

Draft: 2
Date: 12 February 2010

REPORT ON TRAM INFRACO CONTRACT

TO: CITY OF EDINBURGH COUNCIL

DUNDAS & WILSON CS LLP

Saltire Court
20 Castle Terrace
Edinburgh EH1 2EN

Tel 0131 228 8000
Fax 0131 228 8888
Legal Post: LP2 Edinburgh 6

FAS: 1401
Ref: [Reference]

[D&W letterhead]

STRICTLY PRIVATE AND CONFIDENTIAL

12 February 2010

City of Edinburgh Council
City Chambers Business Centre
High Street
Edinburgh
EH1 1YU
FAO: Nick Smith, Legal Services Division

Dear Sirs

1. **Introduction and Scope**

1.1 The Legal Services Division of City of Edinburgh Council (the **Council**) has instructed us to carry out a legal review of certain limited legal aspects of the rights available to tie Limited (**tie**) under its contract dated 14 May 2008 with Bilfinger Berger (UK) Limited and Siemens PLC (together **Infraco**) (the **Infraco Contract**) a copy of which was provided to us by Nick Smith, Senior Solicitor in CD format.

1.2 The scope of our engagement, which is governed by the terms set out in this document and in our engagement letter dated 8 February 2010, a copy of which is attached as Schedule 1, was to report to the Council on:

1.2.1 the rights available to tie under the Infraco Contract to terminate the Infraco Contract and the scope of tie's liabilities to Infraco under the Infraco Contract likely to flow from such termination; and

1.2.2 the rights available to tie under the Infraco Contract to reduce the scale of the Edinburgh Tram Project and the scope of tie's liabilities to Infraco under the Infraco Contract likely to flow from such contract variation

(the **Contracted Work**);

1.2.3 for the avoidance of doubt, our report in respect of the Contracted Work is restricted to a 'desk top' review of the aspects of the Infraco Contract we have

been asked to consider and will not extend to consideration of any the facts and circumstances arising under the Infraco Contract or the application of the Infraco Contract to such facts and circumstances or the interpretation of the terms of the Infraco Contract by reference to such facts and circumstances.

- 1.3 This document, including this letter and the Schedules, is our report, as contemplated in paragraph 1.2 above (the **Report**).
- 1.4 The scope of our engagement expressly excludes any responsibility to:
 - 1.4.1 investigate, advise or report on the (i) matters outside the scope of the Contracted Work or (ii) without prejudice to the foregoing generality, the rights and liabilities of the Council or tie under arrangements in connection with the Edinburgh Tram Project beyond the Infraco Contract; the adequacy of consents and permissions; affairs of the Council or tie in relation to taxation; accounting, internal control or financial matters; the physical state or condition of any asset or its suitability for its intended purpose; physical compliance with environmental law; the valuation of any asset or liability of the Council or tie or which is otherwise to be acquired or assumed in connection with the Project; any actuarial matters; the adequacy or investment of any pension fund relating to the Council or tie or any of its employees; the adequacy or enforceability of any insurance arrangement; the commercial effect or suitability of any arrangement or agreement; the adequacy or suitability of any technology, including any computer systems;
 - 1.4.2 investigate, advise, report on, or carry out any searches of or in relation to, the Council, tie, Infraco or its sub-contractors;
 - 1.4.3 review, advise or report on those documents marked "not reviewed" in Section 2.2 of our Report as a review of these documents falls outside the scope of our engagement.
- 1.5 The identification of the matters listed in paragraph 1.4, and any mention of those matters in our Report will not extend the scope of our engagement or increase our liability.
- 1.6 We have no responsibility to review any reports of any other person. The Council is responsible for drawing our attention specifically to any matters contained in any report on which the Council wishes us to advise or which require any action to be taken by us.
- 1.7 The Council is responsible for determining whether the scope of work we have been asked to carry out is sufficient for the purposes of the Report. If we were to perform

additional work or extend the scope of the Report we might identify other matters that may be considered relevant to the Council.

- 1.8 The Report is limited to matters of the law of Scotland as in force and applied by the Scottish Courts at the date of the Report and should be construed accordingly. We have made no investigation of, and express no opinion with respect to, the laws of any other jurisdiction or in relation to any document or agreement that may be subject to or governed by the laws of any other jurisdiction.
- 1.9 The Report is subject to the qualifications and is based on the assumptions (which have not been verified except as expressly stated in the Report) set out in this letter and the body of the Report.
- 1.10 Our responsibilities in relation to the Report are governed by the law of Scotland.

2. **Reliance on the Report**

- 2.1 The Report is addressed only to the Council and is provided solely for the purpose of assisting the Council to evaluate its options in connection with the Infraco Contract. The Report may not be relied upon by any other person or for any other purpose. We have no responsibility or liability whatsoever in respect of, or arising out of, or in connection with, the contents of the Report to any person other than those to whom it is addressed. If others choose to rely in any way on the contents of the Report they do so entirely at their own risk.
- 2.2 The Report may not be used, copied, quoted, circulated or otherwise disclosed (in whole or in part) for any other purpose or to any person to whom it is not addressed (unless so required by court order or by a regulatory authority having competent jurisdiction) without our prior written consent.

3. **Qualifications**

- 3.1 We have prepared the Report solely on the basis of the Documents in our possession at the date of the Report and we have no obligation to update the Report for any information or replies or documents received by us beyond that date.
- 3.2 We have not undertaken any independent verification of any of the documents or information supplied to us. We make no representation or warranty and give no undertaking as to the accuracy, reasonableness or completeness of the information contained in any document or information supplied to us for the purpose of our preparing the Report.

- 3.3 The Report should not be regarded as a comprehensive or formal legal opinion or legal audit concerning any matter contained in it. It has been prepared solely to identify what on the basis of the Documents, we consider in our professional judgment to be the major legal issues relating to the Contracted Work and contains only a summarised review of the relevant aspects of the Documents. For full information, the Report should be read in conjunction with the Documents.
- 3.4 We have not reviewed the documents marked "not reviewed" in Section 2.2 of our Report, as described above. Accordingly the Report is subject to whatever information is contained in, or arises out of, those documents.
- 3.5 Certain specific qualifications are relevant in relation to particular areas of the work carried out by us. These are set out in the body of our Report, and qualify it accordingly.
4. **Assumptions**
- 4.1 In the Report we have assumed, (save where it has been specifically disclosed to the contrary to us in the Documents, as reflected in the main body of the Report) that:
- 4.1.1 all of the information (including the Documents) supplied to us was, when given, and remains, true, complete, and accurate and not misleading;
- 4.1.2 where only a copy of any document has been provided to us, the original was properly executed and stamped (where relevant), is still in existence and is under the control of the Council and/or tie;
- 4.1.3 the Documents are originals or true, complete and accurate copies of the originals;
- 4.1.4 each of the parties to the Documents had all necessary capacity, power and authority to enter into and be bound by the terms of such documents;
- 4.1.5 all contractual documents have been duly authorised, executed and delivered by the relevant parties and constitute legally enforceable rights and obligations of the parties under the laws of Scotland or such other laws as are expressed in such documents to apply, but such rights and obligations will not necessarily be enforceable or enforced by the courts in accordance with their terms;
- 4.1.6 there has been disclosed to us in writing in the Documents, all agreements, rights and obligations, and all variations of agreements, rights or obligations which are relevant to the Contracted Work;

- 4.1.7 tie and the Council have now, and have had at all relevant times, all necessary licences, permits, authorisations and consents to enable them to carry out the Project;
- 4.1.8 all directors and officers of tie have been validly appointed and have acted within their respective powers;
- 4.1.9 there has been no default or breach or threatened breach by any party of any provisions of any agreement to which the Council/tie is party, other than those that have been disclosed to us in writing;
- 4.1.10 there is no material litigation (including any winding up petition, appointment of any liquidator, receiver, administrative receiver or any similar or analogous event in any jurisdiction), actual, threatened or pending by or against tie or Infracore, nor any resolution to wind up tie or Infracore.

Please contact us should you wish to discuss any aspect of the Report.

Yours faithfully

Amanda Methven

For and on behalf of DUNDAS & WILSON CS LLP

12 February 2010

INDEX

CLAUSE		PAGE
1.	Executive Summary	1
2.	Overview and Contract Structure Chart	4
3.	Termination Rights	9
4.	Variation Rights	20
Schedule		
Schedule 1	Engagement Letter	23
Schedule 2	The Documents	28

1. **EXECUTIVE SUMMARY**

1.1 Please note that this executive summary is only a brief and selective summary of certain key points dealt with in the Report, and it should therefore be read in conjunction with the entire Report for a proper appreciation of the position.

(1) We were instructed to report on the options available to tie under the Infraco Contract to 'exit' the Infraco Contract.

We have summarised in Section 3 of this Report the grounds under the Infraco Contract which afford the parties rights to terminate the contract.

It is clear from Section 3 that, in the absence of grounds constituting Infraco Default (ignoring in this context any rights to remedy such default that may apply to such Infraco Default), there is no right on the part of tie to terminate the Infraco Contract at the present time. The right of tie to terminate the Infraco Contract at will under Clause 89 of the contract ("Voluntary Termination") is not exercisable by tie until the period falling 3 years after the Service Commencement Date (ie 3 years post completion, testing and commissioning of the Infraco Works).

In financial terms there is no distinction between Voluntary Termination under the contract and tie Default. Whilst tie may seek therefore, to bring about circumstances (such as non payment) which constitute a tie Default, Infraco is not bound to exercise its right to terminate the Infraco Contract. Infraco may seek to exercise alternative remedies such as claiming Compensation Events under the Infraco Contract and/or enforcing guarantees. If tie is intent upon exiting the Infraco Contract at the present time, in the absence of Infraco Default, then a negotiated termination with Infraco may provide a better route than wrongful termination and associated liabilities for damages as wrongful termination is not be a straightforward means of exiting from the Infraco Contract.

Section 3.3 of the Report details the amounts to be paid to Infraco following termination for tie Default or tie Voluntary Termination of the Infraco Contract. In summary, tie is required to pay Infraco for the value of works and services performed and goods and materials delivered plus demobilisation costs and expenses arising from the termination of its subcontracts together with an element of loss of profit on such costs and expenses at the rate of 10% for civils and 17% for track and systems.

From a review of some of Infraco's key subcontracts (namely the SDS Agreement, Tram Supply Agreement and Tram Maintenance Agreement), such contracts are terminable on termination of the Infraco Contract subject to payment for works and

services performed, demobilisation costs and other costs arising from termination as detailed in Section 3 (but not future profit).

Please also note that termination of the Infraco Contract is without prejudice to the accrued rights and liabilities of the parties under the contract at termination. It is outside the scope of this Report to consider such accrued rights and liabilities.

If Infraco is willing to consider a negotiated termination, Infraco may seek augmentation of payments on termination for tie Default or Voluntary Termination to compensate Infraco and its subcontractors for loss of profit arising as a consequence of voluntary termination occurring prior to the permitted time for Voluntary Termination under the contract.

Any termination of the Infraco Contract, howsoever arising, would also need to be viewed against the backdrop of a range of considerations which are outside the scope of this Report, such as, by way of example,

- other contractual obligations of tie or the Council outside the Infraco Contract;
- the practicalities around termination and the steps that would need to be taken and expenses that would be required to deal with such matters (eg to make good construction sites etc) or to appoint a replacement contractor;
- implications for existing consents and permissions;
- the power, capacity and authority of tie and the Council to take such action and regulatory and administrative considerations surrounding the same; and
- political and economic considerations given the profile of the Project.

(2) We were also instructed to report on tie's ability to 'downscale' the Project under the Infraco Contract.

We have summarised in Section 4 of this Report, the rights available to tie under the Infraco Contract to instruct a contract variation to reduce the scale of the Project.

In summary, we consider that the tie Change provisions under Clause 80 of the Infraco Contract (and indeed the equivalent provisions under the SDS Agreement, the Tram Supply Agreement and Tram Maintenance Agreement) envisage both reductions and increases in the scope of the Project and set out a process to deal with such changes. We recognise, however, that it is perhaps an over simplification to consider that a change of the magnitude of a significant reduction in the size of the Project could simply be processed through the change procedures and ultimately (in the absence of agreement) determined by a third party in the event of dispute and there is judicial

authority which suggests that omission by Change may not be competent where the purpose is to have the omitted work done by others for a lesser sum. Clause 80.12 of the Infraco Contract details Infraco's grounds for rejecting a proposed tie Change. These grounds are a series of largely generic tests rather than a specific restriction preventing reduction of the proposed route. Technical or financial advice may be required as to the application of such tests in the context of the specific circumstances of tie Change

The scope of liabilities arising from a tie change will largely depend on the specific details of the tie Change. However, Clause 80.6 contains provisions for valuation of tie Changes. We assume technical advice would be required as to the appropriate pricing mechanism in light of the specific change. Infraco is also obliged under Clause 80.7 to demonstrate mitigation of costs. Aside from the direct costs of implementing the tie Change, the impact on the Programme will also have cost implications. Depending on the length of time it may take to progress and agree a tie Change of significant nature and magnitude, tie may need to consider exercising its rights to suspend all or part of the works currently underway. Any such suspension would be at the cost of tie and would require to be factored into the overall costs of the Change.

If the ultimate aim of reducing the scope of the Project is to reduce costs and gain a greater degree of cost certainty in relation to the remainder of the contract then this cannot be guaranteed absolutely given that there are many entitlements of Infraco to recover its additional costs and expenses under the Infraco Contract (for example, see the list of Compensation Events, pricing assumptions and Notified Departures).

2. OVERVIEW AND CONTRACT STRUCTURE CHART

2.1 Overview of the Project

2.1.1 Please note that unless otherwise defined in this Report, capitalised words and expressions in this Report shall bear the meaning ascribed to them in the Infraco Contract.

2.1.2 Based on our review of the Infraco Contract, our understanding of the Project is as follows:

- (a) Powers in respect of the design, construction, commissioning and operation of the Edinburgh Tram Network were conferred on the Council by the Edinburgh Tram (Line 1) Act 2006 and the Edinburgh Tram (Line 2) Act 2006;
- (b) Following competitive procurement processes, the Council's wholly owned limited company, tie, entered into agreements with:
 - (i) The SDS Provider (Parsons Brinkerhoff Limited) to provide system design services under the SDS Agreement dated 19 September 2005;
 - (ii) The Tram Supplier (Construcciones y Auxiliar de Ferrocarriles SA (CAF)) to supply trams under the Tram Supply Agreement dated 13 May 2008;
 - (iii) The Tram Maintainer (Construcciones y Auxiliar de Ferrocarriles SA (CAF)) to provide tram maintenance services under the Tram Maintenance Agreement dated 13 May 2008; and
 - (iv) Infraco (Bilfinger Berger (UK) Limited and Siemens plc) to provide design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network (including novation of the SDS Agreement, the Tram Supply Agreement and the Tram Maintenance Agreement);

Formatted: Outline numbered +
Level: 5 + Numbering Style: i, ii, iii, ...
+ Start at: 1 + Alignment: Left +
Aligned at: 4 cm + Tab after: 5.25 cm
+ Indent at: 5.25 cm

¹ Please note that the SDS Agreement, Tram Supply Agreement and Tram Maintenance Agreement were amended on novation to Infraco on or around 14 May 2008.

- (v) [a Tram Inspector Agreement with the Tram Inspector [•] and Infraco dated [on or about 13 May 2008:]]

(together the **Infraco Contract Documents**).

- (c) Following competitive procurement processes tie entered into agreements with:

(i) The Operator (Transdev Edinburgh Tram Limited) to provide development assistance and operation of the Edinburgh Tram Network under the DPFOA dated 19 and 20 December 2007 (although we understand this document has subsequently terminated); and

(ii) The MUDFA Contractor (Alfred McAlpine Infrastructure Services Limited) to carry out utility works under the MUDFA dated 4 October 2006.

- (d) In connection with the Project:

(i) tie and the Council have entered into the Network Rail Agreement dated 17 and 21 June 2005 and an Asset Protection Agreement with Network Rail dated 13 and 14 March 2008 and Bridge Agreement between the Council and Network Rail dated [•]² and agreements with third parties under the Third Party Agreements;

(ii) the Council has entered into a Grant Agreement with Transport Scotland³;

(iii) the Council has entered into a guarantee in favour of Infraco of performance of tie's financial obligations under the Infraco Contract⁴; and

(iv) the Council and tie have entered into various novations and Collateral Warranties in connection with the novations of the SDS Agreement, Tram Supply Agreement and Tram Maintenance Agreement to Infraco.

Formatted: Outline numbered + Level: 5 + Numbering Style: i, ii, iii, ... + Start at: 1 + Alignment: Left + Aligned at: 4 cm + Tab after: 5.25 cm + Indent at: 5.25 cm

Formatted: Outline numbered + Level: 5 + Numbering Style: i, ii, iii, ... + Start at: 1 + Alignment: Left + Aligned at: 4 cm + Tab after: 5.25 cm + Indent at: 5.25 cm

2.1.3 We have set out in paragraph 2.2 below, a structure chart representing our understanding of the contractual background/context to the Infraco Contract and

² Not seen signed contract – may not have been entered into as at the date of this Report.

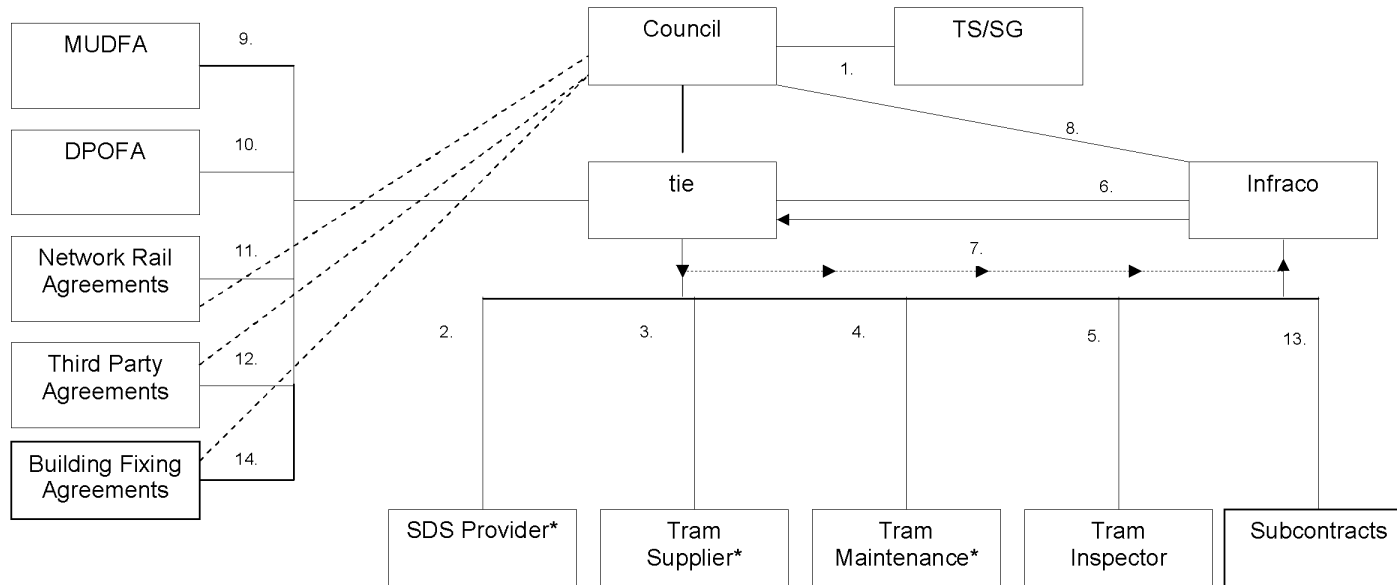
³ Not seen signed version – only draft.

⁴ Not seen as part of review.

its position in relation to the Project as a whole. Our Report does not, however, attempt to address tie's rights and liabilities in relation to termination and/or variations under the contracts other than under the Infraco Contract Documents in the context of a termination or variation under the Infraco Contract. Please note that we are happy to extend the scope of this Report to do so if this would be of assistance to the Council.

- 2.1.4 Please also note that the Contract Structure Chart and this Report focuses on the key contract documents and does not at this stage 'drill down' to the level of ancillary contract documentation such as direct agreements, collateral warranties, parent company guarantees, performance bonds etc provided by Infraco's subcontractors or the rights arising in relation to IPR rights on termination/variation. This is a matter that can be developed to be covered by the Report if the Council so wish.

2.2 Tram Contracts Structure Chart



* Contract novated to Infraco.

- 1 Grant Agreement [not reviewed]
- 2 SDS Agreement - SDS Provider (Parsons Brinkerhoff) and tie
- 3 Tram Supply Agreement
- 4 Tram Maintenance Agreement
- 5 Tram Inspector Agreement
- 6 Infraco Contract
- 7 Infraco Bonds/PCGs [not reviewed]
- 8 Council Guarantee [not reviewed]
- 9 MUDFA between tie and MUDFA Contractor (Alfred McAlpine Infrastructure Services Limited) [not reviewed]
- 10 DPOFA between tie and Operator (Transdev Edinburgh Tram Limited) [not reviewed]
- 11 Network Rail Agreement between tie, CEC and Network Rail and Asset Protection Agreement [not reviewed]
- 12 Third Party Agreements [not reviewed]
- 13 Infraco Sub-contracts [not reviewed]
- 14 Building Fixing Agreement between CEC, tie, Infraco and third parties [not reviewed]

Formatted: Indent: Left: 0.63 cm,
Numbered + Level: 1 + Numbering
Style: 1, 2, 3, ... + Start at: 1 +
Alignment: Left + Aligned at: 0.63 cm
+ Tab after: 1.9 cm + Indent at: 1.9
cm

3. TERMINATION RIGHTS

3.1 Overview of Infraco Contract Termination Provisions

The Infraco Contract contains extensive provisions governing termination of contract. It also contains exclusive remedies provisions (Clauses 77.10, 77.11) which provide that the Infraco Contract can only be terminated on the grounds expressly set out therein and that neither party is entitled to terminate, rescind or accept repudiation under any other right whether arising under common law, or statute or otherwise (other than for fraud or fraudulent misrepresentation). Clause 88.4 also provides that Infraco is not entitled to terminate or accept repudiation except as expressly provided in Clause 88 (*Termination for Suspension for tie Default*) or Clause 91 (*Termination by Reason of Force Majeure*). This Report therefore addresses the express termination rights available to the parties under the Infraco Contract and does not consider rights that may have otherwise arisen outside the Infraco Contract in the absence of the exclusive remedies provisions.

The Infraco Contract contains provisions for termination on the following grounds:

- Natural Expiry
- tie Default
- Voluntary Termination by tie
- Infraco Default
- Force Majeure
- Corrupt Gifts and Fraud
- Persistent Breach

The following paragraphs set out the details of each of the foregoing grounds in more detail. For ease of reference we have grouped the termination grounds into "non fault based" and "fault based" categories.

3.2 Non Fault Based Termination Grounds:

3.2.1 Natural Expiry (*Clause 2 (Term of the Agreement)*)

The Infraco Contract commenced on 14 May 2008 and expires 10 years after the issue by tie of the Certificate of Service Commencement in respect of completion of Section D of the Infraco Works (following sectional completion of Sections A, B, C and D). tie is also entitled to extend the term of the Infraco

Contract for 5 years by serving notice to this effect 6 months prior to the Expiry Date. There is also provision for the parties to agree to further extensions to the contract term subject to a maximum total duration of 30 years.

The Infraco Contract will not therefore expire naturally until 10 years following completion, testing and commissioning of Section D of the Infraco Works.

3.2.2 Voluntary Termination by tie (*Clause 89 (Voluntary Termination by tie)*)

tie has the right under Clause 89 to terminate the Infraco Contract on 6 months prior notice at any time, but this right only applies from 3 years after the first Certificate of Service Commencement and is not therefore an option currently available to tie for exercise at the present time.

tie's liabilities for early termination under Clause 89 are calculated on the same basis as for tie default [see para 3.4.1 below].

3.2.3 Force Majeure (*Clause 91 (Termination by Reason of Force Majeure event)*)

The grounds for Force Majeure termination are extremely limited, (war and armed conflict, nuclear, chemical or biological contamination, pressure waves from devices travelling at supersonic speeds and exceptionally adverse weather conditions affecting shipment or transportation of Trams) and do not therefore seem applicable at the present time. Were they to apply, either party may terminate the Infraco Contract where the relevant ground, or its consequences, are continuing 12 months from the commencement of the relevant Force Majeure Event.

tie's termination liabilities for termination under clause 91 are calculated on the same basis as for tie default [see para 3.4.1 below].

3.3 Default Based Termination Grounds:

3.3.1 Termination on Infraco Default (Clause 90)

Infraco Default means one of the following events: -

- (a) a breach by Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco works;
- (b) the occurrence of an Insolvency Event in relation to the Infraco or either of the Infraco Members;

- (c) the Infraco fails to commence the Infraco Works within 90 days of the Commencement Date or permanently abandons the Infraco Works (or a material part of them) at any time;
- (d) the Service Commencement Date or a Sectional Completion Date (as appropriate) in respect of a Section is not achieved or is programmed to not be achieved (as set out in the Programme) on or before the date falling 12 months after the Planned Service Commencement Date or Planned Sectional Completion Date (as appropriate) except as a result of a Compensation Event, Relief Event, Force Majeure Event, tie Change, Accommodation Works Change, a Change in Law (where compliance with such Change in Law is the sole reason for the Infraco failure to achieve the relevant date) and any legitimate suspension of the Infraco Works by the Infraco pursuant to Clause 87 (Suspension of Work);
- (e) the Infraco does not confirm its agreement in writing to a Liquidated Damages Cap Increment in accordance with Clause 62.10;
- (f) a breach by Infraco of its obligations to take out and maintain the Required Insurances which is not remedied by Infraco within 10 days of written notice from tie to the Infraco specifying the relevant breach and requiring it to be remedied;
- (g) the issue of four or more Underperformance Warning Notices in any 12 month period ;
- (h) NOT USED
- (i) the Infraco has reported a change in the legal status of the Infraco or a Change in Control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works; or
- (j) the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from tie's Representative a written notice to proceed.

The application of the above grounds to the specific facts and circumstances arising on the Project is outside the scope of this Report.

As an aside, on initial review it appeared that ground (g) in certain circumstances may perhaps provide an easier route to termination than ground (a) in the context of breach of contract by Infraco as explained below.

Under Clause 90.1.1 an Infraco Default arising on grounds (c), (d) (e), (g) and (i) gives tie the right to terminate the Infraco Agreement on giving 7 Business Days Notice in writing to Infraco (without right on the part of Infraco to remedy).

Under Clause 90.1.2 on an Infraco Default on grounds (a), (f), (g) (in the case of (g), to the extent the Underperformance Warning Notices have been issued pursuant to Clause 56.7.2) and (j), tie can serve a Remediable Termination Notice. Infraco can submit a comprehensive rectification plan setting out how it intends to remedy the relevant Infraco Default. tie may determine (in its absolute discretion) within 10 Business Days of its receipt of the rectification plan whether the plan is acceptable.

If tie accepts the rectification plan then the Remediable Termination Notice is no longer effective and no further Remediable Termination Notice can be served by tie in respect of the relevant Infraco Default provided Infraco complies in full with the rectification plan accepted by tie. Any failure to comply with the terms of the rectification plan entitles tie to terminate the Infraco Contract on 5 Business Days written notice with no obligation on tie to consider any further rectification plan.

If tie does not accept the rectification plan or Infraco does not submit a rectification plan within the 30 Business Day Period, tie may terminate the Infraco Contract on giving 5 Business Days notice in writing.

It is clear that Clause 90.1 draws a distinction between the grounds of Infraco Default which give rise to an entitlement to tie to automatically terminate (Clause 90.1.1) and grounds which allow Infraco to remedy the default (Clause 90.1.2).

Clause 90.1.2 provides that ground (a) of Infraco Default which is breach materially affecting the Infraco Works, and ground (g) of Infraco Default which relates to the issue of four Under Performance Notices in any twelve month period under clause 56.7.2, allow Infraco an opportunity to remedy through the provision of a rectification plan with Clause 56.7.2 applying only during the operational phase. However, Clause 90.1.1 allows tie to terminate automatically in the event that four Underperformance Warning Notices in any twelve month period have been issued (subject to the proviso of no more than one notice in any twenty eight day period).

Clearly Clauses 57.6 and 90.1, when read together, provide for different remedies for Underperformance Warning Notices whether issued under Clause 56.7.1 or 56.7.2 respectively and, as a matter of logic, if clause 90.1.2 applies to

Underperformance Warning Notices under Clause 56.7.2 then Clause 90.1.1 should apply to any other Underperformance Warning Notices. However, there is an apparent inconsistency between the provisions of Clauses 56.7 and 90.1 on one hand and the definition of Underperformance Warning Notice in Schedule Part 1 on the other, as the definition applies only to notices given pursuant to Clause 56.7.2 (each of which may be also remediable).

Whilst there is a presumption that the main body of the Infraco contract will take precedence over the other parts (and so by implication take precedence over Schedule Part 1) there is nonetheless a tension between the provisions.

Where such a tension exists a tribunal tasked with considering the tension would ordinarily have regard to the usual rules of contractual interpretation. The application of these rules may be complicated by the "entire agreement" provision at Clause 106. Against the background of what are clearly conflicting provisions, we consider there to be a stateable argument that Clause 90.1.1 could be invoked if four Underperformance Warning Notices were issued under Clause 56.7.1 but we are not in a position to advise as to the prospects of successfully pursuing the argument. The issue may be of sufficient magnitude as to justify obtaining the opinion of senior counsel.

Finally, it should also be noted that irrespective of whether an Underperformance Warning Notice is issued pursuant to Clause 56.7.1 and 56.7.2 Infraco can trigger its cancellation by terminating the Infraco party responsible for the issue of the notice.

3.3.2 Termination for Corrupt Gifts and Fraud (Clause 92)

If a Prohibited Act (in summary, offering or giving an inducement or a reward to tie, Scottish Executive, Transport Scotland, the Scottish Ministers, CEC or any tie Party relating to the obtaining or performance of the Infraco Contract, paying commission or agreeing to pay commission in connection with the award of the Infraco Contract, committing any offence under the Prevention of Corruption Acts 1889 – 1916 or Section 68(2) of the Local Government Scotland Act 1973, offences in respect of fraudulent acts, common law fraudulent acts in relation to the Infraco Contract or any of the relevant agreements with tie or defrauding or attempting to defraud or conspiring to defraud tie etc) is committed by Infraco or an employee of Infraco not acting independently of Infraco or by anyone acting on behalf of Infraco (excluding Infraco employees) and not acting independently of Infraco then tie may terminate the Infraco Contract. Similarly, where the Prohibited Act is committed by an employee of Infraco or an Infraco Party acting

independently of Infraco then tie is entitled to give notice to terminate the Infraco Contract and the Infraco Contract will terminate unless within 30 days Infraco terminates the employee's employment or Infraco terminates an Infraco party's employment and procures performance of the relevant part of the Infraco Works by another person.

3.3.3 Termination for Persistent Breach

Clause 93 sets out tie's right to terminate the Infraco Contract for persistent breach, but the right only applies after the first Sectional Completion Date when Infraco is providing Maintenance Services. The process for termination on grounds of persistent breach is lengthy (around 18 months) and even then will not always automatically result in the termination of the Infraco Contract. Furthermore, Infraco can avoid termination by replacing the subcontractor responsible for the circumstances giving rise to the Persistent Breach Notice or Final Persistent Breach Notice as the case may be.

To qualify, the same breach has to have occurred three or more times (other than a breach for which tie has an express remedy) in a twelve month rolling period to entitle tie to service a Persistent Breach Notice. If following such notice the breach specified continues or occurs twice more 30 days after the date of service of the notice and before the anniversary of the date of service of the notice, then tie can serve a Final Persistent Breach Notice stating that, if not remedied within 15 days, or, if remedied, the breach occurs twice more within 180 days after the date of service of the Final Persistent Breach Notice, tie may terminate the Infraco Contract with immediate effect.

It seems unlikely that a route to termination exists under Clause 93 given the stage of the Infraco Works and length of time that it could potentially take to trigger termination particularly as Infraco can ultimately side step all Persistent Breach Notices and Final Persistent Breach Notices issued under Clause 93 by terminating or procuring termination of the party whose acts or omissions gave rise to service of the relevant notice(s) where Infraco replaces a subcontractor. However, this protection is only available to Infraco on 3 occasions of Infraco replacing a subcontractor.

tie's termination liabilities for termination for Infraco Default (whether under Clauses 90, 92 or 93 of the Infraco Contract) are as set out in paragraph 3.4.3 below.

3.3.4 tie Default

Grounds of tie Default are as follows:

- (a) the failure of tie for more than 30 days following the final date for payment to pay to Infraco and amount in excess of £250,000 which has been certified for payment pursuant to Clause 67.5 or 68.4 except where tie has exercised contractual rights of set-off or retention under the Infraco Agreement;
- (b) a breach by tie of any of its material obligations which substantially frustrates or renders it impossible for Infraco to perform any material part of its obligations for a continuous period of 45 Business Days;
- (c) an Insolvency Event in relation to tie;
- (d) breach by tie of Clause 98 (Assignment/Change in Status);
- (e) a Change in Law which makes completion or carrying out of a material part of the Infraco Works either impossible or illegal.

Although not technically within the definition of tie Default, there is provision under Clause 87.2 for a potential route to termination at the election of Infraco where tie has ordered Infraco to suspend the progress of the Infraco Works and such suspension lasts for a period of six months without tie granting permission for resumption of the works. Where Infraco requests such permission and tie does not grant it and the suspension affects the whole of the Infraco Works and prevents Infraco from performing a material part of its obligations for a continuous period of 45 days, Infraco can elect to treat this as tie Default.

Where a tie Default occurs, Infraco is entitled to terminate the Infraco Contract by serving notice on tie and the Infraco Contract will terminate 30 Business Days after tie receives the termination notice unless, where the tie Default is rectifiable, tie rectifies the tie Default within the said 30 Business Day period.

Infraco is also entitled subject to giving the required period of prior notice to suspend performance under Clause 88.9 until payment in full is made by tie. If tie fails to pay Infraco any amount properly due and payable under the Infraco Contract by the final date for payment under Clauses 67 or 68 (as applicable) where no effective withholding notice has been given by tie until payment in full is made by tie.

tie's liabilities for termination for tie Default are set out in paragraph 3.4.1 below.

3.4 Liabilities on Termination of the Infraco Contract

3.4.1 Termination for tie Default, (including Suspension for tie Default, Voluntary Termination by tie and Force Majeure) (Clause 88).

Clause 88.6 provides that no compensation is payable to Infraco for termination of the Infraco Contract but without prejudice to payments due under Clause 88.8.

Clause 88.8 provides for tie to make payment to Infraco within 30 Business Days of receipt of a VAT invoice of the value of all work carried out prior to the date of termination (save to the extent already covered by payments on account made to Infraco) plus: -

- amounts in respect of preliminary items carried out or performed and a proper proportion of any such item partially carried out or performed;
- the cost of goods or materials reasonably ordered for the Infraco Works delivered to Infraco or of which Infraco is obliged to accept delivery of such materials or goods becoming the property of tie on payment to Infraco);
- the reasonable cost of removing all Infraco's Equipment from the Site (ie sites affected by the Infraco Works);
- all other expenses properly, demonstrably and reasonably incurred by the Infraco arising from termination of the Infraco Contract including amounts due to its subcontractors to terminate subcontracts relating to the Infraco Contract provided they have been entered into on reasonable commercial terms. [Please also refer to paragraph 3.4.2 below which details liabilities arising under the novated key subcontracts]; and
- where termination occurs prior to the Service Commencement Date, loss of profit fixed at 10% for civils and 17% for track and systems calculated with reference to demobilisation costs;
- where termination occurs after the Service Commencement Date, a payment equal to the payment to Infraco for one Reporting Period (ie 4 week period) in respect of full performance of the Infrastructure Maintenance Services as calculated in accordance with Part A of Schedule Part 6.

The foregoing amounts are subject to Infraco using all reasonable endeavours to minimise and mitigate costs or to the extent such costs arise out of Infraco's breach of the Infraco Contract or any negligent act or omission by Infraco intended to disrupt, frustrate or delay the procedures applying on termination as described in Clauses 95 and 96.

Interest on late payment applies under Clause 67 with rights to suspend for non-payment under Clauses 88.9.

3.4.2 Infraco's Liabilities to its subcontracts

It is assumed Infraco have entered into a range of subcontracts including (through novation from tie) the SDS Agreement, the Tram Supply Agreement and the Tram Maintenance Agreement and subcontracts with subcontractors from the range of Approved Subcontractors detailed in Schedule Part 38 of the Infraco Contract. We have not seen any such subcontracts other than the novated agreements so review of the termination provisions therein is necessarily outside the scope of this Report. However, in relation to the SDS Agreement; Tram Supply Agreement and Tram Maintenance Agreement; the liabilities ensuing on termination thereof are as follows: -

SDS Agreement

- The agreement is terminable by the Client on termination of the Infraco Contract (Clause 20.1).
- No compensation is payable to the SDS Provider for termination save for payments due under Clauses 25.2 and 25.3 in respect of work in progress which has not been certified for payment and demobilisation costs reasonably and properly incurred. Such amounts are due within 30 days of termination (except in the case of demobilisation costs where termination arises for SDS Provider Default under Clause 19).

Tram Supply Agreement

- The agreement is terminable at any time by the Client on 30 days prior notice where the notice is countersigned by tie, except where the Infraco contract has been terminated without notification of step-in by tie (Clause 58.1).
- No compensation is payable to the Tram Supplier for termination other than undisputed sums due by the Client to the Tram Supplier, certified work in progress plus loss of profit fixed at 19% with reference to demobilisation costs. Such amounts once agreed or determined are due within 35 days of termination.

Tram Maintenance Agreement

- [The agreement is terminable at any time on 6 months prior notice (under clause 35.1) only 5 years after the Certificate of Service Commencement.]

- [There is an additional right of voluntary termination under Clause 35.2 allowing termination at anytime on 6 months prior notice in the period between 3 and 5 years after Certificate of Service Commencement.]
- The agreement is also terminable under Clause 35.10 where following termination of the Infraco Contract, an offer to novate the agreement has been refused by tie.
- No compensation shall be payable by the Client to the Tram Maintainer for termination without prejudice to payments due under Clause 38.3 in respect of undisputed sums due, demobilisation costs demonstrably and reasonably incurred and certified work in progress. Such amounts, once agreed or determined, are due within 35 days of termination.
- [Where terminated under Clause 35.2 there is also entitlement to loss of profit and payment of one period of Maximum Payment Performance.]

3.4.3 Termination for Infraco Default, Corrupt Gifts or Fraud and Persistent Breach

Under Clause 90.11 and Clause 92.8, no compensation is payable by Infraco to tie for termination for Infraco Default or Corrupt Gifts or Fraud (as the case may be) but without prejudice to amounts due to Infraco under Clause 90.15.

The provisions (including Clause 90.15) anticipate that the Works and Services will be completed by or on behalf of tie with the costs to do so certified by tie and where (subject to any liability caps_ such costs exceed the amount Infraco would have received had it completed the Infraco Works and performed the Services, Infraco will pay the difference to tie less amounts due by tie to Infraco for works completed but not paid or unused goods and materials under the control of tie for which Infraco has not been paid. Where a negative amount, such amount will be due by tie to Infraco.

Clause 90 generally anticipates tie taking an assignment of all Key Subcontractor Subcontracts to complete the works and perform the Services or procure that this is done on tie's behalf. The circumstances arising if tie were to terminate the Infraco Contract without completing the Infraco Works and Services would require further consideration.

Please also note that termination of the Infraco Contract is without prejudice to the accrued rights and liabilities of the parties under the contract at termination. It is outside the scope of this Report to consider such accrued rights and liabilities.

If Infraco is willing to consider a negotiated termination, Infraco may seek augmentation of payments on termination for tie Default and Voluntary Termination to compensate

Infraco and its subcontractors for loss of profit arising as a consequence of Voluntary Termination occurring prior to the permitted time for Voluntary Termination under the contract.

Any termination of the Infraco Contract, howsoever arising, would also need to be viewed against the backdrop of a range of considerations which are outside the scope of this Report, such as, by way of example,

- other contractual obligations of tie or the Council outside the Infraco Contract;
- the practicalities around termination and the steps that would need to be taken and expenses that would be required to deal with such matters (eg to make good construction sites etc) or to appoint a replacement contractor;
- implications for existing consents and provisions;
- the power, capacity and authority of tie and the Council to take such action and regulatory and administrative considerations surrounding the same; and
- political and economic considerations given the profile of the Project.

4. VARIATION RIGHTS

4.1 Part 15 of the Infraco Contract deals with Changes.

Scope of tie Changes

4.1.1 tie Changes are defined as inter alia: -

“any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80” and clearly contemplate the possibility of reducing the scope of Infraco’s input.

The Infraco Works definition extends to “works to be completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it in accordance with this Agreement and the Employer’s Requirements”.

Edinburgh Tram Network is defined as “the tramway which is to be designed, constructed and maintained in Edinburgh pursuant to this Agreement in Phase 1a together with all associated works and facilities required pursuant to this Agreement”.

Phase 1a means “Edinburgh Airport to Newhaven (inclusive), together with the Depot at Gogar and the spur at Roseburn Junction,”The reference to and definition of Phase 1a may bring into play an argument there is a ‘fixed’ aspect to the definition of ‘Edinburgh Tram Network’. There is, however, a degree of circularity in the definitions of Infraco Works and Edinburgh Tram Network (which is helpful to a degree and the wording “in Phase 1a” is also not clear in meaning). Infraco may seek to argue that a reduction in the route of the tramway is not competent through the mechanism of a tie Change under the Infraco Contract. To this extent the wording is slightly problematic and it would have been preferable for a tie Change to have been defined as a change to tie’s requirements under the Infraco Contract (eg the Employer’s Requirements).

There is judicial authority on the issue of omission of work from construction contracts. The principles to be drawn from the authorities are that tie may have a right to instruct a Change omitting some or all of the outstanding balance of the Infraco Works. However that right may be subject to the extent of the omission proposed and the omission would not be competent in circumstances where the purpose behind the omission is to pass the work to others.

On balance, therefore, we consider the wording would allow parts of the Infraco Works to be omitted subject to the above qualifications.

4.1.2 Process for tie Changes

Clause 80 sets out a clear mechanism for dealing with tie changes. The process starts with a tie Notice of Change which must set out the tie Change in sufficient detail to enable Infraco to calculate and prepare the Estimate (including inter alia relief from performance of obligations under the Infraco contract, impact on the Infraco Works and performance of the network, extension of time and Programme, Subcontract issues and a revised contract sum etc).

It is implicit therefore that the tie Notice of Change is sufficiently detailed to allow for such information to be provided in response and to provide revised costings.

On agreement of the Estimate tie may issue the tie Change Order to Infraco. Failing agreement on the Estimate it can be referred to dispute resolution for determination. For the above reasons tie would realistically be required to identify potential detailed downsizing options in advance of issuing a Notice of Change. Alternatively this aspect could perhaps be treated as tie Change in its own right with the output being agreement around the scoping of the tie Change.

4.1.3 Grounds for refusing to implement a tie Change

Infraco has the right under Clause 80.12 to refuse to implement proposed tie Change where: -

- tie does not have the legal power or capacity to require the implementation of such proposed tie change; or
- implementation to the proposed tie Change would, *inter alia*
 - be contrary to Law;
 - not be technically feasible; and
 - make the provision of the Maintenance Services by Infraco financially unfeasible.

Consideration should be given to the grounds in Clause 80.12 and this may require tie to seek technical and financial advice as to technical and financial feasibility respectively of the proposed tie Change and also on which of the

pricing/valuation mechanisms contained in Clause 80.6 (as detailed below) is suitable for valuing the tie Change.

Clause 80.6 contains mechanisms for valuation of tie Changes including by measurement and valuation at the applicable contract rates and prices in so far as applicable, or where not applicable, by rates and prices deduced therefrom in so far as practical, failing which at "fair rates and prices". We assume technical advice will be required to assess the appropriate pricing mechanism in light of the specific details of any tie Change.

Clause 80.7 obliges Infraco to demonstrate the steps it has taken to mitigate costs.

4.2 Liabilities arising on a proposed tie Change

Liabilities arising on a tie Change will largely centre around the specific details of the tie Change and the application of the valuation mechanism in Clause 80.6 and the provisions of Infraco's Subcontracts. By way of example, each of the SDS Agreement, Tram Supply Agreement and Tram Maintenance Agreement contain provisions on Client Changes which are broadly equivalent to the Infraco tie Change provisions.

Aside from the direct costs of implementing the tie Change, the impact on the Programme will likely have cost implications. Depending on the length of time it may take to progress and agree a tie Change of significant nature and magnitude, tie may need to consider exercising its rights to suspend some or all of the works currently underway. Any such suspension would be at the cost of tie and would require to be factored into the overall costs of the Change.

If the ultimate aim of reducing the scope of the Project is to reduce costs and gain a greater degree of cost certainty in relation to the remainder of the contract works then this cannot be guaranteed absolutely given that there are many entitlements of Infraco to recover its additional costs and expenses under the Infraco Contract (for example, see the list of Compensation Events, pricing assumptions and Notified Departures).

**SCHEDULE 1
ENGAGEMENT LETTER**

Our ref ARM/CIT016
Your ref

Nick Smith
Senior Solicitor, Legal Services Division
City of Edinburgh Council
City Chambers Business Centre L1
High Street
Edinburgh
EH1 1YJ

STRICTLY PRIVATE AND CONFIDENTIAL

Direct Line: [REDACTED]

8 February 2010

Dear Nick

Report on Tram Infraco Contract between Tie and Infraco

Our engagement

Thank you again for instructing us. This letter (our **Engagement Letter**) covers the following:

1. who our client is;
2. the work we shall do and the people who will do it;
3. the timescale for completion of our work;
4. our fees and costs; and
5. feedback from you on our services.

I enclose our standard conditions of business (the **Conditions of Business**) which, together with this letter, constitute the proposed Engagement Contract for the delivery of legal advice and services by us to you on the Project. Where we use the terms "**Dundas & Wilson**", "**D&W**", "**we**", "**us**" or "**our**" in this letter, these terms are defined in the **Conditions of Business**.

Please call me if you have any questions or comments on either document.

1. **Our client**
 - 1.1 City of Edinburgh Council

You have confirmed that our client is City of Edinburgh Council (the **Council**).

Statutory and professional rules require us to identify each of our clients before agreeing to act for them.

1.2 Communication

As you will appreciate, to enable us to advise you properly, we need to have complete and accurate instructions, details of your intentions and documentation at the outset and throughout the Project. You have advised that you are to be our contact at the Council and that we are to take our instructions from you and report to you.

2. The work we shall do and the people who will do it

2.1 Our team

I am your main contact with overall responsibility for the conduct and supervision of the work which we carry out (the **Engagement Partner**). My contact details are as follows:

Amanda Methven	DDI	[REDACTED]
	Mobile	[REDACTED]
	e-mail:	amanda.methven@dundas-wilson.com
	Secretary	Kirsty Hutchon ([REDACTED])

I shall be assisted by:

Mark Kirke	DDI	[REDACTED]
	Mobile	[REDACTED]
	e-mail:	mark.kirke@dundas-wilson.com
	Secretary	Audrey Brown ([REDACTED])

Sometimes, it will be necessary for other of our lawyers (including lawyers at our **Associated Firm** (as described in our Conditions of Business)) to assist to provide specialist expertise or to meet deadlines or to cover absences of the key named personnel. We shall, where we can reasonably do so, notify you in advance of changes to your main contacts or in the team carrying out the work.

2.2 Our work

The work we expect to carry out in relation to the Project (the **Contracted Work**) will consist of:

Reviewing the Infraco Contract and reporting to the Council on (1) the rights tie has under the Infraco Contract to terminate the contract and the scope of liabilities to Infraco under the Infraco Contract that will arise consequent thereon and (2) on tie's ability to downscale the Project under the Infraco Contract and the scope of consequent liabilities to Infraco that will arise under the Infraco Contract consequent thereon. As discussed, our review will take the form of a "desk top" analysis and will not for example look at the specific facts and circumstances arising to date on the Project or the quantum of liabilities.

2.3 What is not included?

Our work will not include giving any advice and we shall not be responsible for any failure to advise or comment:

- on any financial or accountancy matters arising in connection with the Project;
- on the reasonableness or commercial merits of the Project;

- in relation to any law other than Scots and English law; and
- on any matter which does not fall within the Contracted Work described above or within the agreed scope of any additional work which we agree to carry out in accordance with your instructions after the date of this letter.

2.4 Additional work

We will where you instruct us to do so, provide you with legal advice on the following matters:

- tax;
- environmental matters;
- competition law;
- pensions;
- employment law – TUPE;
- Follow up advice on the Infraco contract.

To the extent you do not expressly instruct us to act for you in any of these areas, we shall have no responsibility to so act or for liability or loss related to such matters. Our fees set out below do not include estimates or quotes for such work which will be charged at hourly rates. We will provide estimates of the likely fees and any disbursements in advance if you expressly ask us to do so.

Formatted: Indent: Left: 1.27 cm,
Hanging: 1.27 cm, Bulleted + Level: 1
+ Aligned at: 1.89 cm + Tab after:
2.52 cm + Indent at: 2.52 cm

3. Timescale for completion of our work

As discussed with you, the current plan is for us to provide our report and meet with you during the week ending 12 February.

4. Our fees and costs

As discussed there are various ways of structuring our fee for performance of the Contracted Work. We have agreed that the following is the most appropriate for the Project:

4.1 Our fees

Hourly Rates and estimate option

Our fees are based on the amount of time we spend in dealing with a matter. Our current hourly fee rates (exclusive of VAT and costs) applicable to tie engagements are:

Partner Amanda Methven	£200
Senior Associate Mark Kirke	£150

Personnel other than those named above may need to be involved from time to time and we shall notify you of their hourly rates if they differ from those above.

These rates are subject to annual review and we shall notify you of any changes in advance.

On the basis that our work will be as described in paragraph 2 above, we estimate our fees at £10,500 (excluding VAT and costs). If it appears likely that the estimate will be exceeded we shall advise you of this as soon as possible.

4.2 Assumptions made in relation to our fee for the Contracted Work

Our fee estimate is made by us on the basis:

- that our work will be as described above;
- of the facts as known to us at the date of this letter;
- that all our work will be concluded within the timescale specified above; and
- that all documentation and correspondence will be conducted in English.

If any of these assumptions are not met, our fee may require to be reviewed and we shall discuss this with you at the time.

Please treat these fee arrangements as confidential and do not disclose them to any third party without our prior written approval.

4.3 Fees for additional work

If additional work is required in connection with the Project over and above the Contracted Work we will discuss the fees applicable to that additional work with you at the relevant time. Unless otherwise agreed, our fees for the additional work will be calculated on the basis of the time involved (as evidenced by our time recording system) at the hourly charge rates detailed in paragraph 4.1 above.

4.4 VAT and Costs and Expenses

We add VAT to our charges at the rate that applies when we carry out the work. Currently this is 17.5%.

In most transactions out of pocket costs and expenses are incurred on the client's behalf (such as bulk copying charges, registration dues, stamp duty, travel and subsistence costs and other costs incurred to third parties). We shall require the Council to reimburse us for these costs and expenses. Where these costs and expenses are within our control, we shall try to keep them to a minimum. However, (with the exception of the instruction of counsel, barristers or experts,) our decision as to the necessity of incurring these costs and expenses shall be final.

We do not anticipate incurring such costs at present.

4.5 Fee Updates and Invoices

We have agreed to issue the invoice for our fees on completion (or earlier termination) of the Contracted work in February 2010. Where the Contracted Work involves work beyond February 2010 we will issue monthly invoices whilst we are carrying out the Contracted Work and a final invoice on completion or termination of the Contracted Work.

We will provide monthly updates on the fees, costs and expenses incurred by us.

5. **Feedback on our services**

Our aim and expectation is that you will be delighted with the service we provide to you and feel that you have received value for money. We always encourage feedback on the services we provide. Please contact our managing partner if at any time there are any issues of concern to you or if you feel that there is any scope for improvement in our service. A copy of our complaints procedure is available on request.

Unless we hear otherwise from you, you agree that this letter and the Conditions of Business together constitute the Engagement Contract between Dundas & Wilson and the Council for the delivery of legal advice and services by us on the Project including work which we have already done in relation to the Project prior to the date of this letter. That said, it would be helpful if you would sign and return the copy of this letter enclosed for our file.

Yours sincerely

Amanda Methven
Partner, For and on behalf of Dundas & Wilson CS LLP

**SCHEDULE 2
THE DOCUMENTS**

[TBC]