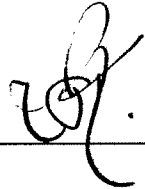


**NOTE OF CONSULTATION WITH SENIOR COUNSEL  
ON THURSDAY 8 JULY 2010 FROM 4.30PM UNTIL 7PM,  
AT PARLIAMENT HOUSE, EDINBURGH**

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IN ATTENDANCE: RICHARD KEEN QC, DEAN OF FACULTY ("Senior Counsel")  
STEVEN BELL, TRAM PROJECT DIRECTOR, TIE ("SB")  
TONY RUSH, CONSULTANT, TIE ("AR")  
NICK SMITH, CITY OF EDINBURGH COUNCIL LEGAL ("NS")  
ANDREW FITCHIE, DLA PIPER ("AF")  
JOANNE GLOVER, DLA PIPER ("JG")



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**1. Introduction**

1.1 Senior Counsel opened the Consultation by stating that he would like to comment on a few general issues which he has identified (which might appear random at first), before touching upon the specific issues and questions asked of him in the instructions from Instructing Solicitors.

**2. General obligations**

- 2.1 There are a number of general contractual obligations which Senior Counsel recommended are approached with care e.g. partnering obligations, good faith obligations. These obligations can be used to "put colour" on a more particular term of the contract, but **tie** should not rely solely on those obligations (more of a "good faith" character) to terminate.
- 2.2 With regard to the obligation on the Infraco to exhibit the required duty of care, **tie** would require expert evidence from a comparable organisation that this is a standard which the Infraco has failed to meet. The Infraco would be looking to lead credible evidence that another contractor may have done the same things in the same circumstances. In litigation, there is a relatively high evidential test with regard to establishing breach of duty of care.
- 2.3 Senior Counsel stated that **tie** should particularise its assertions of breach e.g. provide timescales and specific details of each breach. He saw that this has been the approach in the draft Remediable Termination Notices included with the instructions.

**3. Repudiation**

3.1 Senior Counsel described the situation where party A issues a termination notice which is wrongful and party B rejects the termination notice, but nevertheless takes it as repudiation of the contract on the part of party A, who finds himself in a situation where the contract has been terminated from under him.

- 3.2 Senior Counsel considered that this issue cannot arise in this case. Senior Counsel noted the relevant provisions of the Infraco Contract which led him to this conviction.
- 3.2.1 Clause 77.10 - acknowledgment that the only rights available to the Parties to terminate the Infraco Contract are those termination rights expressly set out in the Infraco Contract and particularly that the Parties are not entitled to accept the repudiation of the Infraco Contract. Terminating by acceptance of repudiation is therefore not available to the Parties. The Infraco would need to deny the Termination Notice and then claim in damages.
- 3.2.2 Clause 88.4 - a further express statement that the Infraco is not entitled to terminate the Infraco Contract, or accept any repudiation of the Infraco Contract, except where there is a **tie** Default as prescribed by the Infraco Contract.
- 3.2.3 Senior Counsel considered the limbs of the definition of "**tie** Default", which are very limited. Senior Counsel considered that we are really only concerned with (b): "*a breach by tie of any of its material obligations under the Infraco Contract which substantially frustrates or renders it impossible for the Infraco to perform any material part of its obligations for a continuous period of 45 Business Days*".
- 3.2.4 Senior Counsel considered that intimation of a notice will never *per se* be an event which would render it impossible for the Infraco to perform its obligations. There would need to be an act by **tie** which was a material breach and which made it impossible for the Infraco to perform. Senior Counsel also considered that a Court looking at this would see reference to other provisions in the Infraco Contract which allow the Infraco to access a (time/costs) claim.
- 3.3 Senior Counsel's view is that it is entirely reasonable to say that, if **tie** delivers a Remediable Termination Notice, that of itself cannot constitute repudiation. Even if it did, it is not a repudiation capable of acceptance by the Infraco. Senior Counsel noted that if, for example, **tie** stopped providing instructions, this may end up in **tie** Default (b).

#### 4. **BDDI to IFC and the SDS Provider's function**

- 4.1 Senior Counsel noted that it is not difficult to infer from the Minutes of the Meeting referred to in the Instructing Solicitors' instructions (July 2009) and the draft collateral agreement between BB and SDS what was going on between the Infraco and SDS. However, if **tie** were seeking to found a termination on these matters, **tie** would need to bring evidence to come within clause 92 (*Termination for Corrupt Gifts and Fraud*) of the Infraco Contract.
- 4.2 Senior Counsel noted the terms of clause 92 and the definition of "Prohibited Act". Limb (d) is relevant: Prohibited Act means "*defrauding, or attempting to defraud or conspiring to defraud tie, CEC, the Scottish Executive, Transport Scotland, the Scottish Ministers or any other public body;*"
- 4.3 Senior Counsel has looked at the material. In particular, paragraph 11 of the draft agreement before it was changed by Pinsents links with the commitment in the Minutes. However, the issue is that proving fraud is extremely difficult. Although in a civil case the burden of proof is the balance of probabilities, in fact, the Courts always demand the most cogent and clear evidence before they will make a finding of fraud.
- 4.4 If someone from the SDS Provider were to come forward and give evidence confirming the intent of the agreement was to disadvantage **tie**, then **tie** would have a case. Absent such evidence, Senior Counsel considered that there is no real prospect of proving this.

4.5 Senior Counsel noted that this is not to say that this issue should be dismissed and he will come on to how to use this tactically (*see section 8 below*), but, in Senior Counsel's view, it is not enough for Prohibited Act.

## 5. Infraco Defaults

5.1 Senior Counsel considered that the definition of "Infraco Default" should not be read in isolation - it needs to be read in the context of the Infraco Contract as a whole (including reasonableness, good faith, partnership), and also in the context of the mechanisms in the Infraco Contract designed to deal with material breaches of contract.

### 5.2 Underperformance Warning Notices

5.2.1 Senior Counsel discussed clause 56.7.1 in relation to Underperformance Warning Notices, which provides: *if "at any time the Infraco has committed any material breach of its obligations under this Agreement... then tie may issue an Underperformance Warning Notice to the Infraco..."* By "material breach", Senior Counsel noted that his view that the ordinary meaning is a breach which goes to the root of the contract. The Infraco Contract does not confer the right to terminate - if there is a "material breach"; the Infraco Contract provides that **tie** may issue an Underperformance Warning Notice.

5.2.2 Limb (g) of the definition of Infraco Default is *"the issue of four Underperformance Warning Notices in any twelve month period."* Therefore, Senior Counsel considered that there has to be something other than a single material breach of contract, before the Infraco Contract can be terminated.

5.2.3 When limb (g) applies (i.e. **tie** has issued four Underperformance Warning Notices in any twelve month period), clause 90.1.1 allows **tie** to terminate forthwith (on 7 Business Days' notice). This applies where the relevant Underperformance Warning Notices appear prior to the issue of the Reliability Certificate.

5.2.4 Limb (g) reappears in clause 90.1.2, which provides for a Remediable Termination Notice. This applies where the relevant Underperformance Warning Notices are issued after the issue of the Reliability Certificate (i.e. clause 90.1.2 covers Infraco Default (g) *"(to the extent that the Underperformance Warning Notices have been issued pursuant to Clause 56.7.2)"*).

5.2.5 **tie** has access to an automatic right of termination if it issues four Underperformance Warning Notices in any twelve month period prior to the issue of the Reliability Certificate. Therefore, if **tie** counts four material breaches (breaches which go to the root of the contract) and **tie** issues an Underperformance Warning Notice for each then **tie** can terminate, by proceeding under clause 90.1.1.

5.2.6 Senior Counsel is of the opinion that the Infraco has no opportunity to correct the termination notice under 90.1.1 arising from the issue of four Underperformance Warning Notices and the termination trigger arises from the issue/service of the Underperformance Warning Notice, irrespective of whether or not the Infraco responds with a rectification plan which is acceptable to **tie** (in which case the Underperformance Warning Notice might be expunged). Therefore, if there are four separate breaches and **tie** issues the relevant notices, even if the Infraco

submits a rectification plan and rectifies the breach for each, **tie** could still say that there has been an Infraco Default.

- 5.2.7 In response to NS' question about the definition of Underperformance Warning Notice and the cross-reference to clause 56.7.2, Senior Counsel stated that he considered this to be a clerical error. Senior Counsel's view was that the Courts would have no difficulty in considering it to be a clerical error in the definitions section (albeit noting that clerical errors may cause difficulty).
- 5.2.8 Senior Counsel noted that **tie** is under no obligation to issue Underperformance Warning Notices.
- 5.2.9 AF noted that it is not by original design that clause 56.7.1 is in this section. The Infraco had resisted this provision and clause 93 strenuously and as an oversight (beneficial to **tie**) clause 56.7.1 had come to apply (on its literal reading) to all phases of the Infraco Contract, not just the maintenance services delivery phase. AR explained that the view has been taken that clause 56.7.1 could be confusing and the better route is clause 90.1.2. In addition, it has been thought that the failure to provide information to allow **tie** to issue a Permit to Commence Works may not be considered a material breach, and there are LDs and other mechanisms available for this sort of breach - **tie** has therefore preferred clause 90.1.2. **tie** noted that no Underperformance Warning Notices have been issued to date.

### 5.3 Infraco Default (a)

- 5.3.1 Senior Counsel noted the definition of Infraco Default, limb (a): "*a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works*";. Limb (a) needs to be read in the context of clause 90.1.2. The Parties to the Infraco Contract are contemplating that the default can be remedied. It doesn't have to be a breach that destroys the contract - it must be something less than that. It can be any breach, or 'accumulation of breaches', or (more accurately) 'course of conduct', which materially and adversely affects the carrying out and/or completion of the Infraco Works.
- 5.3.2 **tie** has to give the Infraco a notice to remedy that of which **tie** complains. The Remediable Termination Notice must identify the breach that **tie** wants the Infraco to rectify. It needs to be specific. Senior Counsel noted that there are often problems where a termination notice is not sufficiently clear in its complaint. Senior Counsel considered that they (the Infraco), as reasonable and experienced contractors, must be able to discern from the Remediable Termination Notice what they have to do to rectify the Infraco Default.
- 5.3.3 To be the subject of a Remediable Termination Notice, the issue at hand must be capable of remedy. The Infraco does not have an absolute right to remedy. AR advised this is why the view was taken on the style of the cover letter.
- 5.3.4 Under Infraco Default limb (a), not every breach needs to be material. But, every breach needs to be impacting performance of the contract. Any breach which is within limb (a) is an Infraco Default, which triggers clause 90.1.2 and requires, in response to the Remediable Termination Notice, a suitable rectification plan.

#### 5.4 Adverse effect on tie

- 5.4.1 In response to SB's question as to whether or not 'adversely affect the Infraco Works' also could mean adversely affect **tie** (e.g. in terms of financial consequences, additional resource required), Senior Counsel's view is that yes, it would, insofar as **tie** has a role in the Infraco Works. For example, the Infraco's failure to produce Estimates is a breach which has a clear material and adverse effect, because **tie** is not able to carry out the intended contractual mechanism.

#### 5.5 Separate Remediable Termination Notices

- 5.5.1 Senior Counsel recommends that each breach of limb (a) is the subject of a separate Remediable Termination Notice. Senior Counsel explained that the danger of including all the breaches in the same Remediable Termination Notice is that some of the breaches are not sufficient and, although some of them are, that still makes it vulnerable to challenge as an incompetent notice. Where separate notices are issued, even if any one notice falls, it will not prejudice the others. In addition, tactically, sending out 10 (for example) separate notices would be far more difficult for the Infraco to cope with. It can be stated in the cover letter that individually and cumulatively these amount to an Infraco Default.
- 5.5.2 If any one of these breaches is not sufficient, Senior Counsel's view is that it should not be in a Remediable Termination Notice in the first place (save as part of conduct).

#### 5.6 Cumulative breaches

- 5.6.1 Senior Counsel's view is that if any one breach is not sufficient to satisfy limb (a) then, even as part of a package, this would not be sufficient i.e. there is nothing to tot up, or  $0 + 0$  (still) = 0.
- 5.6.2 AF made a distinction between  $0 + 0$  and  $0.1 + 0.1$  i.e. where there are minor breaches which are not in themselves a "1" but which cumulatively add up to one. Senior Counsel considered that there is a distinction between 'cumulative breaches' and a 'course of conduct', which would be possible to amount to a breach. This would be the subject of one breach. **tie** would need to identify groups of breaches, or (more accurately) actions and add them together. For example, with regard to **tie** Change, where the Infraco is making the same breach again and again, this does have a material and adverse effect on the Infraco Works, but this would be one breach, subject of one Remediable Termination Notice.
- 5.6.3 Senior Counsel considered that where this could work is where **tie** could discern an intention on the part of the Infraco not to perform the Infraco Contract. **tie** can allege a breach of clause 7, but identify by reference to examples i.e. **tie** can found upon a wide range of conduct, defined by clear reference to contractual obligations (referenced by clause numbers). It is an accumulation of these things which makes it a breach of clause 7. Senior Counsel recommended that this should be a distinct Remediable Termination Notice under clause 90.1.2.

- 5.6.4 Senior Counsel considered that 'course of conduct' is "a breach". In response to JG's question as to whether or not it would make a difference if limb (a) said "breaches", Senior Counsel noted that, yes, it would.<sup>1</sup>

## 5.7 Issue of Remediable Termination Notices

- 5.7.1 Senior Counsel recommended that **tie** issues all the Remediable Termination Notices at the same time (tactically this would be stronger). **tie** should put out a separate Remediable Termination Notice on each clause and should put down all the conduct pertaining to that breach in that one Remediable Termination Notice. Senior Counsel advised that he would be happy to look over the Remediable Termination Notice(s) prior to issue if so desired.

- 5.7.2 In response to AR's question about whether or not it is an issue that we are in month 20 of a 26 month contract and are just raising complaints about this now, Senior Counsel advised that he does not consider that there is a problem with regard to the length of time which it has taken to raise the defaults. Short of 'personal bar' or 'waiver', there is no prejudice. It was noted that the Infraco Contract contains a 'no waiver' provision at clause 109. Senior Counsel noted that **tie** is perfectly entitled to change its view on the management of the Infraco Contract at any time.

- 5.7.3 Senior Counsel noted that **tie** may also send out Underperformance Warning Notice (although **tie** is not obliged to). It was discussed at the Consultation and generally agreed that, as the test for an Underperformance Warning Notice is different ("material breach" rather than 'any breach which has a material and adverse effect'), this may lead to confusion and DRP.<sup>2</sup> Something which does not go to the root of the contract may nevertheless be said to materially and adversely affect the performance of the Infraco Works e.g. by causing delay.

## 5.8 Good faith

- 5.8.1 Senior Counsel noted the terms of clause 90.2, that **tie** has absolute discretion to determine whether or not the Infraco's rectification plan is acceptable. This discretion needs to be exercised *bona fide*.

- 5.8.2 *were* Senior Counsel advised that, if the Infraco were able to prove that **tie** had determined they/going to terminate irrespective of the Infraco's reaction, there could be a problem. The Infraco would need to show that there was a deliberate policy to terminate - a clear statement from **tie** management/governance which stated that **tie** was going to terminate whatever the Infraco does. This is a high test - the Courts demand a very high standard of proof for an allegation of bad faith (as there is for fraud as above) - and the onus would be on the Infraco to show that **tie** had a predetermined motive. Senior Counsel's view is that the Courts are slow to accept bad faith.

- 5.8.3 In response to AR's concerns about the public statements from politicians and CEC that they are frustrated with the Infraco and are considering terminating,

<sup>1</sup> Schedule Part 1 (*Definitions and Interpretation*), at paragraph 2.2, states that unless the context requires otherwise "the singular includes the plural and vice versa".

<sup>2</sup> In addition, SB noted that **tie** is entitled to issue a maximum of one Underperformance Warning Notice each period and has not yet issued any Underperformance Warning Notices.

Senior Counsel did not consider this to be fatal to **tie**'s position at all. Public statements about being frustrated are not proof that **tie** has a hidden plan to terminate. It was noted that care should be taken to ensure there is no suggestion of pre-determination going forward.

5.8.4 In addition, Senior Counsel made the distinction between the statement coming from CEC/politicians and not from **tie** itself, **tie** being the contracting party. **tie** is far enough away from this, albeit that it is a wholly-owned subsidiary of TEL who are owned by CEC. A letter from the Lord Provost would not be enough, as the Lord Provost is not a Party to the Infraco Contract.

5.8.5 In response to AF's question about the role of clause 118,<sup>3</sup> Senior Counsel advised that this means that **tie** would be entitled to act unfairly or unreasonably, but must not act in bad faith i.e. must not have predetermined the outcome. **tie** must be seen to follow through on the Remediable Termination Notice.

## 6. Specific Questions in the Instructions to Senior Counsel

### 6.1 Question A

6.1.1 Senior Counsel noted that points 2, 3 and 4 of the Instructions to Senior Counsel embrace very different things. Senior Counsel re-iterated that **tie** needs to identify the breaches having a material and adverse effect on the Infraco Works.

6.1.2 Senior Counsel queried whether clause 73 (*Best Value*) falls into that category. Senior Counsel advised **tie** to produce a separate Remediable Termination Notice for this.

6.1.3 Senior Counsel noted that the defective works on Princes Street are an Infraco Default (a), even if the Infraco has already offered to rectify (Senior Counsel had noted relevant correspondence in the bundles of papers). Senior Counsel advised **tie** to make this a distinct breach.

### 6.2 Question B

#### 6.2.1 Limb (d)

6.2.1.1 There was some discussion at the Consultation in relation to Infraco Default (d) - failure to obtain a Sectional Completion Date on or before the date falling 12 months after the Planned Sectional Completion Date, except as a result of a Compensation Event, Relief Event, **tie** Change etc. Senior Counsel advised that there would be a danger of undermining the Remediable Termination Notice and therefore limb (d) should be kept separate. In any case, Senior Counsel considered that this would be a difficult case to run, as the issue is cloudy, given the complicated situation with the utilities diversions. The Infraco's position on this is so extreme that it flags that there would be an argument on limb (d). It was noted by SB that **tie** has offered an extension of time.

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<sup>3</sup> Clause 118: "Wherever in this Agreement a Party is required to make any determination ..., that Party shall act fairly and reasonably within the terms of this Agreement (save where this Agreement expressly states that **tie** is to have absolute discretion), and having regard to all the circumstances."

## 6.2.2 Limb (j)

6.2.2.1 Limb (j) applies where "*the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving... notice to proceed*". Senior Counsel considered that this definition has to be read as being the Infraco Works "or any material part thereof". It was noted that this is currently the case with regard to the on-street works. Senior Counsel's view is that this does apply. Senior Counsel recommended that this is subject of an entirely separate notice (to any under limb (a)) and noted that there is a different route to rectification. In the context of the discussions on the Matrix and clauses 34.1 and 80.13 (see below), it was noted that **tie** has a strong case on this ground and that there is correspondence in place on which to rely.

6.2.2.2 The application of limb (j) to the facts on section 1d was discussed i.e. whether or not this was 'suspension' as the Infraco has failed to provide **tie** with the information necessary for **tie** to issue a permit to Commence Works (no assured design and approved sub-contractors). Senior Counsel's view is that the Infraco's argument will be that this is suspension "with due cause". They need a Permit to Commence Works to commence works and **tie** has not issued one. The fact that **tie** cannot issue a Permit to Commence Works until the Infraco has given **tie** the necessary information is subject of a different breach under limb (a). Senior Counsel noted that it troubles him that the Infraco would have a counter-argument on this that they have no Permit to Commence Works from **tie** (and therefore Senior Counsel suggested that these are different breaches under limb (a) referring to clause 7 and clause 11).

6.2.3 The topic of integrated design and the Infraco's obligation to deliver an integrated design under the Infraco Contract was discussed. Senior Counsel noted that he has not been able to find in the core provisions a direct reference to delivery of an integrated, assured, design. This was acknowledged and accepted by **tie**/DLAP. The different and interlinked references to the Infraco's design obligations were discussed. Senior Counsel noted that he did not have a copy of a the Schedules mentioned e.g. Schedule Part 3 (CoCP) and Schedule Part 14 (Review Procedure). Senior Counsel's advice around this topic came back to the recommendation that **tie** identifies the specific contractual provisions which the Infraco is breaching and brings it back to (a).

## 6.2.4 Matrix

6.2.4.1 Senior Counsel had reviewed AF's matrix and provided some comments. See Instructing Solicitors' note of Senior Counsel's view/comments in the updated Matrix attached at Appendix A.

6.2.4.2 As a general note, Senior Counsel stated that **tie** can discriminate on which notices to hand out to strengthen **tie**'s position. **tie** can pick out the strongest ones whatever they may be e.g. limb (j) breach of clauses 34.1 and 80.13; clause 7 - defective works on Princes Street; clause 73 - failure to deliver design.



- 6.2.4.3 **Clauses 34.1 and 80.13** - Senior Counsel considered that **tie** has a sound argument with regard to **tie's** ability to instruct under the Infraco Contract, especially when one reads clauses 34.1 and 80.13 together and as there is provision in the Infraco Contract that the Infraco will get paid if it is a **tie** Change. Senior Counsel considered that the words at the end of clause 80.13 ("*unless otherwise instructed by tie*") deprive the Infraco's argument of any context. Senior Counsel considered that **tie** has a case under limb (j) (suspension of the Infraco Works) for the Infraco's failure to comply with **tie's** instructions to get on with the Infraco Works. We would expect to see a rectification plan that the Infraco will commence and carry on with the Infraco Works. Senior Counsel's advice is to list all the relevant notices to proceed in one Remediable Termination Notice and that 15 Business Days (or more) have passed and, therefore, this is an Infraco Default (j).
- 6.2.4.4 **DRP** - in response to NS' question about the fact that the Infraco has put the interpretation of clauses 34.1 and 80.13 into DRP<sup>4</sup> and whether or not it is problematic to refer to this breach in a Remediable Termination Notice, Senior Counsel stated that, in his view, this is not a problem. **tie** is entitled to exercise different contractual mechanisms open to it in parallel. The Infraco may say, in response to such a Remediable Termination Notice, that they have put the issue into DRP and that this is their rectification plan, but what **tie** wants is for the Infraco to get on with the Infraco Works and that is the purpose of the Remediable Termination Notice. It may be that the Infraco disputes the Remediable Termination Notice on the basis that there is no breach of clauses 34.1 and 80.13, in which case the discussion can be had at the time. But, Senior Counsel noted that this will not be wrongful repudiation on the part of **tie**.
- 6.2.4.5 Senior Counsel's view is that **tie's** argument on clauses 34.1 and 80.13 is likely to succeed and therefore a Remediable Termination Notice founded on breach of those clauses is sound. Senior Counsel's view was that a Court would be extremely unlikely to accept the Infraco's argument on clause 80.13 (especially when there are contractual mechanisms in place regarding compensation). And, if nothing else, the Infraco's interpretation of the provisions is commercially unsound.
- 6.2.4.6 **Clause 60** - Senior Counsel's view is that this is difficult. AR explained **tie's** views on this and the important of failure to mitigate. **ce** Senior Counsel stated that he would like to look at something more developed with regard to this breach.
- 6.2.4.7 **Clause 7 / Defective works on Princes Street** - Senior Counsel stated that the fact that the Infraco are offering to remedy this is neither here nor there. Senior Counsel recommended that the defective works on Princes Street is subject of a separate Remediable Termination Notice and is kept separate from the failure to produce

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<sup>4</sup> SB noted that one discrete question at one structure about a Notified Departure relating to clause 34.1/80.13 has been put into DRP.

an integrated design. Senior Counsel considered that **tie** has a strong argument on this and, although Senior Counsel never states that something has a 'very high' chance, he would say that it was 'high'.

- 6.2.4.8 **Design** - Senior Counsel considered that this could be a more difficult argument to run. It was discussed that, in the core provisions, there is no direct reference to the delivery of an integrated, assured design, but there are a number of relevant design obligations through the Contract suite. With regard to this heading, Senior Counsel indicated he would be happy to consider **tie**'s more detailed argument on design once that has been developed (especially in relation to the timing of delivery of an integrated, assured design across the Edinburgh Tram Network).
- 6.2.4.9 **SDS / Clause 11** - Senior Counsel noted that he was not sure about clause 11. This should be the subject of a separate notice. AR advised that **tie** is currently working on evidence and there is more information becoming available through the ongoing audits. Senior Counsel noted this and recognised that the collateral agreement is compelling evidence of breach.
- 6.2.4.10 **Clause 28** - Senior Counsel suggested this breach did not in itself materially and adversely affect the Infraco Works. SB explained that this means that the Infraco cannot deliver efficient works packages. Senior Counsel acknowledged that, in this case, this could be used as an example for the breach of clause 7 in relation to the Infraco's overall management of the Infraco Works.
- 6.2.4.11 **Clause 73** - what was meant by 'best value' was discussed and AR/SB explained that the obligation to deliver 'best value' has to include some consideration of what design will give **tie** best value over the full term i.e. whole life cost. Senior Counsel advised that he would be interested to see the summary on the impact of the Infraco's failure to consider/deliver best value on **tie**'s ability to approve proposals.
- 6.2.4.12 **Cumulative failings** - as has been discussed, adding up cumulative failings is very difficult. Individually, they may be too remote to be sufficient for an Infraco Default.
- 6.2.4.13 **Clause 7 and clause 26** - AR stated his views on the significance of the Infraco's failure to manage the Infraco Contract and the failure to provide adequate superintendence. For example, the problems on Princes Street would not have arisen had there been adequate superintendence - the Infraco clearly failed in their duties under clause 26.4.3 to "*manage and co-ordinate the provision of the Infraco Works*" (including by any Sub-Contractor). Senior Counsel's view is that this can be a separate head of Remediable Termination Notice, stating that there is a clear failure of clause 26 and listing the examples of conduct which demonstrate this, so that the Infraco would know what needs to be remedied.

**6.3 Question C**

6.3.1 It was noted that this question, in relation to cumulative material adverse effect, has already been discussed and that it is the accumulation of conduct which may give rise to a breach (e.g. regarding clause 26 as above).

**6.4 Question D**

6.4.1 It was noted that this question, in relation to the contractual test in Infraco Default (d), has already been discussed and Senior Counsel considers it difficult.

**6.5 Question E**

6.5.1 It was noted that this question, in relation to the contractual test in Infraco Default (j), has already been discussed and Senior Counsel considers that **tie** has a strong case regarding breach of clauses 34.1 and 80.13.

**6.6 Question F**

6.6.1 It was noted that this question, in relation to the approach taken in the draft Remediable Termination Notice and covering letter, has already been discussed and Senior Counsel recommends that **tie** should issue a separate Remediable Termination Notice for each breach.

**6.7 Question G**

6.7.1 Senior Counsel's view is that the Infraco would not be successful in obtaining interim interdict against **tie** from **tie** seeking to exercise its rights upon termination. Senior Counsel considered that the Infraco's remedy (if the Infraco has one) would lie in damages. Senior Counsel's advised that the Court will not intervene to change a contractual mechanism, therefore, interim interdict would be unlikely.

**6.8 Question H**

6.8.1 It was noted that this question, in relation to the effect of the DRP on clause 34.1 and 80.13, has already been discussed and Senior Counsel does not consider it to be problematic.

**6.9 Question I**

6.9.1 Senior Counsel agreed that the Remediable Termination Notice would be conclusive evidence of a default to enable **tie** to serve a Demand Notice under the Performance Bond and Retention Bond. Senior Counsel noted that this was ultimately a strategic decision but questioned why **tie** would want to call at this stage. Senior Counsel suggested that this could be an option for when the negotiations have broken down and once **tie** has decided to terminate. They are there as a threat and may motivate the Infraco.

**7. Question J**

7.1.1 This question in relation to the summary of the effects of termination was not considered at the Consultation.

**8. Fraud**

8.1 Senior Counsel referred back to the issue of the conspiracy between SDS and the Infraco. Senior Counsel gave his recommendation that **tie** does not issue a notice for breach of clause 92 (*Termination for Corrupt Gifts and Fraud*) at the moment, but writes to the Infraco, stating that: 'we have found this Memo and we have these Minutes and we know about the proposed revisions to the contract and it appears to us that you and SDS 'conspired' to secure from **tie** benefits which you would not otherwise be entitled to. We are now instigating further enquiry and we are considering our position. In the meantime, we are expressly reserving our rights with regard to clause 92 (*Termination for Corrupt Gifts and Fraud*).'

8.2 In response to AF's question about whether or not Senior Counsel is happy that we declare that we have the note and draft from Pinsents, Senior Counsel advised that he is. Senior Counsel accepted that there is case law about recovery of documents which could be used by the Infraco to say that this is legally privileged, but mistaken document transmission happens all the time and there is no harm in letting the Infraco know that we have this.

**9. Timing**

9.1 Senior Counsel asked what the likely timescales are for issuing Remediable Termination Notices.



**DEFINED TERMS**

In this Note of Consultation, the following defined terms apply:

- **"CEC"** means the City of Edinburgh Council;
- **"CoCP"** means the Code of Construction Practice which forms part of Schedule Part 3 of the Infraco Contract;
- **"Consultation"** means the Consultation with Senior Counsel on Thursday 8 July 2010;
- **"Infraco"** means the unincorporated consortium, comprising Bilfinger Berger Civils UK Limited, Siemens Plc and CAF s.a. which entered into the Infraco Contract with **tie** on a joint and several liability basis;
- **"Infraco Contract"** means the contract for the design, construction, testing and commissioning and maintenance of the Edinburgh Tram Network between **tie** and the Infraco, dated 14 May 2008;
- **"Instructing Solicitors"** means DLA Piper Scotland LLP;
- **"Parties"** means the parties to the Infraco Contract;
- **"SDS"** means "the SDS Provider" under the Infraco Contract;
- **"tie"** means **tie** Limited, the Instructing Solicitors' client and a wholly-owned subsidiary of CEC; and
- any other defined terms used in this Note of Consultation shall have the meaning given to them in the Infraco Contract.

**DLA Piper Scotland LLP**

**20 July 2010**

**Acknowledged by Senior Counsel:**

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