

LEGALLY PRIVILEGED AND CONFIDENTIAL
KEY LEGAL RISKS OF REVISED CONTRACTUAL ARRANGEMENTS

Note: This appendix sets out a high level overview of the key legal risks under the revised contractual arrangements and is not an exhaustive analysis of all potential project risks.

	Risk	Comment/Mitigation
1.	The difficulties of the original contractual arrangements with the Infraco have been well documented. It is important to note that much of this contractual framework will remain in place, with only the changes necessary to implement the agreed terms of settlement of the dispute with the consortium members following mediation. This is an imperfect solution compared to a wholesale revision and rewriting of the original contract, but is a necessary consequence of continuing with the existing consortium rather than reprocurring the works.	A number of amendments have been made to change the risk allocation in the Infraco Contract and to shift certain risks from tie/CEC to the Infraco.
2.	Procurement	<p>The infrastructure and tram providers were originally procured through a competitive process by tie on behalf of the Council. There is a risk that by entering into revised arrangements with BBS and CAF tie/CEC will be in breach of procurement law. This would mean that any new contractual arrangement could be challenged in court and an order for ineffectiveness or damages could follow. A challenge may be made by any aggrieved party or reference made to the European Commission to ask them to carry out an investigation into non-compliance.</p> <p>In order to address this risk CEC has sought to agree new terms with the contractor which fairly reflect the evolution of the original contract. In addition CEC has taken expert QC opinion as to the procurement aspects of what is proposed. Whilst the risk of challenge cannot be fully eliminated, every avenue which can minimise such risk is being explored. It should be noted that the proposed new arrangements have been in the public domain for many months and no indication of challenge to the proposals has been received to date.</p>
3.	System Integration	Following the novation of CAF, the Infraco (BB and Siemens) will retain legal responsibility for system integration until the system acceptance

		<p>date. Successful integration of the system from a technical perspective will depend on co-operation and agreement between BBS and CAF in working together on system integration.</p> <p>Clearly this is not a legal issue but a fundamental technical and commercial issue that goes to the core of what we have employed the Infraco to deliver.</p> <p>This is being mitigated by there being a requirement on BBS and CAF to agree an integration specification. In the meantime they are working on and agreeing an integration programme. It is nevertheless critical that the Council receives and is satisfied with the Infraco's confirmation and assurance that system integration is under control and that BBS and CAF can deliver a technical solution before the Council enters into the revised contractual arrangements.</p> <p>It is important to note that system integration, such a fundamental deliverable, that Faithful and Gould have been unable to price the risk failure to deliver on this aspect. It is critical that this risk remains with the BSC and CAF.</p>
4.	Tram delivery and civils programme interplay	<p>We have a contractual obligation to CAF to have certain key stages of the depot complete and available for delivery and testing of the trams by certain dates, commencing on 15 October 2011. BBS have agreed to use reasonable endeavours to achieve those dates, and they believe they are on track to meet them, but are not liable if they fail to do so.</p> <p>The Section A completion date by which BBS must have completed the Depot and all tests is 16 December 2011 and this is contractually enforceable. As a result, we have a maximum exposure to CAF of 2 months' delay costs, on the worst case scenario that the earlier dates are not met, and the trams cannot be delivered and tested until 16 December 2011.</p> <p>We are advised that we are currently on programme for meeting these dates.</p>

5.	Effect of novation	At present, there is a single contract for infrastructure, systems and tram supply and maintenance with a single point of responsibility for the whole system. Following novation of CAF, CEC will have to directly manage the relationship with CAF, the tram supplier and responsibility for the system (other than an integration problem) will be split between CAF and BBS.
6.	Employer's requirements and change control	<p>The Employer's Requirements required amendment to reflect the reduction in the scope of the project. The parties have not yet agreed the amendments that will be required to the system performance, specifically the running times, and negotiations are continuing.</p> <p>The contract will not be agreed until these are finalised to CEC's satisfaction.</p>
7.	On-street works pricing	<p>It is important to note that the on-street contract price will be subject to variation in the event of a departure from certain agreed pricing assumptions or other delay (such as utilities) for which BB/Siemens are also entitled to an extension of time.</p> <p>In the event that the aggregate value of claims submitted for payment but which are unpaid exceeds £750,000 or the aggregate outstanding extension of time claims exceeds 21 days, the on-street works will proceed on a reimbursable cost basis, entitling BB/Siemens to be paid their actual costs (less certain disallowable costs), calculated by reference to an agreed schedule of rates. In these circumstances, the levels of liquidated damages and related liability cap will also reduce to levels to be agreed.</p> <p>If the cost of the on-street Works following transfer to a reimbursable cost basis exceeds a pre-agreed amount, tie/CEC will have the right to limit the Contract to delivery of the off-street section only. The exact terms of this right are still being negotiated.</p>
8.	On-street utilities	There are circa 550 known utilities clashes with the on-street works, of which around 100 are thought to be on the critical path. Each of these may

		<p>give rise to a compensation event for BBS.</p> <p>Faithful & Gould have assessed the likely cost of these works and advised that the budgeted contingency is sufficient.</p>
9.	Consequential effect on the off street works of changes to the on-street works programme	Any variation to the on-street contract price following a departure from the pricing assumptions could impact on the agreed programme for the Off-Street Works. This would give rise to a claim for prolongation costs in respect of the Off-Street Works. CEC is seeking to negotiate a change to the contract that would remove the risk of this consequential effect.
10.	Design finalisation	<p>The design is not yet fully completed.</p> <p>If CEC requires to make any changes to the design because its requirements are not finalised, this will afford the contractor the opportunity of making additional claims.</p>
11.	Obtaining consents/access	<p>CEC has a contractual obligation to obtain consents from third parties such as Network Rail and failure to obtain the consents on time will result in the contractor having a claim.</p> <p>McGrigors are presently reviewing the third party obligations in order to ensure that the risks are known and minimised as far as possible.</p>
12.	Unsettled entitlements	There are a number of tie/CEC requested changes to the works since mediation which have not yet been quantified or agreed and will give rise to an additional cost.
13.	tie will no longer have responsibility for project supervision and management. CEC has appointed a specialist project/contract management organisation to support the Council in the delivery of the project going forward. This gives rise to the potential for a of a gap in knowledge between the outgoing and the new project managers.	The new project managers are presently working with tie staff to ensure a smooth handover.
14.	Operator input will be required in relation to the testing of the trams and CEC will be responsible for procuring the necessary input.	Discussions are being held with Lothian Buses in this regard.

15.	There is the risk of the re-emergence of behaviours of the contracting parties which previously caused difficulties with the project	Since mediation, the parties have been working together to establish a more collaborative, partnership-based method of working. The change in personnel involved in managing the contract should assist. In the revised contract, the ability of the Infraco to cease work while variations to the works are valued has been removed.
16.	Occurrence of force majeure/relief events/change in law	It is usual for the client (CEC) to bear this risk.
17.	Defective work	Financial responsibility remains with the contractor but any requirement to remedy defective work would clearly give rise to delays in the project.
18.	Insolvency	Insolvency of a contracting party would give rise to delay. The risk has been mitigated by the bonds and parent company guarantees that were obtained at the time of entering into the original contract.