

PROJECT PHOENIX STATEMENT

Preamble

The City of Edinburgh Council, as project sponsor, and tie, as contracting party (together the "Clients"), have determined that they will agree to procure the delivery by Infraco of an operational tramway from the Airport to St Andrew Square, provided that such agreement does not prejudice the achievement of the Project Vision.

Any agreement between the Parties arising from this Mediation must be consistent with this objective and the requirements and more detailed objectives set out in this statement. During the period set aside for the mediation commencing upon 8 March the Clients wish to achieve the following:

- agreed figure in principle in full and final settlement of all claims from or on behalf of Infraco;
- agreed guaranteed maximum price ("GMP"), completion date and Heads of Terms for Airport to Haymarket, to enable the earliest recommencement of the Infraco Works;
- agreed process, with timetabled Deliverables, to ensure an agreed GMP and completion date for Haymarket to St Andrew Square, by 2nd September 2011; and
- agreed and signed agreement to reflect the above by 2nd September 2011.

The Clients acknowledge that there have been circumstances which were excluded from the Construction Works Price- arising from Specified Exclusions, Defined Provisional Sums, Pricing Assumptions (all as defined in Schedule Part 4 of the Infraco Contract) and the requirements of third parties and tie. The objective of Project Phoenix (which in effect constitutes an updating of the tie's Project Carlisle proposal of 24 September 2010) is to put the Parties to the Infraco Contract into the position in which they would have been at May 2008, had such excluded circumstances been known at the time but on the basis of the GMP Scope of Works described below.

In doing so the Clients are *inter alia* governed by the *Ethical Standards in Public Life etc. (Scotland) Act 2000 - Model Code of Conduct* and *EU Procurement Law* which requires any agreement arising from this Mediation to be in the public interest. Moreover, any such agreement has to comply with EU procurement law.

tie's proposed changes to the scope of the Infraco Works will be limited to any variation necessary for the satisfactory and contractually compliant completion of the Infraco Works (Section 1a from Airport to Newhaven, together with the Depot at Gogar and the spur at Roseburn Junction) as varied by the GMP Scope of Works described below.

Defined terms used in this statement have the same meaning as set out in the Infraco Contract entered into between tie and Infraco on 14 May 2008 as subsequently amended by minutes of variation between those Parties dated 14 May 2008, 3 June 2009 and 23 April 2010 and by the Princes Street Settlement Agreement between those Parties dated 29 May 2009.

GMP Scope of Works - Essential Requirements

The Clients will require these essential requirements to be met by any agreement arising from this Mediation:

- price certainty with a GMP for a revised scope of Infraco Works described below (the "**GMP Scope of Works**");
- the GMP Scope of Works will comprise a fully working and commissioned Edinburgh Tram Network operating on agreed run-times from the Airport to St Andrew Square and will include enabling works to the Edinburgh Gateway Project, with the assumption that the Infraco will agree to provide the earliest and most cost efficient means of achieving this scope;
- an agreed risk allocation between the Parties based on a Risk Register to be created for the GMP Scope of Works and an agreed risk management process;
- that any agreement arising from this Mediation will build on the obligations of the Parties to work in mutual cooperation pursuant to Clause 6.1 of the Infraco Contract and will entail the creation of a joint forum of the Parties to ensure delivery of the Project Vision to the extent of the GMP Scope of Works;
- Infraco shall be responsible for a timeous and best value Design compliant with required Consents but a collaborative process will be introduced to help achieve this;
- in entering into any agreement arising from this procurement, the Parties will ensure that such agreement complies with EU procurement law;
- any agreement reached will be in full and final settlement of all payments, claims, entitlements, rights and charges properly due to or by Infraco to or by **tie** under the Infraco Contract;
- the GMP encompasses all Infraco Works completed to the date of any agreement arising from this Mediation;
- Infraco will be required to deliver not less than 20 Trams;
- CAF will be required to use its best endeavours to assist the Clients in obtaining a cost efficient way of procuring a delayed provision of any remaining Trams not delivered to **tie** under the Infraco Contract;
- Infraco will be required to enter into such contractual arrangements as are required to achieve this;
- the GMP Scope of Works is in substitution for and replaces all Infraco Works arising from or required by all actual or potential Permitted Variations, tie Changes and Infraco Notices of tie Changes existing as of the date of the tie Change Order to be issued pursuant to any agreement arising from this Mediation;
- the terms of Schedule Part 4 of the Infraco Contract will cease to apply; and

- the existing security package of bonds, guarantees and collateral warranties provided in favour of **tie** pursuant to the Infraco Contract will require to be amended to reflect the GMP Scope of Works as may the guarantee by CEC in favour of the Infraco.

Objectives and Guiding Principles of agreement arising from Mediation

The following issues reflect certain of the principles and other requirements which the Clients require to be considered in reaching any agreement arising from this Mediation:

1	Infraco will be required to submit any outstanding Issued for Construction Drawings for review and approval to those bodies listed in paragraph 8.2 of Schedule Part 14 of the Infraco Contract.
2	The Infraco will remove any contaminated soils which are classified as special waste (as defined in the Special Waste Regulations 1996) to a suitably licensed landfill site/disposal facility. Subject to the Infraco having used its best endeavours to treat such material on site in a cost efficient manner it will be reimbursed for its demonstrable cost up to an aggregate total of £8 million.
3	The Infraco will allow in its price and programme for diverting any unforeseen utility up to a cost of £50,000 in respect of each diversion. To the extent that the diversion of an unforeseen utility exceeds £50,000 in cost it will be treated as a tie Change.
4	(i) The Change mechanism will need to be amended but in particular in relation to Design: <ul style="list-style-type: none"> (a) subject to (b), unless any addition, modification, reduction or omission arises from an error, discrepancy, ambiguity or default by or of the Infraco or any Infraco Parties, any instruction to add to, modify, reduce or omit any part of the Design will constitute a tie Change; and (b) any revision that requires to be made to the Design in order to obtain Consents will not constitute a tie Change.
	(ii) other than to rectify an error, discrepancy, ambiguity or default by or of the Infraco or any Infraco Parties, the Infraco will not add to, modify, reduce or omit any part of the Design unless instructed by tie .
5	Infraco has not delivered the Design for Phase 1b as required by the Infraco Contract. In light of the standard of the Design delivered by the SDS Provider at point of novation, the significant scale of the Infraco Changes required by the Infraco to that Design and the absence of an approved on-street track design, tie releases the Infraco and the SDS Provider from any obligations they have to deliver a Design for Phase 1b.
6	Other than in relation to the Infraco Works included in any agreement arising from this Mediation the Infraco will not be required to deliver the Design for the Infraco Works from St Andrew Square to Newhaven.
7	tie will be entitled to acquire from Siemens any non-proprietary materials and equipment which it wishes to use for delivering the Systems between St Andrew

	<p>Square and Newhaven subject to:</p> <ul style="list-style-type: none"> • prices which are consistent with the Construction Works Price; and • suitable warranties and guarantees attaching to such materials and equipment.
8	<p>Unless such a rectification plan has already been approved by tie, Infraco will submit to tie within 28 days of the conclusion of this Mediation an acceptable rectification plan for the Defects to the trackway installed in Princes Street, which failing the Princes Street Settlement Agreement will be terminated and replaced with an agreement to the effect that the Infraco will be paid a reasonable sum for any work carried out by the Infraco which is retained by tie and accepted by the Independent Competent Person. Such sum shall take account of the cost of rectifying the said works at the absolute discretion of tie.</p>
9	<p>The principles of Clause 81.3 of the Infraco Contract will be incorporated into any agreement arising from this Mediation and the Infraco will deliver a Value Engineering Report for the whole of the GMP Scope of Works within three months of the date of such agreement and for such individual parts of the GMP Scope of Works as may be requested by tie at its absolute discretion.</p>
10	<p>The Infraco shall deliver to tie completed Sub-Contracts required by the Infraco Contract for all Key Sub-Contractors and other Sub-Contractors the Infraco intends to appoint for the Infraco Works included in the GMP Scope of Works in accordance with Clause 28 of the Infraco Contract.</p>
11	<p>The Parties will agree new Milestones for payment purposes pursuant to Clause 66 of the Infraco Contract.</p>
12	<p>The Parties will agree revised Sectional Completion Dates which are designed to have an Edinburgh Tram Network in service from the Airport to St Andrew Square at the earliest possible date. To achieve this Clients are prepared to reconsider times required for testing and commissioning the Trams and Systems including the Tram Type Tests, the Tram Commissioning Routine Tests and the Systems Acceptance Tests.</p>
13	<p>The Infraco shall not be entitled to any extension of time to the revised Sectional Completion Dates unless there is a tie Change.</p>
14	<p>In the event that tie issues a Certificate of Service Commencement before the agreed due date for the issue of the said certificate the Infraco will receive a payment calculated by the number of full weeks saved at rates to be agreed.</p>
15	<p>The Parties will agree a joint communications protocol to cover all external communications by the Parties subsequent to this Mediation.</p>

24 February 2011

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