of Infraco



- 2.1.4 In the event that **tie** wish to consider direct action against the SDS Provider, the terms of the collateral warranty ("**Collateral Warranty**") granted in favour of **tie** by the SDS Provider are relevant.
- 2.1.5 In terms of the Collateral Warranty the SDS Provider warrants and undertakes to **tie** that:
 - 2.1.5.1 it has carried out and shall carry out its Services and other duties and obligations under the SDS Agreement and the Novation Agreement subject to and in accordance with the terms thereof (*Clause 2.1* of the Collateral Warranty);
 - 2.1.5.2 in the production of the Deliverables and in the performance of the Services and its other obligations under the SDS Agreement it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent system design services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity (*Clause 2.2.1* of the Collateral Warranty); and
 - 2.1.5.3 it owes a duty of care to **tie** in carrying out its duties and obligations under the SDS Agreement and the Novation Agreement (*Clause 2.2.2* of the Collateral Warranty).
- 2.1.6 In the event of a claim by **tie** under the Collateral Warranty:
 - 2.1.6.1 the liability of the SDS Provider to **tie** is to be determined in all respects in accordance with the terms of the SDS Agreement and the Novation Agreement;
 - 2.1.6.2 the SDS Provider shall be entitled to rely upon any defence, right, limitation or exclusion under the SDS Agreement or the Novation Agreement as though **tie** were named as Client under it, except that:
 - (a) **tie** shall not be affected by any subsequent variation of the SDS Agreement which would adversely affect the obligations owed by SDS Provider or the waiver, compromise or withdrawal of any claim made by the Infraco; and
 - (b) the SDS Provider shall not be entitled to exercise any right of set-off, retention or withholding against **tie** to which the SDS Provider may be entitled as against the Infraco
 - 2.1.6.3 the liability of the SDS Provider under the Collateral Warranty shall be no greater in extent than the liability of the SDS Provider under the SDS Agreement.
- 2.1.7 In terms of liability, the terms of the collateral warranty provide that the SDS Agreement shall determine the liability of the SDS Provider in all respects and that, if **tie** to choose to make a claim under the collateral warranty, the SDS Provider shall be entitled to rely upon any defence, right, limitation or exclusion in the SDS Agreement. The SDS Provider's liability under the Collateral Warranty cannot exceed its liability under the SDS Agreement.

- 2.1.8 In terms of *Clause 8.8* of the Novation Agreement, **tie** is entitled to deduct the sum of £8,928.57 from the Incentivisation Payment (amounting to £1,000,000) on each occasion that the SDS Provider does not achieve the provision of Issued for Construction Drawings by the dates identified in the Design Delivery Programme, save where **tie** and the SDS Provider otherwise agree. No other reduction from the Incentivisation Payment is permitted.
- 2.1.9 For the purposes of *Clause 8.8* of the Novation Agreement, any extension of time granted to the SDS Provider is to be ignored except where the cause is a circumstance or occurrence entitling the Infraco to an extension of time and that such occurrence is a **tie** Change.
- 2.1.10 The SDS Provider's total liability under the SDS Agreement is not to exceed £10,000,000 in respect of each and every claim other than in respect of claims arising from pollution or contamination where the limit of indemnity of £10,000,000 applies to any one claim in the aggregate but excludes any business interruption, loss of profits, loss of business, loss of business opportunity, loss of or damage to or corruption of data or loss of management time or time of other employees.
- 2.1.11 The rights and benefits of **tie** under the collateral warranty are in addition to any other remedies that **tie** may have against the SDS Provider, such as delictual claims.
- 2.1.12 The collateral warranty is intended to be used in the circumstances where either **tie** have exercised their right to step-in to the role of Client under the SDS Agreement following an Infraco termination, or to be used for claims by **tie** against the SDS Provider in respect of the utilities diversion design works. It would be unusual for **tie** to seek to act directly against the SDS Provider in respect of the infrastructure design rather than against the Infraco due to the relationship of client and sub-contractor that was established following novation of the SDS Agreement to the Infraco.
- 2.1.13 It is to be noted that in terms of the Novation Agreement there are a number of warranties and indemnities granted in favour of the Infraco by **tie** (these relate to a number of matters including pre-novation performance of the SDS Provider). Depending upon the particular facts and circumstances it may be that the Infraco could seek to rely upon these warranties and indemnities in the event of a claim by **tie**.
- 2.1.14 The key points which arise are therefore:
- 2.1.14.1 **tie** should seek to establish whether there is a breach of the design obligations contained in Infraco Contract which may or may not have been as a result of a failure by the SDS Provider. Taking action against the Infraco should relieve **tie** from having to establish fault as between the SDS Provider, and the Infraco's management of the SDS Provider as its sub-contractor;
 - 2.1.14.2 the liability levels in respect of late delivery of the specified Issued for Construction Drawings are clear;
 - 2.1.14.3 in terms of liability generally, the Infraco has a significant amount of options in the drafting of the SDS Agreement which allow it to



recover from the SDS Provider. Limits on liability of £10 million will apply in most cases;

2.1.14.4 the collateral warranty can be used to claim against the SDS Provider for deficiencies in the obligations in relation to utilities diversion design. Similar terms and limits on liability as those which apply to a claim by the Infraco under the SDS Agreement will be applicable; and

2.1.14.5 in the absence of **tie** exercising its right of step-in, it would be extremely unusual for **tie** to prosecute a contractual claim against the SDS Provider under the collateral warranty rather than advancing a claim against the Infraco as the lead contractor in light of the contractual structure.

DLA Piper Scotland LLP

3 July 2009