



**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*

**SUMMARY OF LEGAL ADVICE ACROSS KEY THEMES  
IN DISPUTE RESOLUTION PROCEDURE**

27 July 2009

## 1. INTRODUCTION

- 1.1 Steven Bell of **tie** Limited (hereinafter referred to as "**tie**") has 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 DLA have now been requested to summarise the significant pieces of legal advice provided to **tie** by DLA up to 24 July 2009, categorised by the relevance of that legal advice to the following four key themes which have been identified in respect of contemplated Dispute Resolution Procedure:
  - 1.2.1 Entitlement, which concerns such matters as *Schedule Part 4 (Pricing)*; Compensation Events; Notified Departures; SDS; and Infraco Change;
  - 1.2.2 Design, which concerns such matters as BDDI; BDDI to IFC; relationship between Infraco and SDS; and Misalignment;
  - 1.2.3 Programme, which concerns such matters as Extension of Time 1 and Extension of Time 2; and
  - 1.2.4 Rationale, which concerns such matters as "*On Street*" challenges.
- 1.3 This Advice Note necessarily only represents a selected summary of the whole legal advice provided by DLA to **tie** concerning the SDS Agreement and the Infraco Contract. It is therefore the case that the whole of the legal advice provided by DLA to **tie** must be taken into account when considering any issue which has arisen under or in connection with the SDS Agreement and/or the Infraco Contract.

## 2. KEY THEMES

### 2.1 ENTITLEMENT

- 2.1.1 The theme of "*entitlement*" encompasses such issues as *Schedule Part 4 (Pricing)*; Compensation Events; Notified Departures; SDS; and Infraco Change.



**Status of Schedule Part 4 (Pricing)**

- 2.1.2 *Clause 4.3* of the Infraco Contract provides that nothing in the Agreement shall prejudice Infraco's right to claim "additional relief or payment pursuant to *Schedule Part 4 (Pricing)*." This provision affects all provisions in the main body of the Infraco Contract which would otherwise limit or extinguish claims by the Infraco under *Schedule Part 4 (Pricing)*. It has to be accepted that the Pricing Assumptions take precedence but DLA questions whether *Clause 4.3* actually intended to work against other conditions which would prevent access into *Schedule Part 4*. We note that *Clause 4.3* does not say "pursuant to the Conditions which lead to a Notified Departure" but only "pursuant to *Schedule Part 4*". An example is the way *Clause 80.24* is worded.
- 2.1.3 Subject to the foregoing argument, the provisions in *Schedule Part 4 (Pricing)* require to be read discretely, and Infraco's entitlement to relief and/or additional payment under that schedule are not defeated or limited by the provisions of the main body of the Infraco Contract. *Schedule Part 4 (Pricing)*, with all its conditions and qualifications, itself regulates Infraco's entitlement to relief and/or additional payment.
- 2.1.4 *Schedule Part 4 (Pricing)* then
- (a) circumscribes relevant provisions in the main body of the Infraco Contract - those which would otherwise have the effect of limiting Infraco's entitlement under *Schedule Part 4 (Pricing)*;
- but
- (b) any relevant claims under *Schedule Part 4 (Pricing)* would be subject to the provisions within *Schedule Part 4 (Pricing)* which themselves circumscribe that entitlement - being Infraco breach, Change in Law or Infraco Change.

**Provision of information by Infraco**

- 2.1.5 In the absence of information being provided by Infraco, the Infraco Contract contemplates that the following information is to be made available to **tie** by the Infraco (pursuant to *Clause 104 (Information and Audit Access)*):
- 2.1.5.1 all Deliverables;
  - 2.1.5.2 all invoices, timesheets and expense claims for which the Infraco has sought or is seeking reimbursement under the provisions of the Infraco Contract; and
  - 2.1.5.3 any other information, documents, records and the like in the possession of, or available to the Infraco as may be reasonably requested by **tie**, for any purpose in connection with the Infraco Contract and/or the Infraco Works.

**Operation of Clause(s) 80.13 and 80.15**

- 2.1.6 *Clause 80.13* provides a **tie** ability to require work to commence in situations where Changes are not fully agreed, whilst *Clause 80.15* allows **tie** to require work at demonstrable cost, whilst the Dispute Resolution Procedure is completed.
- 2.1.7 *Clause 80.15* of the Infraco Contract gives **tie** the right to issue a **tie** Change Order instructing the Infraco to carry out the proposed **tie** Change prior to the determination or agreement of an Estimate which has been referred to the Dispute Resolution Procedure if the proposed **tie** Change is urgent and/or has a potential significant impact on the Programme. This is subject to Infraco's right to refuse to carry out a **tie** Change under *Clause 80.12* of the Infraco Contract and excludes a **tie** Change which includes work by the SDS Provider where the valuation of that work has not been agreed.
- 2.1.8 In the event that a **tie** Change Order is issued under *Clause 80.15* of the Infraco Contract, the Infraco would be obliged to comply with it. It does not relieve them of their other contractual obligations.
- 2.1.9 It is therefore the case that in order to exercise the right granted to **tie** under *Clause 80.15* of the Infraco Contract, the Estimate requires to be referred to the Dispute Resolution Procedure before instructing implementation of unagreed notified changes.
- 2.1.10 It should also be noted that *Paragraph 5 of Schedule Part 9 (Dispute Resolution Procedure)* provides that "*Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure contained in this Schedule Part 9.*"

<b>Compensation Events</b>
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- 2.1.11 The Infraco is not free to elect whether a particular event or occurrence is to be classified, for the purposes of the Infraco Contract, as a Notified Departure or as a Compensation Event. *Clause 65.1* provides "*The Infraco's sole right to an extension of time and/or relief from the performance of its obligations and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (Compensation Events).*"
- 2.1.12 Whilst, on the face of it, this is a condition which is affected by *Clause 4.3* as it would prejudice Infraco's entitlement to treat an event as a Notified Departure. It has to be conceded that the intent of *Clause 4.3* may have been to give Infraco exactly this sort of comfort that their entitlement to a Notified Departure would not be cut down in unforeseen ways. Equally it is arguable that *Clause 4.3* intends to ensure that the mechanism of *Schedule Part 4* are allowed to work in full and unaffected by the contract conditions where a Notified Departure has occurred, but does not intend to create a route to a Notified Departure where, by other contract conditions, one has arisen.
- 2.1.13 Subject to the foregoing, it is therefore the case that should one of the events listed under the definition of "*Compensation Event*" at *Schedule Part 1 (Definitions and Interpretation)* of the Infraco Contract occur, the Infraco's remedy lies under *Clause 65* and not *Schedule Part 4 (Pricing)*.

- 2.1.14 Notwithstanding that the Infraco may be able to provide evidence to persuade **tie** that a Compensation Event has occurred, **tie** is obliged, in assessing any delay or extension of time or costs or relief to which the Infraco may be entitled as a consequence of that Compensation Event:
- 2.1.14.1not take into account any event or cause of delay or costs which is caused by any negligence, default or breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties - this issue has particular relevance in the case of failure by the SDS Provider; and
- 2.1.14.2take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs.
- 2.1.15 The Infraco could also be deprived of any entitlement it may have following the occurrence of a Compensation Event (*Clause 65.2*), in the event that the Infraco does not
- 2.1.15.1as soon as practicable, and in any event within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay, adversely affect the performance of Infraco's obligations, or cause the Infraco to incur additional costs give a notice to **tie** in the form prescribed under *Clause 65.2* of the Infraco Contract.
- 2.1.16 Whilst it is not free from potential challenge, clauses of this type (condition precedent) which are directed to a time-bar have been enforced by the courts.

<b>Notified Departures</b>
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- 2.1.17 The Infraco Contract does not expressly deal with the situation where the Infraco asserts that there has been a Notified Departure but provides little (if any) evidence in support but **tie** either do not accept that submission or do not know whether they should accept it or not. To resolve the impasse between **tie** and Infraco in regard to the lack of supporting information and substantiation offered by Infraco it is arguable, as a matter of legal principle, that terms ought to be implied into the Infraco Contract to provide for a minimum level of information for the Infraco to justify the submission that there has been a Notified Departure. Those implied terms would then form the basis of a contractual right which **tie** could rely upon to request certain information from Infraco. At a practical level it has to be for Infraco to justify its entitlement. Whether or not that amounts to an implied obligation to justify the existence and nature of a Notified Departure, will be important in the follow on question of liability for delay where this impasse exists.
- 2.1.18 As a general proposition, the implied terms would be directed towards



- 2.1.18.1 putting **tie** in possession of all the information which would have been necessary for **tie** to come to the view that the **tie** Change is required, necessary and valid.
- 2.1.19 Assuming that requests by **tie** to the Infraco for it to provide further and better particulars and information to support its assertion falls within the ambit of the foregoing general proposition, it could then be said that those requests were reasonable and justified. Such requests for information could then include:
  - 2.1.19.1 the specific Base Date Design Information relevant to the tie Notice of Change under *Clause 80*;
  - 2.1.19.2 who made the design change and what was the technical reason for the change;
  - 2.1.19.3 how the design change process adopted by the Infraco satisfied Clause 10 and in particular Clause 10.2 of the Infraco Contract: "The Infraco shall submit any Deliverables associated with any Permitted Variations to **tie**'s representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan).";
  - 2.1.19.4 the factual and technical grounds justifying why the changes exceed, say, normal design development from Base Date Design Information to Issued For Construction stage;
  - 2.1.19.5 how Infraco has complied with its duty to mitigate the effect of the Notified Departure and the tie Change (if there has been one); and
  - 2.1.19.6 that there has been no Infraco breach or SDS Provider breach, Infraco Change or Change in Law, which has caused or contributed to the occurrence of a Notified Departure.
- 2.1.20 Notwithstanding that the Infraco may be able to provide evidence to persuade **tie** that the facts or circumstances differ from the (1) Base Date Design Information; (2) the Base Tram Information; (3) the Pricing Assumptions; (4) or the Specified Exclusions, Infraco are not entitled to any relief (and it is not a Notified Departure) where the difference(s) result from:
  - 2.1.20.1 a breach of contract by the Infraco;
  - 2.1.20.2 an Infraco Change; or
  - 2.1.20.3 a Change in Law.

<b>Provision of information by Infraco</b>
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- 2.1.21 In the absence of information being provided by Infraco, the Infraco Contract contemplates that the following information is to be made available to **tie** by the Infraco (pursuant to *Clause 104 (Information and Audit Access)*):
  - 2.1.21.1 all Deliverables;



2.1.21.2 all invoices, timesheets and expense claims for which the Infraco has sought or is seeking reimbursement under the provisions of the Infraco Contract; and

2.1.21.3 any other information, documents, records and the like in the possession of, or available to the Infraco as may be reasonably requested by **tie**, for any purpose in connection with the Infraco Contract and/or the Infraco Works.

2.2 Failure by Infraco to provide information or comply with reasonable and justifiable requests for information by **tie** in regard to alleged Notified Departures

2.2.1 would entitle **tie** to withhold the issuing of a **tie** Notice of Change;

2.2.2 a **tie** Notice of Change would not be deemed to have been issued until such information had been provided; and

2.2.3 if Infraco do have an implied obligation to give the information, the period during which Infraco fails to provide the necessary information may be regarded as being due to a breach by Infraco and not reckonable in calculating any period of delay between the notification of a Notified Departure and the actual date (not the deemed date) that **tie** issues a **tie** Notice of Change (*paragraph 3.5 of Schedule Part 4 (Pricing)*) - in other words the Infraco would not be entitled to claim additional loss and expense by alleging that the delay was such that it constituted a Compensation Event.

<b>SDS</b>
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2.2.3.1 As a matter of a general duty of care the SDS Provider warrants (*Clause 3.2 of the SDS Agreement*) that "*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.*" (emphasis added)

2.2.3.2 In the context of whether or not the SDS Provider has achieved the appropriate standard of care in the performance of the Services it would be the case that the following questions would need to be considered in order to determine whether or not the SDS Provider has in fact breached the aforementioned duty of care - a common sense view can be taken but where a question of professional standards is disputed, this is decided with reference to the norms of the relevant profession which ultimately requires expert opinion to answer the questions:

2.2.3.3 Did the SDS Provider exercise the standard of an ordinarily skilled system design services provider?

2.2.3.4 Did the SDS Provider act in accordance with general and approved system design services provider practice?

2.2.3.5 Would the majority of system design services providers under these circumstances have acted the same way as the SDS Provider acted?



2.2.3.6 Did the SDS Provider act in accordance with a practice accepted as proper by a responsible body of system design services providers - even if another body of system design services providers opinion would have thought such practice to be incorrect?

2.2.3.7 In regard to the time for performance, the SDS Agreement places obligations upon the SDS Provider in regard to liaising with other parties to allow progress of the Services (*Clause(s) 3.12; and 3.14* of the SDS Agreement) and in regard to carrying out Services in conformance with the Programme (*Clause(s) 3.15; 7.1; and 7.2* of the SDS Agreement)

2.2.3.8 As the time for performance of Services is allied to and measured by the Consents Programme and the Design Delivery Programme the SDS Provider is to give notice of it becoming aware of a likelihood of delay to the performance of the Services (*Clause 7.4* of the SDS Agreement) and on the occurrence of certain specified events is entitled to an extension of time and amendment to the Consents Programme and/or the Design Delivery Programme (*Clause 7.5* of the SDS Agreement). DLA do not know what reliefs have been applied for or given under the SDS Agreement post-novation.

2.2.3.9 From the foregoing it can then be said that the positive obligation undertaken by the SDS Provider in regard to time for performance of Services is:

to progress the Services

- (a) with due expedition; and
- (b) in a timely and efficient manner without delay

in order to achieve completion of the Services in accordance with the Consents Programme and the Design Delivery Programme as those programmes may be adjusted to reflect the award of any extension of time granted in terms of the SDS Agreement.

2.2.3.10 The Infraco is obliged to:

- *"procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement" (Clause 11.3 of the Infraco Contract);*
- *"carry out all required management activities in order to manage the performance of the SDS Services" (Clause 11.4 of the Infraco Contract);*
- *"use reasonable endeavours to procure that the SDS Provider shall perform any additional services which may be required" (Clause 11.7 of the Infraco Contract);*
- *"perform all the duties and discharge all the obligations of tie under the SDS Agreement" (Clause 6.1 of the Novation Agreement)*

and subject to any express limitations or rights in relation to the performance of the SDS Provider, the Infraco is wholly liable for the performance of the SDS Provider (*Clause 11.4* of the Infraco Contract).





**Infraco Change**

2.2.4 In considering what does (and what does not) constitute a Notified Departure, Paragraph 2.8 of Schedule Part 4 (Pricing) to the Infraco Contract provides

*"A "Notified Departure" is where now or at any time the facts or circumstances differ in any way from the Base Case Assumptions save to the extent caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law." (emphasis added)*

2.2.5 In turn Schedule Part 1 (Definitions And Interpretation) to the Infraco Contract provides, amongst other things

*"Infraco Change" means a change proposed by the Infraco in accordance with Clause 81.1 and approved by tie in accordance with Clause 80 (tie Changes) or Clause 81 (Infraco Changes);" (emphasis added)*

2.2.6 Clause 81.1 of the Infraco Contract then provides

*"If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2) the Infraco shall notify tie of the reasons for such variation and make proposals for the proposed variation in writing. tie shall be free to accept or reject any proposed variation as tie thinks fit, (other than where the Infraco Change is necessary for Infraco to comply with a Change in Law which is not a Qualifying Change in Law, in which case tie shall accept such proposal or such other proposal as tie may reasonable require which does not increase the costs to the Infraco of complying with the relevant Change in Law) and tie shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3." (emphasis added)*

**2.3 DESIGN**

2.3.1 The theme of "design" encompasses such issues as BDDI; BDDI to IFC; BSC to SDS; Misalignment.

**Agreement on BDDI**

2.3.2 "Base Date Design Information" is defined in Schedule Part 4 (Pricing) of the Infraco Contract as "the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4". Appendix H to Schedule Part 4 specifically includes "All of the Drawings available to Infraco up to and including 25th November 2007". The words in Appendix H would be construed in light of the "factual matrix" at the time the contract was entered into. These drawings comprise the BDDI. The Schedule Part 30 (Infraco Proposals) drawings do not.

2.3.3 Appendix A to Schedule Part 30 (Infraco Proposals) provides a list of documents appended to the Infraco Proposals. This list is not, and is not anywhere stated to be, exhaustive of all the design data, information and drawings available to or issued to the Infraco up to and including the 25 November 2007. There is therefore no basis (contractual or otherwise) for saying that Appendix A contains all of the drawings available to or issued to



the Infraco at 25 November 2007. Whatever *Appendix A* is, it is not the set of information which is the Base Date Design Information.

- 2.3.4 The *Schedule Part 30 (Infraco Proposals)* drawings do not form part of the BDDI and therefore do not form part of the Base Case Assumptions. Accordingly, a departure from the *Schedule Part 30 (Infraco Proposals)* drawings does not constitute a Notified Departure.
- 2.3.5 Whilst the Infraco may assert that the Construction Works Price is the price for the work specified in the Employer's Requirements and the Infraco Proposals (*Schedule Part 4, paragraph 3.1*), this does not alter the definition of the Base Case Assumptions and the BDDI.
- 2.3.6 The Infraco may also assert that the 21 annotated drawings conflict with other drawings. The drawings do not create conflict since (i) the annotated drawings are not Base Date Design Information; (ii) the 21 drawings which the Infraco subsequently annotated were not the latest drawings issued by the SDS Provider relevant for the roads specification and therefore the later drawings (which fall within the Base Date Design Information) would trump the 21 drawings in any case irrespective of the annotations; and (iii) the manuscript annotations made by the Infraco contradict the relevant agreed key Pricing Assumptions in *Schedule Part 4 (Pricing)* and have no contractual status.

<b>BDDI to IFC</b>
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- 2.3.6.1 Pricing Assumption 1 in *Schedule Part 4* is that the SDS Provider will not change certain things from the BDDI, other than amendments arising from the normal development and completion of designs. The Infraco, therefore, is assumed to have taken into account, when pricing, all the amendments to the design as at the design freeze date which would result from the normal development and completion of the designs. The Infraco has maintained that every change from the BDDI constitutes a Notified Departure. However, such a claim ignores this important qualification.
- 2.3.6.2 What constitutes “*normal development and completion of design*” as opposed to alterations in “*design principle, shape, form and/or specification*” which do not arise from the normal development and completion of design would require to be a matter of professional opinion and, inevitably, judgement.
- 2.3.6.3 **tie** reasonably requires a proper examination and explanation of the changes to design which the Infraco asserts have been made to BDDI during the evolution of the relevant design to IFC. It is for the Infraco to demonstrate and prove that:
  - 1. the factual and technical grounds justify why the changes to the design exceed normal design development from BDDI to IFC stage;
  - 2. who made the design change, when and under what instruction, and in the Infraco complying with the Employer's Requirements what the technical need for the design change was;
  - 3. how each design change permitted by the Infraco satisfied *Clause 10*;

4. how the Infraco has managed the SDS Provider effectively in relation to each design change;
5. that there has been no Infraco breach or SDS Provider breach, Infraco Design, Infraco Change or Change in Law which has caused or contributed to the occurrence of a Notified Departure; and
6. how the Infraco has complied with its duty to mitigate the effect of the Notified Departure (if there has been one).

2.3.6.4 It is for the Infraco to demonstrate to **tie** that a Notified Departure has occurred, not for **tie** to attempt to disprove the Infraco's assertion without facts which can only be within the Infraco's knowledge in accordance with its responsibility for Design.

2.3.6.5 Any and every change from Base Date Design Information does not constitute a Notified Departure as it is only those changes which are alterations in “*design principle, shape, form and/or specification*” which do not arise from the normal development and completion of design which give rise to an entitlement on the part of the Infraco.

<b>Relationship between Infraco and SDS</b>
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2.3.7 It is conceivable that the Infraco could seek to demonstrate that a difference in the facts and circumstances arose as a consequence of either (1) delay in the performance of Services on the part of the SDS Provider; or (2) the quality of the designs prepared by the SDS Provider thereby triggering a Notified Departure. The particular facts and circumstances relied upon by Infraco would however need to be investigated as a mere allegation of delay/poor quality on the part of the SDS Provider by the Infraco would not, of itself, be sufficient.

2.3.8 In regard to Notified Departures, it is also the case that consideration would need to be given to whether or not there had been a breach of contract by Infraco, in particular with respect to Infraco's obligations vis-à-vis the SDS Provider (Clause(s) 11.3; and 11.4) thereby disentiing the Infraco from relief.

2.3.9 Delay in the performance of Services by the SDS Provider could give rise to a Compensation Event and the delay would be measured against the various programmes.

2.3.10 One limitation placed upon Infraco's entitlement in regard to time for performance by the SDS Provider - and on which basis Infraco would be unable to claim that a Compensation Event has occurred - is where the Infraco Design is (i) not submitted by the SDS Provider in accordance with the Consents Programme and *Schedule Part 14 (Review Procedure and Design Management Plan)*; or (ii) is rejected by the Approvals Body on grounds of content or quality but not, for avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals.

2.3.11 A further limitation placed upon Infraco's entitlement in regard to time for performance by the SDS Provider, which could have the effect of reducing or

negating Infraco's entitlement, is that **tie** when assessing Infraco's entitlement is not to take into account "*any event or cause of delay or costs*" which is caused by a breach of contract by Infraco.

- 2.3.12 Infraco could therefore be disentitled from any relief in the event that it has breached its obligations in regard to management of the SDS Provider (*Clause 11.3*) and/or that Infraco is liable for a failure by the SDS Provider to perform services in accordance with the terms of the SDS Agreement (*Clause 11.4*).
- 2.3.13 It can therefore be said that Compensation Event (t):
- 2.3.13.1 is heavily circumscribed;
- 2.3.13.2 the circumstances in which it could be found that any entitlement flows to Infraco are limited;
- 2.3.13.3 does operate in certain limited circumstances; and
- 2.3.13.4 does not operate where the Infraco is in culpable delay.
- 2.3.14 In terms of the Infraco Contract **tie** are entitled to deduct from any additional costs which Infraco is entitled to recover as a consequence of the occurrence of Compensation Event (t) the amount of liquidated damages recoverable from the SDS Provider pursuant to *Clause 27.7* of the SDS Agreement - which amounts to £8,928.57 (up to a total aggregate of £1,000,000) in respect of each failure by the SDS Provider to achieve the provision of Issued for Construction Drawings by the dates identified in the Design Delivery Programme. The deduction is made irrespective of whether or not Infraco are in breach and whether or not Infraco are found to have any entitlement as a consequence of the occurrence of the Compensation Event.
- 2.3.15 In regard to Compensation Event (u), it is qualified in that the breach must be "*material*". It is not therefore every instance of alleged failure by the SDS Provider where the quality of Deliverables can be called into question which will give rise to a Compensation Event. The courts have described the concept of "*material breach*" in various ways – a failure to perform the obligations under the contract "*in any material respect*"; a violation of stipulations which are "*material or essential*" as opposed to "*minor and incidental*"; "*substantial failure*"; a breach of stipulations going "*to the root of the contract*"; a breach which is "*of the essence of the contract*"; or which affects "*the root and substance of the contract*". Whether a breach is material is a question of fact and degree. In this context "*material*" then means serious as opposed to trivial. It will therefore be for Infraco to demonstrate that any such breach on the part of the SDS Provider is "*material*".
- 2.3.16 A further limitation placed upon Infraco's entitlement in regard to quality, which could have the effect of reducing or negating Infraco's entitlement, is that **tie** when assessing Infraco's entitlement is not to take into account "*any event or cause of delay or costs*" which is caused by a breach of contract by Infraco.
- 2.3.17 Infraco would therefore be disentitled from any relief in the event that it has breached its obligations in regard to management of the SDS Provider

(*Clause 11.3*) and/or that Infraco is liable for a failure by the SDS Provider to perform services in accordance with the terms of the SDS Agreement (*Clause 11.4*).

- 2.3.18 It ought to be acknowledged that, on the face of it, the foregoing gives rise to an apparent conflict in the operation of Compensation Event (u). That conflict arises as a consequence of the tension amongst (1) the obligations undertaken by the Infraco vis-à-vis the SDS Provider under the Infraco Contract (in terms of which Infraco is liable for a failure by the SDS Provider and Infraco would be in breach of the Infraco Contract if there was a failure by the SDS Provider); (2) the right of the Infraco to relief under the Infraco Contract in the event of a material breach by the SDS Provider; and (3) when assessing the effect of a Compensation Event **tie** is to ignore "*any event or cause of delay or costs*" which is caused by a breach of contract by Infraco.
- 2.3.19 This may be an issue which Infraco could attempt to exploit and seek to argue that the conflict ought to be resolved in the Infraco's favour.
- 2.3.20 In terms of the Infraco Contract (*Clause 65.13*) **tie** are entitled to deduct from any additional costs which Infraco is entitled to recover as a consequence of the occurrence of Compensation Event (u) the full amount recoverable by Infraco (up to ten million pounds (£10,000,000) for each and every event) pursuant to the SDS Agreement as a result of the occurrence of such Compensation Event.

<b>Misalignment</b>
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- 2.3.21 As a matter of principle, a difference from the designs contained and comprised in BDDI, which is caused by a change required by Infraco, does not, of itself, entitle the Infraco to claim that a Notified Departure has occurred. It would therefore follow that Infraco ought to be disentitled from claiming a Notified Departure (and therefore disentitled from claiming any additional payment (either for design or associated construction costs) on that basis) in the circumstances where:
- 2.3.21.1 an item of plant or equipment originally to be supplied/installed by Siemens as part of the Infraco Works, is to be amended/substituted for a different item of plant or equipment to be supplied/installed by Siemens;
  - 2.3.21.2 the BDDI included as part of its design the item of plant or equipment which Siemens now wish to amend/substitute;
  - 2.3.21.3 the amended/substituted item of plant or equipment necessitates a change to associated construction elements described in the BDDI and
  - 2.3.21.4 the decision to amend/substitute the item of plant of equipment is one being made unilaterally by the Infraco to suit their own preferences and not **tie**.
- 2.3.22 *Clause 81.2* of the Infraco Contract then confirms that a change requested by Infraco is not to give rise to a variation to the Contract Price, unless agreed by Infraco and **tie**, as it provides

"81.2 *If **tie** wishes to proceed with a variation proposed by the Infraco, **tie** shall serve a tie Notice of Change on the Infraco and Clause 80 shall be adhered to by **tie** and the Infraco in respect thereof, provided that:*

81.2.1 ***tie** may require that there be a reduction to the Contract Price if such change will result in lower costs for the Infraco; or*

81.2.2 *in the event of an anticipated increase to the costs of the Infraco resulting from any change requested by the Infraco pursuant to Clause 81.1, there shall be no variation to the Contract Price unless otherwise agreed by the Parties.*"  
(emphasis added)

2.3.23 As **tie** will appreciate the matter turns upon the particular facts and circumstances.

<b>Provision of information by Infraco</b>
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2.3.24 In the absence of information being provided by Infraco, the Infraco Contract contemplates that the following information is to be made available to **tie** by the Infraco (pursuant to *Clause 104 (Information and Audit Access)*):

2.3.24.1all Deliverables;

2.3.24.2all invoices, timesheets and expense claims for which the Infraco has sought or is seeking reimbursement under the provisions of the Infraco Contract; and

2.3.24.3any other information, documents, records and the like in the possession of, or available to the Infraco as may be reasonably requested by **tie**, for any purpose in connection with the Infraco Contract and/or the Infraco Works.

## 2.4 PROGRAMME

2.4.1 The theme of "*programme*" encompasses such issues as EoT 1 and EoT 2

<b>Valuation of tie Change Order 1</b>
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2.4.2 **tie** Change Order 1 is to be valued in accordance with *Clause 80.6* of the Infraco Contract. *Clause 80.6* of the Infraco Contract then sets out the mandatory rules which are to apply in respect of the valuation a **tie** Change.

2.4.3 In respect of the valuation of **tie** Change Order 1 the rates and prices contained in *Appendix F to Schedule Part 4 (Pricing)* do not apply. The valuation of **tie** Change Order 1 can be ascertained by measurement and it is practicable to deduce rates and prices from the rates and prices contained in *Appendix F to Schedule Part 4 (Pricing)*. Accordingly, valuation of **tie** Change Order 1 is to be on the basis of measurement and valuation at rates and prices deduced from the rates and prices contained in *Appendix F to Schedule Part 4 (Pricing)*.



- 2.4.4 *Spreadsheet 2* forming part of *Schedule Part 4 (Pricing)* lists lump sums for fixed and time related elements. Those lump sums are calculated by reference to the original contract duration of 169 weeks. Accordingly, such lumps sums do not apply in the valuation of adjustments to the Planned Sectional Completion Date of Section A (Depot) 5.8 weeks; Section B (Test Track) 9.8 weeks; Section C (Testing and Commissioning) 7.6 weeks; and Section D (Revenue Commencement Date) -0.2 weeks. It is, however, the case that the **tie** Change is capable of measurement (as it is referable to specific periods of time) and it is practicable for rates to be deduced from the lump sums set out in *Spreadsheet 2* in *Schedule Part 4 (Pricing)* (as they are also referable to specific periods of time).
- 2.4.5 By way of further explanation, *Spreadsheet 2* in *Schedule Part 4 (Pricing)* is the summary of the items, quantities and rates indentified in *Appendix A2* of *Schedule Part 4 (Pricing)*. *Appendix A2* is in the form of a bill of quantities, in terms of which a rate for an item is applied to a quantity resulting in a total for that particular item. That total is subsequently transferred to *Spreadsheet 2* in *Schedule Part 4 (Pricing)* as a lump sum. Accordingly, the rates to be used for valuation of **tie** Change Order 1 are the rates stated in *Appendix A2* of *Schedule Part 4 (Pricing)*.

<b>Accommodation Works at Hilton Car Park</b>
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- 2.4.6 The works at the Hilton car park (defined in the Infraco Contract as "*the New Car Park Works*") are fully described in *Section 12* of *Schedule Part 13* of the Infraco Contract ("*the Stakis Agreement*"). The scope of the New Car Park Works is shown on the plan annexed at *Appendix 9* to *Schedule Part 13*. The Infraco is responsible for obtaining planning permission for these works.
- 2.4.7 The Infraco appears to confuse Accommodation Works and Third Party Obligations ("*TPOs*"). The former are any works which **tie** may need to instruct and which eventuate post contract award in connection with third party interface generally. TPOs as they are known comprise key third party non-interference and works agreements. These are contained in *Schedule 13 Part A* and which the Infraco had full opportunity to examine and price the scope and execution of those works during the tender phase.
- 2.4.8 The Infraco Contract's approach on this issue is unambiguous. Under *Clause 18.17B*, the Infraco undertakes to carry out all of its obligations under *Schedule Part 13, Section A*. *Section 12* of *Schedule Part 13 A* contains the express stepped-down obligations (at 12.9, 12.10 and 12.11) agreed to by the Infraco and pursuant to which the Infraco is responsible for carrying out the New Car Park Works.
- 2.4.9 The New Car Park Works are a defined category of works - "*Third Party Obligations*" - under the Infraco Contract. These are core works and constraints and obligations to be performed, to which the Infraco agreed to on 14 May 2008. The price for the New Car Park Works is contractually included as part of the Construction Works Price set out in *Schedule Part 4*.
- 2.4.10 The Infraco asserts that the New Car Park Works are Accommodation Works and require a **tie** Notice of Change. For this to be so, either those works would be alluded to in *Schedule Part 13 B* or would have been unknown at 14 May 2008. Neither is the case and, in addition, *Clause 83* deals with



Accommodation Works for which **tie** would have issued an Accommodation Works Change Order. **tie** has not issued and does not need to issue such an Order.

- 2.4.11 In addition to the unambiguous approach of the Infraco Contract under *Clause 18.17B* and *Schedule Part 13 A*, it is the case that (1) the contract drawings detail the New Car Park Works; (2) the New Car Park Works are programmed; (3) the New Car Park Works are a milestone payment; (4) the Infraco's tendered Bills of Quantities and price make up includes the New Car Park Works; and (5) the Schedule of Rates contains a rate for the New Car Park Works (in case of any variation to this element of scope of works).

#### Provision of information by Infraco

- 2.4.12 In the absence of information being provided by Infraco, the Infraco Contract contemplates that the following information is to be made available to **tie** by the Infraco (pursuant to *Clause 104 (Information and Audit Access)*):

2.4.12.1 all Deliverables;

2.4.12.2 all invoices, timesheets and expense claims for which the Infraco has sought or is seeking reimbursement under the provisions of the Infraco Contract; and

2.4.12.3 any other information, documents, records and the like in the possession of, or available to the Infraco as may be reasonably requested by **tie**, for any purpose in connection with the Infraco Contract and/or the Infraco Works.

#### Access to carry out Infraco Works

- 2.4.13 *Clause 18.1* of the Infraco Contract constitutes a warranty by **tie** that the Infraco access will be granted and all necessary Land Consents will be obtained.

- 2.4.14 Access is warranted "*only in so far as the same is required for the purposes of carrying out the Infraco works*". So unless the restriction in the area to which access is granted is such that the Infraco works cannot be carried out there is not breach of the warranty.

- 2.4.15 Furthermore, in terms of the definition of "*Compensation Event*" in Schedule Part 1, "*the failure of tie to give possession or access as referred to in clause 18 (Land Consents, Permanent Land and Temporary Sites)*", is a Compensation Event and would fall to be dealt with as such in terms of *Clause 65*. So, for example, if such a failure directly and adversely affected Infraco's ability to perform any of its obligations and/or caused Infraco to incur costs which were reasonably anticipated to be incurred by the Infraco but for the occurrence of the Compensation Event, the Infraco would be entitled to apply for an extension of time and/or relief from the performance of its obligations and/or claim additional costs under the Infraco Contract (*Clause 65.1*).

## 2.5 RATIONALE



- 2.5.1 The theme of "*rationale*" encompasses such issues as "*On Street*" challenges.

**"On Street" Challenges**

- 2.5.2 The terms of the Supplemental Agreement entered into amongst the parties in connection with the works at Princes Street can be reviewed and revised once the particular facts and circumstances surrounding other "*On Street*" challenges are known.

**Infraco Default**

- 2.5.3 A preliminary review of a limited set of correspondence passing between **tie** and Infraco has disclosed that most of the problems have concerned changes, both actual and anticipated. This covers both the "*soft*" obligations (to minimise, mitigate and co-operate, with a related section on best/reasonable endeavours and reasonable skill and care) and the differences of opinion on the "*hard*" issues beginning with the question of what constitutes a compensable change, as opposed to design development or changes brought about through Infraco default, what constitutes a competent Notice of Change, what constitutes a competent Estimate, failure or delay in giving Estimates, the difficulty and cost of providing Estimates, what constitutes an Instruction and the correct basis of monetary and time entitlement in implementing a change order.
- 2.5.4 Those exchanges were inconclusive insofar as establishing clear grounds of default on the part of the Infraco. That indicates that both parties have understood their own position (or at least the position they wanted to present) from an early stage and have not been substantially persuaded by any points in the other party's stated position, hence the points and counterpoints have not produced synthesis. This is magnified by the Infraco failure to provide competent Estimates, meaning that **tie** has little understanding of Infraco's position on actual entitlement beyond discrete issues such as the treatment of preliminaries. The logical conclusion is that these positions will have to be organised and stated for DRP in order to obtain a definite Infraco position and see which one will persuade a third party, together with the compilation and sending of detailed notices of default for the record and to put Infraco in no doubt as to their position.

DLA Piper Scotland LLP

27 July 2009