

## Executive Summary

MOV 4 reached agreed form (but has yet to be executed) following extensive engagement between the CEC negotiating team and Infraco negotiating team on Saturday 16 April 2011.

This agreed document was provided to tie and has been reviewed, including a detailed discussion with tie, CEC legal and McGrigors on 19 April 2011.

This report highlights advice from tie to the CEC negotiating team over the last three weeks and includes detailed mark up comments to fully inform CEC decision makers in the attached Appendices.

For ease of reference, tie considers that the principal issues that CEC should consider when deciding on executing this Variation to the Infraco Contract are as follows:

1. **Valuation of Entitlement under this MOV.** The value of the payment schedule included in the MOV (particularly the £49m payments scheduled over certificates 1, 2 and 3) cannot be supported by our analysis. It is noted this is a commercial decision for the funders.
2. **Certifier Agreement.** This needs to be prepared and in agreed form, including mechanics of operation, and compatible with responsibilities and accountabilities (and necessary Insurances).
3. **Payment.** The payment mechanics in Clause 6 prescribe payment by 22 April 2011 based on a Certificate which has still to be received by tie (or CEC?); with no vesting of materials until cash has been received by Infraco; with no executed version of the MOV4; with a Certifier Agreement which has yet to be agreed and executed by the Certifier, tie, CEC or Infraco); with no instruction from CEC to tie to pay on the basis of the MOV4 terms and with no revised delegated authority from CEC above the current £545m approved budget (tie considers that these payments include entitlement beyond the £545m). In addition, all payments are now classified as final and binding, allowing no changes to these amounts at a final account stage.
4. **Removal of Design approval rights and Infraco Obligations / ROGS duty holder risks.** The proposed changes to utilising only the Infraco IDC procedure, deleting obligations under Clause 10 and removing tie rights of approval under Schedule Part 14. If the transparency of the "self certification" being undertaken by Infraco is not suitable and timely, it is very likely to increase the risk of tie (and potentially the ICP) being unable to discharge their duties under ROGS. This could result in the city being unable to open the tram system for revenue services. Recent correspondence demonstrates an uncooperative approach from Infraco.
5. **Design obligations and Outstanding Consents.** The MOV does not require Infraco to achieve any completed design for the payments made under this variation and there is no transparency of what the Certifier may be considering within Certificate 1 for design. The MOV also transfers the risk of all outstanding Consents to tie, irrespective of whose obligation they currently are.
6. **HSQE rights regarding subcontractors.** The MOV removes all rights of tie to impose any restrictions on Key Sub-Contractors including Health and Safety performance measures. Given Infraco's underwhelming attention to this matter, tie will no rights to address this for the Prioritised Works.

7. **Programme amends Section A completion irrevocably.** By agreeing to MOV4 it is accepted that Infraco are entitled to EOT to December 2011 to complete a reduced scope of works and that no LDs will be levied before then. If MOV5 is never signed this cannot be taken back.
8. **Formal Advice Note from McGrigors.** The **tie** advice incorporated in this report should be read in conjunction with the legal advice note prepared by McGrigors on the impact of MOV4.

## Introduction

The Minute of Variation 4 (MOV4) agreed between CEC negotiating team (supported by McGrigors) and Bilfinger Berger and Siemens representatives (supported by their legal advisors) representing Infraco was prepared to amend the Infraco Contract in line with the Heads of Terms agreed at Mar Hall Mediation in March 2011.

It is intended to be a “stepping stone” to MOV5 but also needs to cater for the circumstances if MOV5 is never signed.

The scope is restricted to defined Prioritised Works, associated preliminaries plus payments for the vesting of materials and equipment and payment for Infraco remobilising to undertake works after their cessation of work in October 2010.

**tie** has provided detailed separate commentary on the above valuation issues to CEC and their lead negotiator (C Smith) during 12 March to date.

The risk exists that the Infraco will see the “precedents” set by MOV4 as the building blocks to start negotiations from on MOV5. Tie’s experience to date has been that once an approach has been “agreed” Infraco will resist any dilution of such movement.

## Commentary on proposed Minute on Variation 4

### Overview

Design is not explicitly within scope of works although it is in the justification for the Certifier’s Certificate 1.

The parties have agreed to a joint risk register approach but that has made little headway so far. This MOV is silent on it.

A formal legal advice note has been requested from McGrigors to advise CEC and tie on the significance of the amendments to the Infraco Contract enacted by this MOV and the consequent changes to the client rights, obligations and remedies available once this has been executed.

### Clause 1: Definitions

Generally, not all Schedules are in final form and need final review before sign off.

Certifier Agreement needs to be in available in final form and mechanics agreed before MOV is signed. Current drafting does not fit with processes described by C Smith.

Fixed Sum Prioritised Works Price appears to have mismatch between Programme, Scope and Cost schedule.

IDC definition is ok in its own right but operative clauses a major concern.

Materials and Equipment definition allows for other than items originally listed to be vested.

Prioritised Works definition east of Depot should to be tidied up with diagram inconsistency.

Outstanding Consents obligation now all moved to **tie**. Major Concern.

Prioritised Works Programme is not yet agreed (Princes Street Remedial Works still under discussion). If this is left as currently drafted it will generate immediate change.

## Conclusions

CEC decision makers should be aware that execution of this MOV4 will transfer significant financial benefit to Infraco and dilute Infraco contract terms related to design, valuation of the Prioritised Works and Programme. There are increased risks in relation to successful compliance with duty holder responsibilities under ROGS

## Appendices

- Appendix 1      Commentary provided 14/04/11  
                    Email analysis of Infraco's IDC proposal 15/04/11
- Appendix 2      Commentary provided 18/04/11 on MOV4 circulated 16/04/11
- Appendix 3      Consolidated Commentary provided 20/04/11 following review on 19/04/11 and  
                    20/04/11