NOTE BY SENIOR COUNSEL

for

tie LIMITED

I refer to the Agents' email dated 11 June 2009. I am instructed to address some further questions following on from my Note dated 2 June 2009.

1. Please would Counsel provide a view as to whether he considers that one of the following propositions is correct:-

1. That Clause 4.3 is too broad and unspecific to make Schedule Part 4 more important than the whole of the main body of the Agreement, and therefore it does not affect any clause not expressly stated subject to 4.3. Since the clause purports to wash over many provisions in the main body of the Agreement which would become redundant, on Infraco's view, an adjudicator or a court would be very likely to conclude that this cannot have been the intention of the parties – and would take the view that if this had been the intention, express provisions would have been agreed in each affected provision.

2. That Schedule Part 4 does circumscribe relevant provisions in the main body of the Agreement, ie those which do have the effect of limiting Infraco's entitlement under Schedule Part 4 but any relevant claims would be subject to the provisions within

Schedule Part 4 which themselves circumscribe that entitlement – being Infraco breach, Change in Law or Infraco Change. This takes the focus back to the main agreement to look for breaches. As an example, it would prevent a Schedule Part 4 claim by the Infraco in relation to a discrepancy between the Employer's Requirements and Infraco Proposals, because there would be an Infraco breach of warranty in failing to identify such discrepancy.

3. That Clause 4.3 elevates Schedule Part 4 to supersede all and any relevant provisions of the main body of the Agreement and that this would apply to changes in the Base Case Assumptions for whatever reason, leaving entitlement not limited by provisions in the main body or in the Schedule itself.

I do not think it is helpful to look at any part of the Agreement or Schedule as being "more important" than (statement 1), "elevated" or "superseding" (statement 3) other parts of the Agreement or Schedule.

Statement 1 is unattractive in respect that it sees only the provisions which are expressly stated to be subject to Clause 4.3 as being subject to it. Such an analysis does not take into account the broad wording of Clause 4.3 which provides that "Nothing in this Agreement shall prejudice Infraco's right to claim additional relief or payment …" My view is that a judicial approach to interpretation would not find statement 1 attractive.

What Clause 4.3 does is to refer all questions relating to additional relief or payment to Schedule Part 4. Schedule Part 4, with all its conditions and qualifications, regulates Infraco's entitlement to additional relief or payment.

Accordingly, I agree with the first two sentences of statement 2. Differences from the Base Case Assumptions are not Notified Departures if they result from breach of contract on the part of the Infraco, an Infraco Change or a Change in Law.

The example given in statement 2, however, is problematic in respect that what is described there as a warranty is a reference to the confirmation and acceptance of risk contained in Clause 4.4. That clause, however, is expressly stated to be subject to Clause 4.3. There is a tension, maybe a direct contradiction, between the two clauses.

However, Notified Departures are departures from the Base Case Assumptions and the Base Case Assumptions do not include the Infraco Proposals. It seems to me, therefore, that the existence of discrepancies between the Infraco Proposals and the Employer's Requirements would be of limited relevance to a claim under Schedule Part 4 in respect of a Notified Departure.

2. tie request elaboration from Counsel about the implications mentioned in page 4 of the Note and the prospects of successfully mounting these arguments.

The implication referred to on page 4 of my previous Note is that Clause 11.3 provides that, "To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to have complied with its obligations under the Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." The implication, therefore, is that to the extent that the SDS Services are not and have not been carried out and completed in accordance with the SDS Agreement, the Infraco will be deemed not to have complied with its obligations under the Agreement" etc. The implication is a necessary one to make sense of Clause 11.3.

I agree with the supplementary statement set out in the email.

3. Given that position, does Counsel consider that the requirements on the SDS Provider in the SDS Agreement are in line with the requirements of the Infraco Contract?

Yes.

4. tie wishes to explore whether tie is responding to a Notified Departure claim in the correct way where insufficient information is given, and seek Counsel's view on that point.

It seems to me that this question falls to be answered along with question 5.

5. tie would like to explore whether we can develop these requirements so that Counsel's "not unreasonable" becomes Unarguably Necessary, and would invite any further Counsel views in this respect in advance of the further developed list being completed.

It is outside my area of competence to advise on precisely what information is required by **tie** to be able to judge whether a claim that a Notified Departure has given rise to a deemed **tie** Notice of Change in terms of Clause 80.25 is valid or not, and it would be unwise of me to attempt to do so. However, as a matter of legal principle, given that Clause 80, and in particular clause 80.24, provides no detailed mechanism for the situation in which the Infraco claims there has been a Notified Departure but **tie** either do not accept that or do not know whether they should accept it or not, there has to be implied into that Clause provisions which will make it work. Those implied provisions should mirror as closely as possible those which apply to **tie** Notices of Change where it is **tie** who require the **tie** Change.

It may be helpful to consider that where it is **tie** who require the **tie** Change (in terms of Clause 80.1), **tie** will themselves be in possession of sufficient information for them to have made the decision that a **tie** Change is required. In order for the mechanism in Clause 80 to function, **tie** will require to be put in possession of all the information which would have been necessary for **tie** to come to the view that the **tie** Change is required. If the information which **tie** are requesting of the Infraco falls within this description, I consider that the requests are justified. Failure to comply with those requests would entitle **tie** to withhold the issuing of a **tie** Notice of Change and, indeed, they would not

be deemed to have issued a **tie** Notice of Change until such information had been provided.

6. For clarification, does Counsel agree that the Construction Works Price "includes reference" to the Base Case Assumptions in the sense that it must be calculated on the basis of those assumptions?

The Construction Works Price is defined (Schedule Part 1) as "the construction works price included in Schedule Part 4 (*Pricing*) as may be varied from time to time in accordance with this Agreement." Schedule Part 4, paragraph 3.1 provides that the Construction Works Price is a lump sum for all elements of work required in terms of the Employer's Requirements and the Infraco Proposals subject to variation in accordance with the terms of the Agreement. Paragraph 3.2.1 acknowledges the Pricing Assumptions. Paragraph 3.5 provides that the Contract Price (of which the Construction Works Price is an element) has been fixed on the basis of the Base Case Assumptions. By that route, the Construction Works Price must be regarded as having been calculated with reference to the Base Case Assumptions.

7. and 8. Please elaborate specifically on A10 and 11 from our original instructions about whether a breach of warranty arose from failure to disclose the annotated drawings, and whether there is a threshold for breach of the general obligations in the Infraco Contract, with specific reference to those set out in Clauses 6 and 7.

Infraco is deemed in terms of the contract to have arrived at the Construction Works Price and the Contract Price on the basis of the assumptions set out in Schedule Part 4, not on the basis of the Infraco drawings. Notified Departures only arise where the facts and circumstances differ from the Base Case Assumptions, not where they differ from the Infraco drawings. Accordingly, whatever the significance of the Infraco drawings, departures from them do not constitute Notified Departures.

A breach of warranty would only arise in the event the **tie** were to accept that reliance had been placed by them on the Infraco drawings and that departures from those drawings constituted Notified Departures. I do not think there is merit in such a concession and thus no loss arises from the existence, or even the reliance by the Infraco, on those drawings.

As for the general obligations contained in Clauses 6 and 7, as discussed at the consultation, these are obligations relating to the way in which the parties will carry out their obligations under the Infraco contract. They do not stand alone but can only be seen in the context of how the parties carry out their specific obligations. A breach of any of these general obligations could only be substantiated by reference to specific instances in which a party had failed to comply with its specific obligations under the contract.

9. Please elaborate on B4 from our original instructions for clarification: Have the Infraco claims thus far in respect of notified Departures been deficient such that tie's assertion that it cannot issue a tie Change Order is correct?

Question B4 in the original instructions proceeds on the basis that Infraco have provided **tie** with no information on the basis of which **tie** can assess the validity of Notified Departures. In this basis, the Infraco claims are deficient and **tie** cannot issue a **tie** Change Order.

10. Whether Counsel agrees that Clause 22.5 creates a qualifying provision to the occurrence of a Compensation Event – provided that the Infraco demonstrates the facts in 22.5.1 – 22.5.3.

I agree that compliance by Infraco with Clauses 22.5.1 – 22.5.3 is a necessary prerequisite to any of the events described in Clause 22.5(a) – (c) constituting a Compensation Event.

Again, if there are further matters arising, I shall, of course, be happy to provide clarification or additional advice.

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18 June 2009

NOTE BY SENIOR COUNSEL

for

tie LIMITED

18 June 2009

DLA
(Ref: KK/KK/310299/15)