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**From:** Anthony Rush [rush\_aj@cqm.co.uk]  
**Sent:** 02 December 2010 10:00  
**To:** Richard Jeffrey; Steven Bell  
**Cc:** 'Brandon Nolan'; 'Nigel Robson'  
**Subject:** RE: McGrigors - Privileged and confidential

All,

On the balance of what would be reasonable and normal I have always thought Steven's opinion to be correct (albeit I have had to get him to explain it to me several times). Indeed whenever I have run it past other engineers including RBB they have agreed on that basis. But I have needed it explained so many times that it does not "leap out of the pages" of the Infraco Contract.

I think we should also take note of what RCKQC opines:

"In light of the foregoing I would have to conclude that in the event of tie giving notice of termination of the Agreement in reliance upon the specified RTN's, there would be a material risk of their acting being found to be a wrongful repudiation of contract."

We have decided that we will not give notice of termination solely on reliance of the specified (RTN1 and 6 only) or indeed on any of the others.

I would also remind us that it was the commonly held view that BSC would dispute the RTN's through DRP – they didn't so they have given us a different challenge, but one which gives us time.

Whilst not in any way wanting to cast doubts on Richard Keen's opinion I do think he should have considered paragraph 2.4 of RTN 1, which refers to correspondence on the detail of apparent defects. At the time of issuing the RTN I was satisfied that the RTN did give BSC a clear understanding of what was been complained of and I also consider the fact they issued a rectification plan (albeit maybe not a competent one because they deny there is a breach) shows that they understand what was being complained of.

I refer to "apparent defects" because I take the view (please check our response to the rectification plan which I haven't got to hand) that part of the acceptable remedy would have included a testing regime to establish the full extent of the defects. However, the extent of apparent defects are a matter of record and fact.

You will note that the tie letter referred to in paragraph 2.4 refers to the different nature of materials in Scotland. In this respect I referred in my slides for the team meeting to a meeting note in February 2008:

"To note that the issue of the interface between the asphalt surface, sealant and rails requires further understanding and detailing in view of different asphalt hardness compared with existing installations of the trackform (UK being softer) and the volume of buses passing over many sections of the track. Also to note similar issue of where to place edge of floating slab in relation to the road cross-section (taking account of drainage if place at the gutter)."

That note not only refers to the issue of materials but it also refers to sealant and rails; and the volume of buses. Issues which are being addressed in the rectification plan and are causes of the defects.

I don't think that we should lose sight of the fact that BSC have admitted that there are defects and that we have always doubted that on its own the defects on Princes Street would in normal circumstances be sufficient to repudiate the Contract at this time – but it did add up in the complaint on conduct.

Richard is absolutely right in saying that our prosecution of breach of contract needs careful preparation. That preparation requires the expert opinion of RBB on these issues based on a full disclosure of all of the facts (as exemplified by Blair having dug out the minute).

Richard Keen is not saying that we haven't got a case he is saying that there is a material risk. On which subject I think we have to learn from Lord Dervaird who decides that tie should have applied for exemption from Landfill tax because they were the "beneficiaries". This is Lord Dervaird setting a new precedence because what LFT2 says on the subject of who should apply is:

"The person carrying out, or intending to carry out the reclamation of the contaminated land should apply for the exemption. This would normally be the landowner, developer or main contractor."

In my experience the contract would clearly say who is responsible – the problem with this Infraco Contract is that it isn't clear and tie clearly have to overcome the concept of "contra proferentem" in the minds of Lord Dervaird and the other adjudicators.

Nobody should believe that there is an easy answer to the Infraco Contract.

Tony

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**From:** Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]  
**Sent:** 02 December 2010 09:01  
**To:** Steven Bell  
**Cc:** Anthony Rush; Brandon Nolan; 'Nigel Robson'  
**Subject:** RE: McGrigors - Privileged and confidential

Steven, thanks for this.

Given that the contract does not contain explicit requirements for the design to be integrated and assured etc prior to starting on site, we need to be clear on why we think it is nevertheless a requirement that this is so.

The risk here is that, should they win the sub-contractor DRP, they will then presumably argue that all the delay caused by our refusal to issue a permit to work will be to our account.

[It is also worth recalling that at the time we considered this risk, and in the absence of an agreed way forward as to how the contract should operate (especially clause 80), on balance we still felt it was better not to have them start on street]

I understand our argument to be that,

- Whilst contractually it may be their risk if they build a design that cannot be subsequently integrated or approved, our actions in refusing to issue a permit on the basis of an incomplete un-approved design are reasonable in that, in the event that work was to a non-approved design and had to be re-done, we would suffer damage (loss of reputation, further disruption to traffic during remedial works, etc) that are not catered for under the contract.
- That it is not unreasonable for us to expect them to have a completed design at this stage in the process
- That to have an approved design before starting work is best practice
- That to have an approved design before starting work is minimising our risks
- That we have reasonable grounds to believe the design that they are currently working to will not be approved
- That they have not yet come up with a satisfactory re-design for the Princes Street works
- That we have made them aware of our concerns over the suitability of the design. (I assume this is so)

All comments gratefully received.

R

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**From:** Steven Bell  
**Sent:** 01 December 2010 22:51  
**To:** Richard Jeffrey  
**Cc:** Anthony Rush; Brandon Nolan; 'Nigel Robson'  
**Subject:** RE: McGrigors - Privileged and confidential

Richard

My view on design integration is as follows:

Contractually, there is a clear obligation to implement system integration (Clause 8) and within Clause 8.5, for ensuring all elements of the design are compatible with system integration. Particularly relevant are clauses 8.1.2 and 8.1.6 which highlight technical interfaces and the safety assurances and Case for Safety. I have attached a short note on this matter previously prepared which addresses elements of the ROGS and Case for Safety.

I believe that the obligation ( and risk) of satisfying the integration requirement falls to Infraco and that they should, through their interdisciplinary design checks, assurance and integration activities ensure the design and systems are integrated (or capable and expected to achieve integration) to enable them to satisfy the Case for Safety as defined in schedule part 1 for ROGS.

What Clause 8 or schedule part 3 (CoCP) do not say is that satisfactory integration or design assurance are explicit conditions precedent on the issue of a Permit to Commence Works. I think this is the area of concern that Richard Keen alights on.

Happy to discuss on or before Monday.

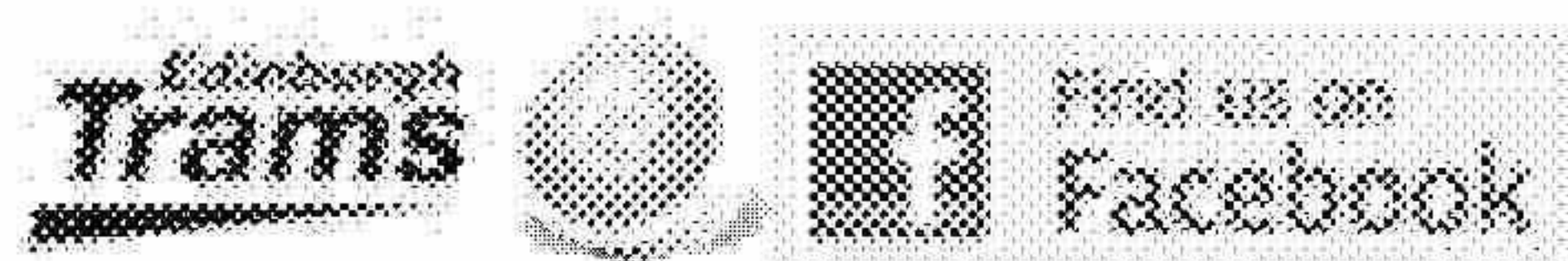
Steven

**Steven Bell**  
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**From:** Richard Jeffrey  
**Sent:** 01 December 2010 16:58  
**To:** Steven Bell  
**Subject:** FW: McGrigors - Privileged and confidential

Steven, can you articulate why you believe the point about an integrated design please, thanks

R

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**From:** AJRush [rush\_aj@cqm.co.uk]  
**Sent:** 01 December 2010 13:34  
**To:** rush\_aj@cqm.co.uk; Brandon Nolan; Richard Jeffrey  
**Cc:** Nigel Robson  
**Subject:** Re: McGrigors - Privileged and confidential

I think the points that Richard Keen raises are points for RBB to consider.

I do not share his concerns about Infraco being able to assert that the defects complained on in Princes Street were not apparent - but that may be because I am too close to the issue.

With regards to his concern that the Contract does not require the design to be integrated - this point as troubled me but Steven has always been resolute on it. My reasoning in support has always been that it follows that before a drawing can be issued for IFC purposes it has to be integrated so that it will eventually form part of an integrated package. This is an important point as it appears that Siemens haven't completed their trials to validate the systems design.

Anthony Rush  


Sent from my iPad

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Sent using my BlackBerry® from Orange

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BoW Tel   
Mobile 07   
email [rush\\_aj@cqm.co.uk](mailto:rush_aj@cqm.co.uk)

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**From:** "Nolan, Brandon" <[Brandon.Nolan@mcgrigors.com](mailto:Brandon.Nolan@mcgrigors.com)>  
**Date:** Wed, 1 Dec 2010 12:35:18 -0000  
**To:** Richard Jeffrey <[Richard.Jeffrey@tie.ltd.uk](mailto:Richard.Jeffrey@tie.ltd.uk)>  
**Cc:** <[rush\\_aj@cqm.co.uk](mailto:rush_aj@cqm.co.uk)>  
**Subject:** RE: McGrigors - Privileged and confidential

Richard

Aiming to issue a draft later today. Have just received Richard Keen's further Opinion which I attach.

B

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**From:** Richard Jeffrey [mailto:[Richard.Jeffrey@tie.ltd.uk](mailto:Richard.Jeffrey@tie.ltd.uk)]  
**Sent:** 01 December 2010 12:25

**To:** Nolan, Brandon  
**Subject:** FW: McGrigors

Brandon,

What is the latest please, thanks

R

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**From:** Nick Smith [Nick.Smith@edinburgh.gov.uk]  
**Sent:** 01 December 2010 12:05  
**To:** Richard Jeffrey  
**Subject:** McGrigors

Richard

Have you any update on when the McGrigors report will be available? From what Brandon said last week he was planning on providing it by last Friday. Even an initial draft would be useful if you have it.

Thanks

Nick

Nick Smith  
Principal Solicitor - Commercial, Procurement & Finance  
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City of Edinburgh Council  
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East Market Street  
Edinburgh EH8 8BG

(t) 0131 [REDACTED]

*Please note that I am not in the office on a Monday*

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