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Our reference

AF/LMH/310299/15/
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120 March 2008

Please address also to tie Limited

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Dear Ms Lindsay,

**EDINBURGH TRAM NETWORK ("ETN")
DRAFT CONTRACT SUITE AS AT 12 MARCH 2008**

This letter is our report to update you on the matters which we addressed in our letter of 16 December and to report further on the evolution of the contract documentation towards tie's planned close date of March 24th. It has been produced under heavy time constraint which will explain the measure of overlap between this letter and its Annex. We are instructed that tie's intention is to issue a notification of intent to award the Infraco Contract and the Tramco Contracts on 13 March 2008. This letter therefore provides our view on the status of the contract suite and its readiness for this final stage of the procurement commenced in October 2006.

Comment [MSOffice1]: Can we have a DLA view on readiness ?

PROGRAMME

We have commented in this report on those elements of the procurement documentation and central contractual papers which when complete are viewed by tie as enabling Council officers to recommend Full Council authorisation for tie to enter into the ETN contract suite (as anticipated in the full Council Resolution of 20 December 2007):

1. CORE INFRACO CONTRACT TERMS SETTLED AND ALIGNED WITH TRAMCO CONTRACT

We are able to report that by close of business Wednesday March 12th the draft ETN contract suite will have been advanced to a point where there are no significant legal issues outstanding on the Infraco and Tramco core terms and conditions which would prevent the documentation being ready for signature by end of March. This forecast will rely also on the cooperation and focus of, and interaction with, the Consortium. Detailed drafting remains necessary to ensure accurate and fully agreed reflection of myriad commercial aspects which have come together in the last 10 days. The Annex to this report, a report by tie with input by ourselves on contractual matters, provides more detailed analysis of the draft contracts.

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Infraco/Tramco Contract alignment has been completed to a painstakingly detailed level on all issues which were outstanding when we last reported. CAF has agreed to the terms of the Tram Supply Agreement and Tram Maintenance Agreement and BBS and CAF have agreed to the terms of the two related Novation Agreements, subject to final review.

2. UPDATED RISK ALLOCATION MATRICES

The Infraco Contract Risk Matrix is appended to this letter. It is updated to show change since our December 16th letter.

3. PERFORMANCE SECURITY PACKAGE

Comment [MSOffice2]: Comment on relationship to market norms

3.1 There has been no material change to the structure of the main performance security package. The BBS Consortium will provide:

- (a) bonds/financial guarantees to be issued by ANZ Bank and/or Deutsche Bank (to cover the construction and commissioning of the ETN) ; and
- (b) German parent company guarantees to underwrite contractual performance and financial liability of the two UK contracting subsidiaries.

3.2 On Demand Bonds

Two "On Demand" Bonds offered by the BBS Consortium have been negotiated to a level (on proposed amounts and detailed acceptable terms and conditions), enabling the BBS Consortium to select their proposed sureties for confirmation of pricing. No issues of significance (aside from a possible adjustment to the value of the main performance bond to reflect final contract price) are outstanding. We are awaiting final confirmation on agreed terms accepted by the sureties.

3.3 Parent Company Guarantees

As you know, we have advanced these negotiations in parallel with the negotiation of the terms of the Council's formal Guarantee of tie's payment obligations under the ETN suite of contracts. The key terms are now agreed. What remains is the precise liability cap for each Parent Company Guarantee, following final agreement reached on the liability cap, duration and scope for the Infraco Contract, which will be settled by Wednesday 13th March. Following this, the Parent Company Guarantees will finalise quickly.

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3.4 Confirmation of Novation Strategy

Contrary to expectations in December 2007, the process of engagement on SDS Provider novation has proved arduous, with both BBS and SDS taking positions at opposing ends of the negotiating

spectrum. BBS have taken a most risk averse stance, due to their developing first hand views on SDS performance to date, in particular in relation to design Consent achievement, but also in relation to important aspects of design quality.

BBS have insisted on reinforced contractual protection (in our view overplayed) and commercial support in the form of **tie** accepting compensation entitlement for BBS in the event of SDS default on its design production and Consent delivery obligations, which risk to **tie** is discussed further in section 6 below. This is predominately a function of SDS serial underperformance throughout its mandate and also at a time when the need for due and proper performance has been under close bidder scrutiny.

Comment [MSOffice3]: And add comment there on extent of risk, time-limited period based on committed programme etc

Nevertheless, an advanced draft Novation Agreement is in play for negotiation to close. The terms of the Novation, as mentioned, result in retained SDS performance risk for **tie**. We cannot predict when this tripartite exercise can be brought to a conclusion since there is a lack of trust and apprehension on both sides, translating into a reluctance to compromise protection sought. Every means is being used to encourage the Parties to explore their minimum acceptable positions.

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4. RISK

4.1 Our view on the contractual allocation of risk and responsibility between **tie** Limited and the competitively selected private sector providers remains that the Infraco Contract and the Tram Supply and Maintenance Agreements broadly aligned with the market norm for UK urban light rail projects, taking into account the distinct characteristics of the Edinburgh Tram Network. The project's state of technical and commercial readiness has matured since Christmas. However, the fact that significant work still continues on the Employer's Requirements - the core project scope - at this very late stage (resulting in SDS insisting on an instruction to align their designs with **tie**'s Employer's Requirements and the Infraco Proposals) means that technical ambiguity (and therefore delay/cost risk) may exist in the interplay between design, scope and method of execution.

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5. THIRD PARTY AGREEMENTS

The position achieved regarding Third Party commitments made by the ETN project is as follows:

5.1 At ITN issue in October 2006, DLA Piper had included all major third party agreements **tie** had concluded at that time (plus SRU agreement in draft) in the Infraco Contract Schedule 13. This put Infraco on notice of the requirements to carry out work and/or observe constraints in these agreements. The inclusion of these agreements in the ITN documentation was carried out by DLA Piper

Comment [MSOffice4]: Can we add a reference to the sample review performed (I am told) by DLA on certain of the deals done in support of parliament submission.

without detailed **tie** instruction or review and that remains the case - that is to say the obligations selected for step down are DLA Piper's judgement, but not informed by any commercial or engineering view from **tie**. The third party agreements themselves - with the exception of the utilities diversions and the Network Rail APA - were all prepared by Dundas & Wilson for CEC without DLA Piper's input.

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Comment [MSOffice5]: Can DLA comment on quality of interface with D&W agreements, risk assessment etc ; also at 7.3.

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In addition to the Schedule 13 agreements (which has been updated to introduce further agreements concluded since ITN issue date), **tie** had entered into a range of commitments with private individuals and smaller businesses during the parliamentary phase and beyond. Following preferred bidder appointment, BBS took the position that they had never been shown or given access to these papers by **tie** (contained on two CDs "CD Commitments"). Whether this assertion is accurate or not, that is the preferred bid qualification BBS held to, with considerable determination. This situation was negotiated strenuously by **tie**.

5.2 BBS have accepted the contractual outcome that:

- (a) BBS must comply with the obligations set out in Schedule 13;
- (b) BBS must not put **tie**/CEC in breach of (or in a position where they cannot use entitlement under) the Schedule 13 Agreements (which include, in essence, Network Rail APA and EAL Agreements);
- (c) BBS undertakes to take all reasonable steps to ensure not to cause **tie**/CEC to be in breach of the CD commitments;
- (d) if BBS Construction Programme or normal activity is impaired by constraints/requirements in the CD commitments which are unusual or could not reasonably have been foreseen by an experienced contractor, BBS will be entitled to apply for relief and any demonstrable additional cost.

5.3 SDS are contractually obliged to ensure that their design deliverables take account of all third party agreements and commitments and they are guaranteeing this to BBS under the Novation Agreement. To confirm.

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5.4 EAL

This matter was finally negotiated to conclusion in February this year.

A number of issues have arisen from mismatches between the Licence, agreed to permit construction activity at the airport under MUDFA and the **tie**-Infraco Contract and the terms of the permanent

lease negotiated with EAL which was to reflect the license. These are required to be corrected to remove risk and a Minute of Variation is under preparation.

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Comment [MSOffice6]: What is state of play ?

A future risk is uncovered at present. The lease terms under which EAL is entitled to require the tramway to be shifted (post January 1, 2013) do not include an indemnity to CEC/tie in relation to any defects or unforeseen interference in the ETN system which might result from this intrusive construction activity and its ultimate interface with the existing ETN system. tie is assessing this.

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5.5 SRU

This agreement is included in Schedule 13 in draft form, but we understand no pricing allowance is at present made for the Infraco executing the works. Implications ?

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6. CONSENTS

6.1 The terms of the novation of SDS have been settled on the basis that BBS risk adversity required accommodation, otherwise no transfer of responsibility for design production and consent management could have been achieved on acceptable terms, in the timeframe remaining. Two prime concessions have therefore been made by tie:

A

- to the extent the CEC consenting process is delayed through no fault of SDS Provider, that delay will entitle BBS to claim a Compensation Event under the Infraco Contract (time relief and additional cost). Such a claim would also encompass SDS Provider delay costs. Although the SDS Contract provided that SDS would take all consent risk, without exception, BBS were not prepared to absorb this risk (through direct recourse to SDS Provider) having carried out post preferred bidder due diligence on the status and history of SDS design and the consent process within CEC.
- If through its own fault or dilatoriness SDS is late in delivering a design into the CEC Consent process and this in turn delays the issue of construction drawings to BBS, BBS will be entitled to apply liquidated damages up to an agreed level (currently proposed by tie at £1,000,000 and with approximate minimum rate of £20,000 per week).

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- BBS would have recovery risk on such liquidated and ascertained damages¹ but beyond the cap, **tie** would be required to recompense BBS.

B

- BBS are reluctant to take any risk as regards to quality of BBS SDS designs. The current position is that any damages or loss suffered by BBS beyond the £10,000,000 cap under SDS novated contract (in relation to deficiency in SDS design) would be a **tie** risk.

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6.2 Following the novation of SDS, **tie** will hold a collateral warranty from SDS regarding SDS services and work product prior to novation. The terms of the Collateral Warranty will be standard for a design and engineering services consultancy and were substantially contained in one annex to the SDS Contract when it was executed in September 2005. **tie** will also hold the SDS Parent Company Guarantee which supported the original SDS Contract. What is continuing value of this in a novated world?

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7. NETWORK RAIL ("NR") ASSET PROTECTION AGREEMENT

7.1 The Asset Protection Agreement with NR has been fully negotiated and is ready to close. This has been an arduous process, however the outcome is a document which achieves significant commercial improvements for **tie**/CEC on what was originally offered by Network Rail. The arrangement remains heavily tilted in Network Rail's favour, as is inevitable given the starting point of the regulatory template agreements. The main improvements secured have been:

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- (a) Significant widening of the circumstances in which **tie** can recover money from Network Rail;
- (b) Reasonableness in Network Rail actions and ability to refer to the Infracore ETN Suite form of Dispute Resolution Procedure;
- (c) Dilution of indemnities given by **tie** to Network Rail to a mutually acceptable level.

7.2 The unreasonable position taken by Network Rail regarding the indemnities contained in the Protection Provisions Agreement (entered into to remove Network Rail's objection to the tram scheme) delayed closure for a considerable time. This has now been resolved to restrict the scope and duration of this indemnity, particularly during construction.

¹ Note that the enforceability of such LADs is open to question unless they represent a genuine pre-estimate of BBS loss from the delay.

7.3 All property related aspects of the ETN-NR post construction interface have been handled by Dundas & Wilson.

Comment [MSOffice7]: See 5.1

7.4 Network Rail require a collateral warranty from BBS. BBS has, until yesterday, refused to disclose the entire draft Infraco Contract to Network Rail, resulting in Network Rail insisting that BBS would not be able to rely upon any part of the Infraco Contract not disclosed. A solution to this impasse is being brokered.

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8. CEC GUARANTEE

8.1 The terms and conditions of the CEC Guarantee and in particular its call mechanics, liability cap and protections are in line with market practice for this type of instrument. It should be noted that the Guarantee may be called upon by the Infraco on multiple occasions if **tie** is in payment default more than once. The instrument has been drafted, negotiated and settled with direct involvement and support of CEC Legal and Finance.

8.2 CEC will benefit from the same contractual defences and entitlements to set off as **tie** and will have no liability greater than **tie's**. No claim can be made for an amount which is in dispute if **tie** has been referred the matter under the dispute resolution provisions of the contract. The Guarantee is released at issue of Reliability Certificate.

9. PROCUREMENT RISK

You have asked for our opinion in relation to procurement risk imported on account of adjustment to risk allocation post Preferred Bidder. Our view is as follows:

9.1 The time which has elapsed since preferred bidder announcement is appreciable, particularly when an outside observer may not have a detailed understanding of the procurement strategy and the considerable difficulty caused by SDS Provider's underperformance. With that passing of time before an award, comes the risk of increased perception that the final deal has been restructured to accommodate the winning party on different and more favourable terms.

9.2 Both bidders final submissions were qualified as to acceptance of contractual terms and therefore their risk acceptance. It would be difficult, in our view, for a challenge to be upheld on the sole grounds that the settled position on Contractual Risk Allocation is a position that the losing bidder could point to and say: "that is far beyond what I would have required to maintain my price." There have been shifts in risk allocation, but in most key cases, this relates to the process of the novations, which was clearly identified as a post preferred bidder process. Both bidders' positions on novation were heavily qualified. A very detailed analysis would be needed to rank the changes

introduced post preferred bidder and that is beyond the scope of this letter and not possible in the time allowed.

9.3 The area where we have very limited visibility is price. We played a role in bid evaluation only in relation to the two bidders' response to the draft contracts. In order to advise that **tie** has the best platform from which to resist any challenge, we would need to discuss with **tie** the make-up of BBS original pricing submission and the current final offer and to understand how this compares to Tramlines final bid price. We note that Tramlines expressly raised this in an informal debrief last autumn.

9.4 We note below the commentary from **tie** in relation to the finalisation of commercial terms :

[In the period post the selection of preferred Infraco bidder, there has, as normal and expected, been movement in the commercial pricing of the contract based on a number of key drivers:

- Both parties in the preferred bidder review had lodged substantial and material qualifications to their bids and it was a key requirement in the ensuing months and prior to contract close that these were understood and resolved/removed, leading inevitably to change in contract terms.
- The substantial revision of the Employer's requirements, which are now at version 3.5 (Version 2.4 at conclusion of preferred bidder selection). These changes in requirements have been crystallised as both parties went through a process of harmonising and clarifying the requisite specifications. Included amongst these were the CEC's requirement for tapered poles in the heritage areas.
- Completion of further elements of the overall design which were not available at the time of the preferred bidder selection.
- Following the recognised changes to employer requirements and the completion and refinement of further aspects of the overall design, a review of the programme timescale has seen the programme move from delivery at the end of March 2011 to 16th July 2011 with concomitant effect on price.
- Review of the Depot equipment base with the TRAMCO preferred bidder has seen a number of changes to said base to assure compliance.

It is not considered that this price movement from £xxxm to £xxxm represents an issue which requires review of the selected party, the volume of change as described was to be expected and would have occasioned similar price movement, ceteris paribus, with other competing suppliers]

[tie / DLA to finalise commentary here]

- 9.5 We are not instructed in relation to any matter on the tram supply and maintenance procurements which would alert us to any evident or latent risk of a challenge once CAF are formally awarded the contracts. However, BBS have discussed with tie CAF joining the Consortium. If this occurred prior to contract award, it would necessitate a re-evaluation of the bid Consortium. Present indications are that CAF may join post contract award, a matter for BBS to handle, with tie's consent.

All our efforts over the next 48 hours are focussed on an efficient and optimal close of the contract documentation which will be initialled by authorised representatives to record final positions (from which the award documentation will be finalised) and on the basis of which tie can issue the notification of intent to award with confidence.

This report itself has needed to strike a difficult balance between commenting upon what is still under final discussion with an unpredictable counter party and what we can reasonably anticipate as an outcome.

Yours faithfully

DLA PIPER SCOTLAND LLP

cc Graeme Bissett, tie Limited Strategic Planning Director

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