



## EDINBURGH TRAM NETWORK

### REPORT TO CEC ON THE DEVELOPMENT OF THE CONTRACTUAL RISK ALLOCATION IN THE INFRACO CONTRACT

#### Executive Summary

In this report, we examine how the allocation of contractual risks in the Infraco Contract (the "Contract") has developed from the Invitation to Negotiate (the "ITN") version of the Contract to the 8 March 2007 version that is currently being negotiated by **tie** with the Infraco bidders.

We highlight below instances where, during the period between ITN issue and the 8 March 2007 submission, the allocation of risk has transferred from the private to the public sector, or vice versa, or where a new contractual risk has been introduced, in each case as a result of the development and adjustment of the Contract.

As our comments are of a relatively high level nature, in order to fully appreciate the precise allocation of risk throughout the Contract, this report should be read in conjunction with the appropriate version of the Contract and the risk allocation matrix circulated on 24 August 2007.

It should also be noted that, as **tie** are currently engaged in ongoing dialogue with the bidders with regards to the Contract, the risk allocation position as stated below is subject to change.

#### Public Sector risks

The following are additional public sector risks which have resulted from the development of the Contract from the ITN stage to the 8 March submission to the Infraco bidders:

- The Infraco can terminate the Agreement due to a failure to satisfy a condition precedent within 6 months of the Effective Date (unless such condition precedent has been waived by **tie**);
- Transfer of title in all materials and goods is to be on payment by **tie**, rather than on delivery to the Site. Such title is to pass to CEC, and not to **tie** (also title to any fossils and antiquities found on Site are to transfer to CEC as are Assets on termination or expiry of the Agreement);
- **tie**, not the Infraco, is to set up meetings in relation to addressing Operator Events and it is **tie's**, not the Infraco's, responsibility to obtain the Operator's support for corrective measures in this regard. Costs are to be paid by **tie** to the Infraco for managing and mitigating Operator Events;
- **tie** is required to use reasonable endeavours to provide assistance to the Infraco in obtaining Land Consents and Consents - although its costs in doing so are to be reimbursed by the Infraco;
- **tie** is responsible for obtaining, and maintaining in effect, the Traffic Regulation Orders which are required for the Infraco Works;

- The risk of encountering unexploded ordnance and any unidentified utility apparatus. **tie** is to be responsible for the reimbursement of the Infraco's reasonable costs and the granting of an extension of time if certain conditions are fulfilled;
- Procuring the compliance of **tie's** Representative and all persons authorised by **tie** or **tie's** Representatives with the rules and regulations of certain premises upon such persons accessing these areas;
- The costs of tests required by **tie** which are not identified in the Agreement (but not where the result of such tests show materials to not be in accordance with the Agreement or tests for the Infraco's audit);
- The review and assessment of the Infraco's performance at the end of each Performance Review Period, specifying requirements where performance has not satisfied the specified criteria;
- The granting of an extension of time to the Infraco, where it has suffered delay due to taking measures against Protestor Action;
- The bonding arrangements now include an adjudication bond and on-demand, retention and handback bonds. Formally all bonds were to be on an on-demand basis;
- The execution of any utility works or MUDFA works is a Compensation Event;
- The exercise by CEC of its discretion to temporarily stop up streets where there is a material and adverse effect on the Infraco Works is a Compensation Event;
- Failure to respond to a revised programme within 10 Business Days;
- Liquidated Damages are capped at 10% of the Contract Price; and
- Overall cap on liability of 15% of the Contract Price excluding bond proceeds and insurance proceeds.

### **Private Sector risks**

Additional risk has been allocated to the private sector as described below:

- The carrying out and completion of the Infraco Works is to be in accordance with the Code of Construction Practice and the Code of Maintenance Practice;
- The managing of the configuration control of the Edinburgh Tram Network;
- The delivery of the Infraco's comments on functional and maintainability issues during the design and construction process to **tie** and the Operator;
- The provision of technical advice to **tie** regarding operational deployment and integration of various components of the Edinburgh Tram Network;
- The provision of assistance to **tie** in obtaining Traffic Regulation Orders;
- The prevention of the consumption of alcohol or drugs by Infraco Parties at any premises where any obligations under the Contract are being carried out;
- The payment of **tie's** costs in rectifying errors where the Infraco has failed to do so;

- The costs and the notification to **tie** of the date of carrying out of the post-commissioning, performance and pre-operations tests and the date of substantial completion of the final section of works (including remedying of outstanding matters);
- Indemnifying **tie** for making alternative arrangements in respect of software, procuring or commissioning a bespoke "fix" or replacement system due to an Infraco breach;
- The provision of the Handback Package 12 months prior to the Expiry Date, as well as on the Expiry Date;
- Increase in the Change in Law threshold risk;
- Price adjustment associated with the instruction of Phase 1B;
- If the cap on Liquidated Damages is exceeded then this is a ground for termination; and
- The Infraco is responsible for the maintenance of access to bus stops and bus services and is required to minimise any nuisance or inconvenience to TEL's bus operations.

In order to align the Contract with the Infrastructure Maintenance and Tram Maintenance Agreements, a number of additional risks have been transferred to the Infraco. These include maintenance, responsibility for spare parts and tools, dealing with hazardous materials and control of records and computer systems. All of these risks have been included in the risk allocation matrix sent to CEC.

#### **Shared risks**

Both **tie** and the Infraco share responsibility for:

- having discussions regarding the adjustment of performance review criteria; and
- agreeing contractual provisions in lieu of invalid provisions which will have the same commercial effect as the invalid provisions would have had.

**DLA Piper**  
**29 August 2007**