McGrigors

DRAFT

REPORT FOR TIE LIMITED ON CERTAIN CONTRACTUAL ISSUES CONCERNING EDINBURGH TRAM PROJECT

5 March 2010

Privileged and confidential – prepared in contemplation of litigation
FOISA exempt

McGrigors LLP
141 Bothwell Street
Glasgow G2 7EQ
Tel: +44 (0)141 567 8400
Fax: +44 (0)141 567 8401
Email: enquiries@mcgrigors.com
Website: www.mcgrigors.com

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1 Executive Summary

Price

1.1 Infraco claim to be entitled to recover the cost and time consequences associated with changes in the design between BDDI and IFC as Notified Departures. That claim is based on a literal interpretation of the wording in Pricing Assumption No.1, and in particular that tie bears the risk of all changes of "*design principle, shape and form and outline specification*". These words on the face of it appear to narrow substantially the scope or content of what would otherwise form part of normal design development, for which Infraco would bear the risk.

1.2 There is a stateable argument that something has gone wrong with the words of Pricing Assumption No.1, in that their literal interpretation produces a result which a reasonable person would conclude cannot have been intended by tie and Infraco when they entered into the contract, because that result is absurd, irrational or arbitrary. Though not fatal, the argument will have less force if tie were the proferens of the exclusionary words referred to above. The forensic investigation carried out has not so far revealed whether the words were proffered by tie or Infraco.

1.3 There are two categories of design change where it would produce an irrational or absurd result if Infraco were to be entitled to recover cost and time:

(a) Where a change is driven by Infraco, for example to improve the buildability of the project;

(b) Where something is required by the Employer's Requirements, but not shown on the BDDI.

1.4 Beyond this, could it properly be said that the words should be interpreted, and revised, in such a way as to mean that Infraco bears the risk of all design development other than substantial or material changes? It is considered that there are difficulties with such a submission.

1.5 Whilst there is a stateable argument that something has gone wrong with the wording, this meets only part of the required test. What is also required is to determine the result which must rationally have been intended, and to propose the wording that would achieve that result. Whilst that may appear straightforward, it is an extremely difficult exercise. That exercise is not assisted by the factual background which has presented in relation to the execution of the Wiesbaden Agreement. This issue is still under consideration by McGrigors LLP in conjunction with Richard Keen QC.

1.6 Richard Keen QC has reviewed the sections of the report which deal with Pricing Assumption No. 1, and he concurs with the views expressed.

Progress

1.7 Infraco have relied on clause 80 to the effect that where there is a dispute about whether a Notified Departure has occurred (for example because of a change in design between BDDI and IFC), Infraco are

entitled to refuse to progress the work in question. Infraco assert that the only circumstances where tie are entitled to instruct Infraco to proceed in this context is where an Estimate in relation to the Notified Departure has been referred to DRP.

1.8 There is a stateable argument that the provisions of clause 80 cannot apply in a situation where the existence of a Notified Departure is disputed. This is because the deeming provisions in clause 3.5 of Schedule Part 4 in relation to the existence of a Mandatory tie Change and the issue of a tie Notice of Change (which lead to clause 80) do not arise.

1.9 On this premise, there is a reasonable argument that tie are entitled to issue instructions to Infraco to proceed with the work in question in terms of clause 34.1, notwithstanding the existence of a dispute about the existence of a Notified Departure. Infraco's legitimate entitlements are protected by clause 34.3, which provides that Infraco will be entitled to recover the cost and time consequences of proceeding with the work where it subsequently transpires that they do have an entitlement to a Mandatory tie Change.

1.10 There is an alternative argument available to tie that the final words of clause 80.13 entitle them to instruct Infraco to proceed at any time, whether in circumstances where the existence of a Notified Departure is disputed, or where it is accepted that there is a Notified Departure, but Infraco have failed to provide an Estimate.

1.11 Both of these arguments carry the force of avoiding the outcome that Infraco contend for, which is that they are entitled to hold up progress of the work, particularly where the scope and nature of the work is clear, and the only issue between the parties is either who should bear the cost consequences, or what the quantum of those costs consequences should be.

1.12 Richard Keen QC has reviewed the sections of the report which deal with clauses 80 and 34.1, and he concurs with the views expressed.

Time

1.13 Clearly there has been a substantial time overrun and what is at issue is whether completion has been delayed as a consequence of matters which fall within Infraco's risk or tie's risk. Where matters are within tie's risk, Infraco will be entitled to an extension of time and thereby be relieved from the payment of liquidated damages.

1.14 In each case, there will be a two stage test:

(a) Has an event occurred which is a Relief Event, a Compensation Event or a tie Change (including a Notified Departure)?

(b) Has that event caused a delay in achieving the relevant contractual dates?

1.15 Where there is more than one event which has caused delay, one which is an Infraco risk and one which is a tie risk, it will be necessary to determine which event is the *dominant* or effective cause of delay. If the dominant cause is an event which is a tie risk, then Infraco will be entitled to an extension of time in relation to that event.

1.16 In very rare circumstances, there may be delay which is truly concurrent. Concurrent delay occurs where two events, one which is an Infraco risk, and one which is a tie risk, impact on the critical path of the works at the same time and produce a common period of delay. In these limited circumstances, Infraco may be entitled to an extension of time

1.17 Issues of causation and concurrency can only be properly determined by a detailed analysis of the critical path, underpinned by factual and forensic analysis.

1.18 The consequences of delay to Infraco caused by the Utilities Works constitute both a Compensation Event and a Notified Departure, and Infraco are entitled to pursue recovery under either of these routes.

1.19 It is accepted by tie that some delay has been sustained by Infraco as a consequence of the Utilities Works. The second extension of time of 9 months was offered in the context of discussions in relation to this issue. It is not clear how much of this extension was allocated by tie to Utilities Works; that may require to be unravelled in the event of future DRPs in relation to time.

1.20 Infraco's argument that they are entitled to insist on *all* Utilities Works being completed in a physical section of the work, before they commence their own work, is vulnerable to attack on a number of grounds.

1.21 The relevant issue in each case will be the extent to which the detailed critical path analysis demonstrates that the Utilities Works were the cause (and where relevant, the *dominant* cause) of delay.

1.22 In relation to delay caused by the SDS Services (and in particular, the late issue of design), Infraco's obligations to manage the SDS Provider must be considered in the context of Infraco's entitlement to a Compensation Event or Notified Departure in certain circumstances where the SDS Provider is late in the issue of design, or is in material breach of its obligations.

1.23 Delay caused by the SDS Provider will be at Infraco's risk only if it can be established that it was Infraco's failure to manage the SDS Provider which *caused* the delay. However, if:

(a) Infraco's failure to manage the SDS Provider did not have any impact on the critical path of the work, or was not a cause (or dominant cause) of delay; or

(b) Infraco's fulfilled their obligations to manage the SDS Provider, but despite that, the design was still late or defective,

Then Infraco may still be entitled to an extension of time.

1.24 Where Infraco have failed to comply with the provisions of the contract in relation to programming information to be provided by them, that is unlikely to be fatal to their entitlement to an extension of time as a matter of principle; however, to the extent that their claims fail to address issues such as causation, concurrency, their own culpable delay and mitigation they are likely to be jeopardising their case, and the length of any extension which might be awarded to them.

1.25 Compliance with the notice provisions of clause 65 may be a condition precedent to Infraco's entitlement to make recovery of cost or time as a result of Compensation Events, however the position is far from clear (in particular, in relation to time). However, a relatively high level of compliance is likely to be sufficient to enable that condition to be satisfied, and the degree of detail of information required is unlikely to be extensive.

Other breaches

1.26 The provisions of clause 6 and 7 in relation to partnering, co-operation, mitigation and the exercise of reasonable skill and care are unlikely to constitute a valid basis for freestanding claims against Infraco.

1.27 Those clauses are essentially parasitic and inform the way in which Infraco are required to carry out their other, substantive, obligations under the contract. This view is supported by previous advice to tie from Calum MacNeill QC.

Bringing the contract to an end

1.28 For present purposes, the relevant means for bringing the contract to an end lawfully are for termination by tie on the grounds of Infraco Default, or by Infraco on the grounds of tie Default.

1.29 Termination for Infraco Default is likely to be possible only on the grounds that Infraco breach which has had a material and adverse impact on the execution of the Infraco Works. There may also be a ground in relation to material breach leading to four Underperformance Warning Notices in any one year, although that argument is likely to be more difficult to sustain.

1.30 Of the issues identified in this report, it is likely that only breach of an instruction to proceed under clauses 34.1 or 84.13 is capable of constituting such a breach, and even then only on the basis that (i) it is established that those clauses may be validly relied upon, as referred to at paragraphs 1.7 to 1.12 above; and (ii) that there is a sufficient materiality to warrant termination.

1.31 Infraco may be entitled to terminate in circumstances where tie are 30 Business Days late in making payment of certified sums in excess of £250k, or where tie frustrate Infraco's performance for more than 45 Business Days.

1.32 Where tie terminate, they will be entitled to recover from Infraco (after the Infraco Works are substantially complete) the *additional* costs associated with employing others to complete the Infraco Works and perform the Maintenance Services, less payment to Infraco for work already carried out

1.33 Where Infraco terminate for tie Default, tie will not be entitled to recover these sums, and will be obliged to make payment to Infraco for work carried out, as well expenses arising from termination, and profit at 10% on civils and 17% on track and systems.

1.34 In each case, claims which arose pre-termination will survive the termination: Infraco's claims to be entitled to additional payment will still require to be resolved in the event of termination.

1.35 Where tie or Infraco purport to terminate on grounds which transpire not to be valid, then that may well constitute grounds for the other party to terminate. On one view, it might even entitle the "innocent" party to compensatory damages.

DRPs

1.36 It would be open to tie to take some of the issues referred to in this report to DRP:

(a) The proper interpretation to be given to Pricing Assumption No. 1 in relation to how the risk in relation to changes in design from BDDI to IFC is to be allocated;

(b) Infraco's obligation to comply with instructions issued by tie pursuant to clause 34.1 and 80.13 where those instructions arise from a disputed Notified Departure or failure by Infraco to provide an Estimate in relation to an agreed Notified Departure.

1.37 In relation to the proper interpretation to be given to Pricing Assumption No. 1, there is a risk that the conclusions reached by Mr Wilson in his adjudication decision are binding until the Dispute is finally determined by legal proceedings (or agreement).

1.38 Although the provisions of Schedule Part 9 are not straightforward, on one interpretation those legal proceedings must be raised and served by 14 April 2010, otherwise the entitlement to bring them might be irretrievably lost. In these circumstances, the safest, no risk, course of action is to proceed on the basis that this time limit is critical. This matter warrants further discussion with senior counsel.

1.39 In relation to the interpretation of clauses 34.1 and 80.13, the mechanisms in Schedule Part 9 would require to be followed, namely the Internal Resolution Procedure, Mediation and Adjudication, unless agreement could be reached with Infraco at an earlier stage that the issue should be referred to the court.

2 Aim of this Report

2.1 The aim of this Report is to address the key contractual issues which bear upon claims which have been advanced by Infraco under the Contract for price increase and more time.

2.2 The Report assumes a familiarity with the Contract between tie Limited and the Bilfinger Berger – Siemens – CAF Consortium dated 14 May 2008 and the definitions used therein are employed within this Report. The Report also assumes a familiarity with the history to date and the factual position of the claims that have been advanced.

3 **Claims for price increase**

3.1 Infraco have advanced claims by way of Notified Departures in respect of changes which have been made in moving from BDDI to IFC. A number of these have gone through the Dispute Resolution Procedure and 3 have resulted in adjudication decisions:

3.1.1 Gogarburn Bridge: Mr J Hunter

3.1.2 Carrick Knowe Bridge: Mr J Hunter

3.1.3 Russell Road Retaining Wall: Mr A E Wilson

3.2 Of central importance to the merits of Infraco's claims is the interpretation to be given to the Pricing Assumptions which are set out in clause 3.4 of the Schedule Part 4.

4 **Introduction to Pricing Assumptions**

4.1 Clause 3.1 of Schedule Part 4 states:

"*The Construction Works Price is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirement…and the Infraco Proposals…and is not subject to variation except in accordance with the provisions of this Agreement*."

4.2 Clause 3.2.1 introduces the Pricing Assumptions and explains that these arise as a consequence of the need to fix the Contract Price against the developing factual background. The Pricing Assumptions are said to "*…represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply.*"

4.3 Clause 3.3 sets out the various exclusions from the Construction Works Price.

4.4 Clause 3.5 is of central importance. It states:

"*The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions noted herein. If now or at any time the facts or circumstances differ in any way from the Base Case Assumptions (or any part of them) such Notified Departure will be deemed to be a Mandatory tie Change requiring a change to the Employer's Requirements and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the Contract Price and/or Programme…*"

4.5 It is apparent from the foregoing that Infraco qualified the price by linking it to various assumptions which if departed from would confer an entitlement to price adjustment. Evidently Infraco were unable to commit to (an unqualified) fixed price due to what was described in clause 3.2.1 as "a developing factual background". In particular the development of the design by the SDS Provider from the Base Date

Design Information (also referred to in this report as the BDDI) which is defined in Clause 2.3 as "the design information drawings issued to Infraco up to and including 25 November 2007" was a key issue. Beyond the risk of the development and completion of design to[1] Issued for Construction ("IFC") drawings, areas of inconsistency, or misalignment, between the BDDI produced by the SDS Provider and the Infraco Proposals were recognised prior to contract formation. This has been examined in a previous paper prepared by McGrigors LLP which is reproduced in Appendix 3 of this Report. In short, the Base Case Assumptions were the contractual technique which was used for allocating risk in relation to these matters. The Base Case Assumptions are defined as meaning:

"*…the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions*."

Clause 3.4 sets out the Pricing Assumptions. Given the number and value of the claims which have been advanced by Infraco by way of Notified Departures in respect of changes in moving from BDDI to IFC, Pricing Assumption No.1 is examined in detail below.

5 Pricing Assumption No. 1

5.1 The relevant part of Pricing Assumption No. 1 states:

"*The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs) in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information…For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification*."

6 Infraco's interpretation: the literal meaning of the words

6.1 Infraco's principal contention is that a literal interpretation ought to be given to Pricing Assumption No. 1, such that "[tie] *assumes the commercial risk for changes to design between the Base Date Design Information Drawings and Issued for Construction Drawings which fall into the categories of design principle, shape, form or specification*".[2]

6.2 Their analysis proceeds on the basis that consideration should be given to:

"*…whether each change between BDDI to IFC falls within one or more of the four categories of para. 3.4.1.1. - design principle, shape, form or specification. If a change falls within one or more of the above categories, then expressly by contractual definition, it cannot be normal development and completion of*

[1] Defined as "those Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure"
[2] Paragraph 4.5 of Infraco's Referral Notice in the adjudication before Alan Wilson in relation to the Russell Road retaining wall no. 2 ("the Wilson Adjudication")

the design because para. 3.4.1 excludes these categories from what might otherwise be understood as normal development and completion of design[3]".

6.3 On this analysis, there are few changes to the BDDI which do *not* constitute a Notified Departure: almost any change will be one of design principle, shape, form or specification.

7 **Has something gone wrong with the words?**

7.1 There are a number of difficulties with Infraco's literal interpretation of Pricing Assumption No. 1 which suggests that something has "gone wrong" with the words. This is because Infraco's literal reading produces a result which, it is contented, a reasonable person would not have understood tie and Infraco to have intended at the point that the contract was entered into.

7.2 *Firstly*, Infraco's interpretation would mean that they would be able to recover the costs associated with changes which they themselves had promoted, for example to improve the buildability of the scheme. Such a change would be wholly within Infraco's control, made for their own benefit and at their whim: it is difficult to conclude that a reasonable person would have considered that both tie and Infraco intended that tie would bear the costs of these changes. The type of change referred to here falls to be distinguished from an Infraco Change which is excluded from constituting a Notified Departure. An Infraco Change is *"…a change proposed by the Infraco in accordance with Clause 81.1 and approved by tie in accordance with Clause 80… or Clause 81*". A change proposed by Infraco in accordance with clause 81.1 will occur "*If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works*…" which in turn are defined by reference to the physical works.

7.3 *Secondly*, Infraco's interpretation yields the result that they would be entitled to additional payment for all elements of the Employer's Requirements not shown on the BDDI. What they say is: "*the Contract Price was fixed on the basis of the design work completed by the designer and the design information drawings issued to the Referring Party up to and including 25 November 2007 only*." [4]

7.4 That is at odds with the provisions of:

7.4.1 Clause 3.1 of Schedule Part 4, which states that:

"*The Construction Works Price is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with the provisions of this Agreement*"; and

7.5 Clause 1.2 of Schedule Part 4 which states that:

"*The Construction Works Price is on a lump sum basis that is fixed until completion of the Infraco Works and not subject to variation except in accordance with the provisions of this Agreement*."

[3] Paragraph 5.8.8 of Infraco's Referral Notice in the Wilson Adjudication
[4] Paragraph 5.8.9 of Infraco's Referral Notice in the Wilson Adjudication

7.6 In support of their position, Infraco rely on, amongst other things, the opening words of clause 3.5 which state that "*the Contract Price has been fixed on the basis of inter alia the Base Case Assumptions*".

7.7 The words *inter alia* have a significance which Infraco's analysis does not address: the Contract Price includes the Construction Works Price. The Construction Works Price is in turn a lump sum fixed and firm price in respect of the Employer's Requirements. The Base Case Assumptions do not encompass all of the Employer's Requirements, but only those incorporated in the design information drawings issued to Infraco up to 25 November 2007[5].

7.8 It makes no commercial sense to arrive at a conclusion that the "*lump sum, fixed and firm price*" referred to in clause 3.1 of Schedule Part 4 extends only to that part of the Infraco Works as may have been the subject of design information drawings issued up to 25 November 2007[6]. There is a tension between, on the one hand, the provision for a fixed lump sum for the delivery of the Employer's Requirements, as against, on the other, the risk of the evolution of the design sitting with tie.

7.9 *Thirdly,* clause 3.5 of Schedule Part 4 identifies a Notified Departure as a situation where facts or circumstances *differ* from the Base Case Assumptions. The term "*differ*" signifies change: it is to *make* unlike, dissimilar, or different. If some aspect of the Employer's Requirements was "missing" from the BDDI, the "issued for construction" design information which subsequently incorporates it cannot properly be said to have been *made* different from the BDDI.

7.10 This applies equally to the situation where an aspect of the Employer's Requirements is the subject of an outline design at BDDI stage, and the eventual issued for construction design is not unlike, dissimilar or different from that BDDI outline design.

7.11 *Fourthly*, Infraco's interpretation does not address the wording of clause 3.5 of Schedule Part 4, which provides that a Notified Departure:

"*will be deemed to be a Mandatory tie Change requiring a* ***change to the Employer's Requirements***..."

7.12 Where the BDDI fails to take account of something in the Employer's Requirements it would make little sense for the resulting design change to be deemed to require a change to the Employer's Requirements: the essence of the issue is that the design is changed to take account of the Employer's Requirements, and there is no change to the Employer's Requirements. Infraco's interpretation fails to make sense of the clause 3.5 wording.

7.13 The section quoted from 3.5 goes on to state "...*and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the Contract Price and/or Programme in respect of which tie will be deemed to have issued a tie Notice of Change on the date that such Notified Departure is notified by either Party to the other.*" It is difficult to make sense of the wording that begins "*or otherwise...*", but it may be that it is intended to be a catch all to be interpreted along the lines of "*the*

[5] See paragraphs 8 and 9 of the draft Opinion of Richard Keen QC dated 14 January 2010

Notified Departure will be deemed to be a Mandatory tie Change which (i) requires a change to the ER's; (ii) requires a change to the IP's, or (iii) requires any other change to the Price and/or Programme."

7.14 *Fifthly*, even on the Infraco's own case, they accept that there must be some departure from the literal meaning of the words.

7.15 During the course of the Wilson adjudication, Infraco's engineering expert[7] conceded that if a change was *minor* or "*reasonable*" and "*comprising normal development and completion of designs*", then this would not give rise to a Notified Departure.

7.16 This approach necessitates some re-writing of the literal words in Pricing Assumption No. 1: there is no express derogation for minor or reasonable changes. In other words, the approach of Infraco's expert appears to accept that, to some extent, something has gone wrong with the words. The question then becomes how those words are to be put right.

7.17 Furthermore, the concession made by the Infraco leads to the necessity of enquiring into the *reason* for a change. That is at odds with the written submissions which were made on behalf of Infraco during the Wilson adjudication, where it was stated:

"*Whilst such information* [the reason for a change] *may in certain circumstances throw light on the background leading to the change it is not a condition precedent or precondition to being able to establish that a Notified Departure has occurred*[8]"...

"*Under the terms of the Contract, and insofar as changes which fall within section 3.4.1.1 are concerned (changes between BDDI and IFC), the Referring Party is not required to prove the reason for any change*.[9]"

7.18 There has been discussion in relation to the interaction between the operation of clause 80 of the conditions (tie Change) and the Notified Departure mechanism: issues in relation to clause 80 are dealt with in paragraph 17 below; but, in short, even if it is the case that Infraco are frustrating the proper operation of clause 80 by failing, or delaying, in the production of compliant Estimates, or failing to proceed with work until Estimates have been agreed, that is unlikely to be relevant to a consideration of how the wording of Pricing Assumption No. 1 is to be interpreted in assessing whether a Notified Departure has occurred. The breach by Infraco of their obligations does not affect the underlying interpretation. Conversely, Infraco's argument is likely to revolve around the mutuality of obligations: when faced with Infraco's notification of a tie Change based on a Notified Departure, tie's options are either to agree or to dispute that a Notified Departure has occurred, as is more fully addressed in paragraph 17 below. Infraco's approach might well be relevant to apportioning responsibility for delay and cost, but it is not an aid to interpretation.

[6] Paragraph 9 of the draft Opinion of Richard Keen QC dated 14 January 2010
[7] Mr Hunt of Hunter Consulting
[8] Paragraph 5.8.10 of Infraco's Referral Notice in Wilson Adjudication
[9] Paragraph 2.6 of Infraco's Reply to the Response in the Wilson Adjudication

7.19 If a literal interpretation of the words is to be avoided, it is not sufficient for tie to establish that the literal interpretation is *unfavourable* to it: the Courts will not intervene simply to save one of the parties from having made a "bad bargain". The test to be applied will be whether the interpretation contended for by Infraco produces a result which is absurd, arbitrary and irrational, in circumstances where an alternative interpretation can produce a rational result[10].

7.20 For the reasons referred to above, there are a number of bases on which it might be said that Infraco's interpretation produces an absurd or irrational result, either because the outcome cannot be what a reasonable person would consider the parties to have intended (design changes driven by Infraco, missing design) or because their interpretation cannot readily be reconciled with other provisions of the contract.

7.21 Accordingly, there is a stateable argument that something has gone wrong with the words used in Pricing Assumption No. 1, in that their literal interpretation produces a result which a reasonable person would conclude cannot have been intended by tie and Infraco when they entered into the contract. Though not fatal, the argument will have less force if tie were the proferens of the exclusionary words at the end of Pricing Assumption No.1[11].

8 **What is the consequence if the words have "gone wrong"?**

8.1 Where it is evident that something has "gone wrong" with the words used, the Court may be prepared to intervene in order to interpret the agreement in its context, in order to get as close as possible to the meaning which the parties intended[12].

8.2 The question will be: what would a reasonable person (having all the background knowledge which would have been available to tie and Infraco at the time that the contract was entered into) have understood Pricing Assumption No. 1 to mean[13].

8.3 In practical terms, this means that evidence of the factual background, or matrix, against which the contract was entered into will be relevant. However, there is an important distinction to be made between objective facts known, or reasonably available, to tie and Infraco, and pre-contractual negotiations in which each party set out its respective negotiating positions. The general rule which the Court apply is that the pre-contractual negotiations are not admissible in arriving upon the correct interpretation to be given to the contract.

8.4 This issue was recently considered by the House of Lords[14], where Lord Hoffmann put it in this way:

[10] *Chartbrook Limited* v *Persimmon Homes Limited and others* [2009] UKHL 38 at paragraph 20
[11] Refer to paragraph 9 below and to paragraphs 13.13 to 13.17 of the Factual Background in relation to Pricing Assumption No. 1 at Appendix 1 to this Report. A more detailed schedule of the relevant background is set out at Appendix 2 to this Report.
[12] *KPMG LLP* v *Network Rail Infrastructure Ltd* [2007] Bus LR 1336 at paragraph 50
[13] *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 page 912 at paragraph H
[14] *Chartbrook Limited* v *Persimmon Homes Limited supra* at paragraph 38

"*Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity…It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations of one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded*."

8.5 The detailed factual background to the wording eventually adopted in Pricing Assumption No. 1 is dealt with in the document included at Appendix 1 of this report, with the relevant available documents being referred in Appendix 2: in short, however, the relevant wording first arose in the Wiesbaden Agreement executed on 20 December 2007. It was then incorporated, almost verbatim, into Schedule Part 4. The context, in turn, of the execution of the Wiesbaden Agreement was that of negotiations between tie and Infraco as to who should bear the risk of the development of the design. Various statements were made by each party in relation to their position in that negotiation[15], but those are unlikely to be accepted by the Court as relevant aids to interpretation.

8.6 It should be noted that, although the court may refuse to consider the pre-contract negotiations in interpreting the words of the contract, those negotiations may nonetheless form part of the evidence given during the proceedings. They would be admissible in an action for rectification, and even in an action where rectification is not an issue, they may appear in evidence before the Court for other reasons. Infraco may press for the negotiations to be admitted, as evidence that the words were introduced to satisfy their own objective of minimising their risk profile in relation to design. To set against that, there does appear to have been a series of premiums added in to the price to reflect the risk that tie believed that Infraco were taking on.

8.7 A relevant factor in the court's consideration may be the way in which the particular words came into existence: put simply, if the words were drafted and proffered by tie, it will be more difficult for tie to argue that they are absurd, irrational or arbitrary. The forensic exercise carried out has not so far revealed whether the relevant words were tie's or Infraco's.

9 What meaning should the words be given?

9.1 It is not sufficient for tie to establish that something has gone wrong with the wording of the contract; they also require to establish what it is that a reasonable person would have understood the parties to have intended when they signed up to Pricing Assumption No. 1.

9.2 The courts have held that, in principle, "*there is not a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed*"[16]. In practical terms, a court is likely to be more attracted to a simple re-working of the relevant words, rather than a complicated and lengthy formulation.

[15] For example, tie's letter of 11 December 2007, Bilfinger Berger's letter of 12 December 2007 and Bilfinger Berger's e-mail to tie sent at 6.07am on 20 December 2007
[16] Lord Hoffmann in Chartbrook Limited v Persimmon Homes Limited supra at paragraph 25

9.3 In consultation with Richard Keen QC, one formulation of the "redlining" that could be done to the clause was considered, as follows:

For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification due to any change in the Employer's Requirements."

9.4 However, a change in the Employer's Requirements which necessitated a change in the design of the Infraco Works would give rise to a tie Change. Accordingly, no purpose is served if the exclusionary words were to be amended by the additional words referred to.

9.5 In any event, if this formulation is tested against the factual matrix it becomes much more difficult to sustain. The Employer's Requirements were a functional specification. The changes in the BDDI have not, in most cases, been driven by changes in the Employer Requirements, which are relatively high level output requirements of the functioning tram system, and do not address the design solutions which might deliver those requirements.

9.6 The factual information gathered so far suggests that those involved at tie did not consider that Infraco's ability to make recovery in respect of change would be tied to changes in the Employer's Requirements.

9.7 In considering the possible formulation of words, there would appear to be three categories of change that are relevant:

(a) Change driven by Infraco (buildability);

(b) Change in relation to matters required by the Employer's Requirements but not shown on the BDDI;

(c) Change which is not substantial, or material.

9.8 The first two of these three categories have been addressed above, and in conclusion, there is a stateable argument that Pricing Assumption No. 1 should be interpreted in such a way as to mean that Infraco should not be entitled to additional payment for those categories of change.

9.9 The third category is more difficult. Those at tie involved in the formation of the Wiesbaden Agreement and the contract itself are of the view that what was intended was that Infraco would be entitled to additional recovery only where the change in design was *substantial* (this has also been put by witnesses as *significant* or *material*). An example of what was discussed between the parties (verbally) as constituting a *substantial* change has been described by one tie witness as the difference between one type of bridge (*e.g.* a suspension bridge) to another (*e.g.* a slab and beam bridge).

9.10 There is evidence that it was tie's *intention* that substantial changes to the design would be excluded from the lump sum price. That can be seen from tie documents generated in the context of the Wiesbaden discussions. By way of example:

9.10.1 The "script" for the Wiesbaden negotiations refers to the following proposition:

"*Your* [*i.e.* BBS] *price based on prelim design includes risk for emerging detailed design changes (accepted not fundamental design changes).*"

It is not understood that this document was shown to BBS, although it is likely that the proposition was put verbally to BBS during the course of the Wiesbaden discussions.

9.10.2 What appears to have been the first draft of the Wiesbaden agreement dated 14 December 2007, prepared by tie and sent to Infraco on 17 December 2007 contains the following wording at clause 3.3:

"*3.3 Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-*

a) Any future changes to elements of the design for civils works that are substantially different compared to those forming the current scheme being designed by SDS. "

9.11 That wording was broadly retained in the subsequent draft of the Wiesbaden Agreement sent by tie to Infraco on 19 December 2007, although some amendments were made as follows:

"*3.3 Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-*

a) Any future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS as typically represented by the drawings issued to BBS with the design information drop on 25 November 2007".

9.12 For the reasons referred to above, a court is unlikely to have regard to communications which represent statements of subjective intent, or a party's negotiating position, and these will not be regarded as valid aids to interpretation. In other words, simply because tie *thought* or *desired* there to be an element of materiality in the definition, that does not mean that a reasonable person would conclude that this is how the words should be interpreted. Indeed, BBS' position may well be that the reason for the substantial change in the wording of the formulation which appears to have taken place on 20 December 2007 was precisely because BBS were not prepared to agree to a definition based on the notion of what was substantial: there is witness evidence that BBS objected to the initial formulation on exactly those grounds.

9.13 In this context, however, it is possible to interpret the wording eventually adopted as an attempt to bring a greater degree of precision or granularity to the original wording: the references to "*normal development*",

"*design intent*" and "*evolution of design*" all being intended to express that anything other than a substantial change of direction would fall within the firm price. On this interpretation, the exclusionary words should be seen as a way of *explaining* what was meant by what had previously been described as *substantially different*.

9.14 In his draft report, tie's engineering expert (Robin Blois-Brooke) explains the definitions that he has utilised for the exclusionary words[17]:

"*In the past the Adjudicators, assisted by Parties' Experts, have sought to define "design principle, shape, form and/or specification". To an extent these definitions depend on a degree of engineering experience and judgement, but in broad terms I have, where necessary in Sections 4 and 5 below, adopted the following definitions which take account the submissions made by the other Experts to date*:

*(a) The **design principle** is the design philosophy or way in which the intended objective is achieved.*

*(b) The **shape** is the total effect produced by the outline of a component.*

*(c) The **form** is the overall external appearance of a component.*

*(d) The **specification** is the required characteristics of the component in terms of features such as performance, materials, etc.*"

9.15 In the Wilson adjudication, the Adjudicator reached the following view:

"*As to 'normal' development, I consider that this is the progression towards the Employer's Requirements as would be expected by an experienced contractor and his designer. If this results in amendment of the design principle, shape, form and/or specification shown on the BDDI drawings then it becomes a Notified Departure…*[18]

I think the correct interpretation lies in the proper application of the definitions to the facts; to which I return under the relevant issues. By way of indication:

i) The design principle is a fundamental principle rather than a design detail; for example a change from in situ to precast concrete changes the principle of the design

ii) The shape, being the total effect produced by the outline; I do not consider this necessarily changes due to a dimensional change; for instance a rectangle may remain a rectangle

iii) The form, being the external appearance; I consider that the appearance may or may not change as a result of a small dimensional change; it is a matter of scale

[17] Paragraph 3.18
[18] Paragraph 101 of the Wilson decision

iv) The specification, being the nature and quality of the work; I do not consider that the nature or quality of say an in situ concrete deck, changes because it is thicker or more heavily reinforced."[19]

9.16 This leads to a formulation where the interpretation of the words is that which would be attributed to them by a civil engineer, within the context of what would be expected by an experienced design and build contractor, having regard to the Employer's Requirements.

9.17 In applying this interpretation, it may be that a further relevant consideration is that the words should also be considered as providing particularity in relation to the concept of *substantial* change. Indeed, Mr Wilson's definition of the exclusionary words involves the application of that concept to some extent.

9.18 However, the consequence of such a formulation would militate against a requirement for any re-writing of the words of the contract: they can be given a meaning within the context explained above. Moreover a court will be reluctant to arrive at a formulation which involves a subjective assessment which in effect leads to a choice between two "competing" experts. "Substantial" could encompass a minor change which has significant consequences, or a major change which has little or no consequence.

9.19 If the present wording is being attacked on the grounds of irrationality (in relation to the two categories of (i) buildability changes and (ii) something "missing" from the BBDI but shown in the ER's), then it has to be followed through with new wording which converts what is said to be irrational into something which is rational. Leaving the current wording as it is does not address what is contended to have gone wrong with the words in relation to these two categories.

9.20 Recent experience in the Supreme Court suggests that if the first limb of the test can be overcome (something has gone wrong with the words), then the court may be prepared to go quite far in what it will imply or add. In this tie are supported by the concession made by Infraco's expert that the words cannot bear a literal meaning – there is a community of view that the words cannot mean what they say.

9.21 Whilst there is a stateable argument that something has gone wrong with the wording, this meets only part of the required test. What is also required is to determine the result which must rationally have been intended, and to propose the wording that would achieve that result. Whilst that may appear straightforward, it is an extremely difficult exercise. That exercise is not assisted by the factual background which has presented in relation to the execution of the Wiesbaden Agreement. This issue is still under consideration by McGrigors LLP in conjunction with Richard Keen QC.

9.22 Richard Keen QC has reviewed the foregoing sections of the report which deal with Pricing Assumption No. 1, and he concurs with the views expressed.

10 Dispute resolution in the context of Pricing Assumption No. 1

[19] Paragraph 104 of the Wilson decision

10.1 It is open to tie to seek refer the proper interpretation to be given to the meaning of Pricing Assumption No. 1 to the DRP. In terms of clause 3 of Schedule Part 9, the parties are required to follow the Internal Resolution Procedure, Mediation and Adjudication procedures before any reference is made to the Court to seek a declarator as to the proper interpretation to be given.

10.2 In the two adjudications referred to him, John Hunter made certain findings in relation to the interpretation of the contract, and in particular Schedule Part 4 and Pricing Assumption No. 1.

10.3 In terms of clause 50 of Schedule Part 9, the decision of an Adjudicator is "*binding on the Parties, and they shall comply with it until the Dispute is determined by legal proceedings or by agreement*". Accordingly, to the extent that an issue has been decided on by an Adjudicator, it is not open to the parties to refer that same issue to adjudication again (other than by agreement).

10.4 Notwithstanding that, it appears to have been agreed in the adjudication before Mr Wilson that no parts of the Hunter decisions were binding upon him.

10.5 Mr Wilson was asked to find that various changes in design in relation to the foundations of Russell Road retaining wall 4 constituted a Notified Departure in terms of Pricing Assumption No. 1. Paragraphs 237 and 238 of his decision consist of declarations that specific changes constitute Notified Departures, and the value of those changes. However, in arriving at those declarations he reaches certain conclusions in relation to the interpretation to be given to Pricing Assumption No. 1.

10.6 There is a risk that Mr Wilson's conclusions in relation to the interpretation of Pricing Assumption No. 1 form part of his decision, and are therefore binding - until the Dispute is finally determined by legal proceedings (or agreement).

10.7 The contractual provisions in relation to the time limits which may apply to legal proceedings are addressed at paragraph 36 below.

11 Extension of time

There is no controversy that the progress of the Infraco Works has been delayed. The following sections of this report address the way in which the apportionment of responsibility for that overrun should be addressed.

12 Contractual provisions in relation to time

12.1 Clause 60.1 of the contract conditions provides that:

"*The Infraco shall progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme. Notwithstanding the generality of the foregoing, the Infraco shall complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion in respect of each Section or Certificate of Service Commencement (as appropriate) to be issued…by the Planned Service Commencement Date or the relevant Planned Sectional Completion Date.*"

12.2 The contractual mechanisms through which Infraco is entitled to an extension of time for completion of the Infraco Works are as follows:

12.2.1 Clause 64 – Relief Events, which give rise to an entitlement to an extension of time;

12.2.2 Clause 65 – Compensation Events, which give rise both to an entitlement to an extension of time and to recovery of additional costs;

12.2.3 Clause 80 – tie Changes, which include Notified Departures.

12.3 Clauses 64 and 65 provide that "*if and to the extent that a* [Relief/Compensation Event] *is the direct cause of…a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or a Certificate of Service Commencement on or before the Planned Service Commencement Date*", Infraco will be entitled to apply for an extension of time[20]. Subject to certain conditions which are discussed in more detail below, there is express provision for the relevant dates to be postponed by such time as is "*reasonable for such a* [Relief/Compensation] *Event taking into account the likely effect of delay*"[21].

12.4 The clause 80 mechanism is not explicitly linked to clauses 64 and 65: tie Changes do not constitute either a Compensation Event or a Relief Event. Indeed, there is no corresponding *express* provision in clause 80 which entitles Infraco to an extension of time, or provides that the relevant dates will be postponed.

[20] Clauses 64.1 and 65.1
[21] Clauses 64.3 and 65.3 of the contract conditions

12.5 If there is no provision which entitles a contractor to more time to complete work in the event of delay caused by the employer, then the consequence may be that time is at large: in other words, the contractual dates for completion no longer apply and there is no right to liquidated damages. Instead, a contractor is required to complete the work in a reasonable time, and if he fails to do so, the employer is entitled to recover the actual loss which flows from that failure to complete: the extent of the loss incurred would require to be proved.

12.6 However, taking clause 80 as a whole, it is possible to interpret it in such a way as to conclude that it must reasonably have been intended by the parties that Infraco would be entitled to an extension of time in the event of a tie Change. That is reinforced by the following provisions:

12.6.1 Clause 80.4 provides that the Infraco Estimate:

"*…shall include the opinion of the Infraco (acting reasonably) in all cases on…any impact on the Programme and any requirement for an extension of time."*

12.6.2 Clause 80.19 sets out what are described as "*restrictions of entitlements to relief for tie Change*", and provides that Infraco "*shall not be entitled to any extension of time*" in certain circumstances.

12.6.3 Clause 80.17 provides that the Programme is to be updated in accordance with clause 60 after a tie Change Order has been issued.

12.7 The principal options available to tie in the event of Infraco failing to comply with their obligations in relation to progress of the Work include the following:

12.7.1 In terms of clause 60.7, tie are entitled to require Infraco to produce a revised programme showing the modifications that may be necessary to ensure timely completion;

12.7.2 In terms of clause 61.1:

"*If for any reason which does not entitle the Infraco to an extension of time, the rate of progress of the Infraco Works is at any time, in the reasonable opinion of tie's Representative, too slow to ensure substantial completion of any section by the Planned Sectional Completion Date for that Section, or any previously agreed revised time for completion agreed under Clause 61.2, tie's Representative shall notify the Infraco in writing and the Infraco shall thereupon take such steps as are necessary and to which tie's Representative may consent to expedite the progress so as substantially to complete the Section by the Planned Sectional Completion Date, such consent not to be unreasonably delayed or withheld. The Infraco shall not be entitled to any additional payment for taking such steps.*"

12.7.3 In the event that completion is not achieved by the Planned Sectional Completion Dates (as extended by any extensions of time awarded by tie, or determined through the Dispute Resolution Procedure ("DRP")), for reasons which do not entitle Infraco to an extension of time, then tie are entitled to recover liquidated and ascertained damages at the rates set out in clause 62.2 of the contract conditions.

12.7.4 To the extent that there has been an Infraco Default, tie may be entitled to terminate the Agreement on the grounds of that Default.

12.8 Beyond these provisions, the principal question which falls to be resolved in this context is the extent to which delaying events have *caused* a delay to completion of the Infraco Works, or sections thereof, and who bears the responsibility for those events.

13 **General principles in relation to entitlement to extension of time**

13.1 There is no controversy that completion of the Infraco Works[22] has been delayed beyond the contractually specified dates. What is at issue is *causation*: namely, whether completion has been delayed as a consequence of matters which fall within Infraco's risk, or within tie's risk.

13.2 In assessing whether a particular cause of delay is capable of giving rise to an extension of time, it will be necessary to have regard to the *critical path* through the work, namely the sequence of events through the project – from start to finish – the sum of whose duration determines the overall duration of the Infraco Works. If there is delay to the progress of an activity which is on the critical path, this may result in delay to the overall completion of the project.

13.3 Issues of causation and concurrency can only be properly determined by a detailed analysis of the critical path, underpinned by forensic and factual investigation. It is well established by the courts that such an analysis is necessary to an assessment of extension of time[23]. This analysis is addressed in more detail below.

13.4 Clauses 64.1 and 65.1 provide that Infraco will only be entitled to apply for an extension of time "*if and to the extent that a* [Relief/Compensation] *Event is the* ***direct cause*** *of a delay in achievement of the issue of a Certificate of Sectional Completion…*"[24]

13.5 Although there is no corresponding provision in clause 80, the same test of causation ought to be applied at common law in assessing whether an entitlement to an extension of time has arisen.

13.6 There is accordingly a two stage test for the award of an extension of time:

13.6.1 Has an event occurred which is not an Infraco risk event (*i.e.* a Compensation Event, a Relief Event or a tie Change?)

13.6.2 Has that event caused a delay in achieving the relevant contractual dates?

13.7 In this context, it is important to note that issues of causation ought to be applied strictly: the assessment of what extension of time would be *reasonable* only comes into play once causation has been established, and consideration is being given to the *measure* or *extent* of the delay which has been *caused* by the delaying event.

13.8 Accordingly, the relevant completion dates ought to be adjusted only if events have occurred which are not at Infraco's risk, and those events have caused delay to the completion of the Infraco Works[25]. The

[22] Or sections thereof
[23] e.g. *Balfour Beatty v London Borough of Lambeth* (2002) BLR 288 at paragraph 30; *Royal Brompton Hospital NHS Trust* v *Hammond & Ors* [2000] All ER 2342 at paragraph 26; *Castle Inns (Stirling) Ltd* v *Clark Contracts Ltd* [2009] CSOH 174 at paragraph 36
[24] Emphasis added
[25] Or relevant Sections thereof

extent to which the relevant date(s) are adjusted ought to correspond with the amount of delay time which has been caused by the non-Infraco risk events.

13.9 In practical terms, a vast number of events will have played a part in the delay to completion of the Infraco Works: some of those will be Infraco risk events, and some of those will be non-Infraco risk events. In each case, what is required is an analysis of whether the completion of the works can truly be said to have been caused by each event:

"*A situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a relevant event, "the completion of the Works is (not) likely to be delayed thereby beyond the Completion Date." The relevant event simply has no effect on the completion date*."[26]

13.10 As part of this analysis, regard will be had to which is the dominant, or effective, cause of the delay. The matter has been put in this way by the courts:

"*In such cases, if an event or events for which the employer is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability, notwithstanding the existence of other causes that are to some degree at least concurrent... If an item of loss results from concurrent causes, and one of those causes can be identified as the proximate or dominant cause of the loss, it will be treated as the operative cause, and the person responsible for it will be responsible for the loss.*[27]"

13.11 A hypothetical example of this might be the following: Infraco have legitimately been unable to take possession of an area because of delays caused by Utilities Works. During the same period, Infraco themselves delay in managing the SDS Provider in such a way as to mean that design relating to that area is delayed.

13.12 In this example, there is a risk that the dominant cause of the delay will be held to be the late possession associated with the Utilities Works, rather than the design. In other words, even if the design had been available in January, no progress could have been made because Infraco had no access to the site. This approach would result in Infraco being entitled to an extension of time for the full extent of the delay associated with the Utilities Work.

13.13 The question of whether the Utilities Works are held to be the dominant cause will turn to a significant extent on an examination of the facts, underpinned by the delay analysis (see paragraph 14 below). Limited guidance has been given by the courts in relation to how the "dominant" cause is to be determined, but in high level terms:

[26] *Royal Brompton Hospital NHS Trust supra* at paragraph 31
[27] *John Doyle Construction Ltd* v *Laing Management (Scotland) Ltd* 2004 SC 713 at paragraph 15

"*The underlying objective is to arrive at the aggregate period of time within which the contract works as ultimately defined ought to have been completed having regard to the incidence of non-contractor's risk events and to calculate the excess time, if any, over that period, which the contractor took to complete the works…to arrive at an aggregate period for completion of the contractual works, having regard to the occurrence of non-contractor's risk events and to calculate the extent to which the completion of the works has exceeded that period.*"[28]

13.14 In very rare circumstances, there will be true concurrency: this situation must be distinguished from the ordinary situation of competing causes, and only occurs where two events (one which is an Infraco risk, and one which is a tie risk) are equivalent both in their cause, and in their effect: on other words, they impact with the same force upon the critical path of the works at the same time and produce a common delay. In these limited circumstances, it is not possible to identify a dominant cause, because of the equivalence of the two events, and Infraco may be entitled to an extension of time (although they will not necessarily be entitled to recover all their cost).

13.15 Clauses 64 and 65 contain provisions that state:

"*tie shall, in assessing any delay* [or] *extension of time…for the purpose of this clause…not take into account any event or cause of delay…which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco*"[29].

13.16 There is an argument available to tie that the effect of these words is that where there is delay which can be truly be said to be concurrently caused by Infraco risk events and non-Infraco risk, then no extension of time falls to be awarded. That argument is likely to be difficult to sustain, and a court is more likely to prefer the interpretation that this clause simply requires the analysis of causation referred to above.

13.17 In any event, these provisions apply only to the award of extensions of time in relation to Relief and Compensation Events; there is no equivalent provision in relation to tie Changes (and hence Notified Departures) under clause 80. The words "*for the purpose of this clause*" would appear to expressly restrict these provisions to Relief and Compensation Events, rather than allowing them to have application in the clause 80 context.

13.18 In the case of *City Inn Limited* v *Shepherd Construction Limited*[30], the court was prepared to carry out an apportionment exercise in relation to the consequences of competing concurrent causes of delay. That decision is subject to appeal, and there is some doubt as to whether such an apportionment exercise is legitimate.

14 Critical path analysis

[28] *Balfour Beatty Building Ltd* v *Chestermount Properties Ltd* [1993] 62 BLR 1 at page 25
[29] Clauses 64.7 and 65.8 of the contract conditions
[30] [2007] CSOH 190

14.1 As referred to above, the courts have held that an analysis of the critical path will be crucial to an assessment of extension of time.

14.2 The contract makes provision for the steps which Infraco ought to take in relation to the Programme. These include the following:

14.2.1 In terms of clause 60.2, Infraco are required to update the Programme in accordance with the requirements of Schedule Part 2 (the Employer's Requirements);

14.2.2 Section 12 of the Employer's Requirements deals with "*Project Management Processes*". Paragraph 12.2 requires Infraco to *"undertake programme management including the implementation, regular updating and management of a fully detailed comprehensive Programme illustrating how the Infraco proposes to execute the whole of the Infraco Works in compliance with the Project Programme.*[31]" There is considerable detail in relation to the content of the Programme[32], which requires to be updated "*every four weeks in line with tie reporting periods to take full account of the Infraco progress in completing the Infraco Works*". Paragraph 12.6 requires the production of a Construction Management Plan relating to the Programme.

14.2.3 Clause 60.3 provides that Infraco shall submit to tie for approval any change to the Programme showing the revised order or manner in which Infraco proposes to carry out the Infraco Works. Clause 60 provides a mechanism for how these proposed revisions are to be dealt with.

14.2.4 In terms of clauses 64.2 and 65.2, Infraco are required to include certain information in their Relief/Compensation Event Notice.

14.2.5 Clauses 80.4, 80.5 and 80.7 provide that Infraco should include certain time related information in their Estimate in respect of a tie Change[33].

14.2.6 In terms of clause 65.10, Infraco are required to inform tie of delays to the Infraco Works which are Infraco risk events, and to give an estimate of the likely effect upon the Programme.

14.3 It can readily be seen how compliance with these provisions would facilitate the production of a critical path analysis. tie have indicated that Infraco have failed to comply with these provisions on many occasions. The absence of credible records and updated programmes, including as built information, may make it difficult properly to assess the impact of delay events on completion.

14.4 Acutus have reported[34] that all of Infraco's submissions to date have utilised the impacted as-planned method of critical path analysis. That method of delay analysis starts from the planned programme, and impacts delay events onto that planned programme. The Society of Construction Law Delay and Disruption Protocol notes that this form of analysis is the "*simplest form of delay analysis…The*

[31] Sheet 161 of the Employer's Requirements
[32] Sheets 162 to 164 of the Employer's Requirements
[33] Clause 80.7 does not apply where the tie Change arises through an Infraco notification pursuant to clause 80.20
[34] Paragraph 1.5.3 on page 4 of Executive Summary of draft Acutus report dated 24 December 2009

usefulness of the impacted as-planned technique is restricted due to the theoretical nature of the projected delays that are determined using this technique and uncertainty as to the feasibility of the Contractor's as-planned programme.[35]"

14.5 Acutus have considered the nature of the claims for extension of time which have been made by Infraco to date, and consider that the following criticisms can each by applied to Infraco's approach in their claims:

"*a) It does not take account of changed intentions or construction methods;*

b) It takes no account of actual progress;

c) It takes no account of any re-sequencing;

d) It ignores any duty to mitigate delay;

e) It does not establish the actual effect of the delaying events;

f) It gives only theoretical results which often conflict with known facts;

g) It can be easily manipulated, particularly by focusing only on the delays attributable to one of the parties, such that concurrency and dominance always accrues to the benefit of that party."[36]

14.6 To the extent that these criticisms can be supported, then they may provide a valid basis for attacking the way in which Infraco have presented their claim to be entitled to an extension of time: tie may be able to assert that Infraco have failed to record the critical path of the works and therefore failed to establish how the delay events have impacted upon that critical path. In other words, the strength of Infraco's case may be diluted if they have failed to establish causation and addressed the concurrency of delaying events.

14.7 This is not equivalent, however, to the proposition that compliance with the provisions referred to above constitutes a condition precedent to the award of an extension of time (other than possibly in relation to clauses 64.2 and 65.2, which are addressed at paragraph 16 below). In other words, simply because Infraco have failed to comply with their obligations in relation to the Programme does not automatically mean that they have forfeited their entitlement to an extension of time.

14.8 Furthermore, it is open to Infraco to improve their position, and adopt a more sophisticated and reliable approach to delay analysis. They may be able to provide improved records which would enable a retrospective reconstruction of the as built programme to take place. Beyond that, there remains a risk that either a court or an adjudicator would be prepared to take a broad brush approach, and allow an extension of time even in the absence of detailed records, programming information and/or a more sophisticated critical path analysis.

[35] Paragraph 4.6 of the Protocol
[36] Paragraph 1.5.3 on page 4 of Executive Summary of draft Acutus report dated 24 December 2009

14.9 It should be noted that in order for tie to be entitled to rely on a breach of these provisions as constituting grounds for tie Termination on Infraco Default, consideration would require to be given to whether the breach had "*materially and adversely affected the carrying out and/or completion of the Infraco Works*" or constituted a material breach in terms of clause 56.7.1 (subject to the comments at paragraph 28 below in relation to this ground). However, an initial consideration suggests that it might be difficult for tie to bring themselves within these limbs. Failure to comply with these provisions goes to Infraco's entitlement to an extension of time. If Infraco fail to comply, they risk imperilling their own entitlement; that is a different matter to materially and adversely affecting the execution of the Infraco Works, or constituting a material breach sufficient to justify termination.

15 **The extent of the extension of time to be awarded**

15.1 Where an extension of time is being considered in the context of clauses 64 and 65, the contract provides that the time that is given:

"…*shall be reasonable for such a* [Relief/Compensation] *Event, taking into account the likely effect of delay and in Infraco's ability to perform its obligations under this Agreement*"[37]

15.2 Further guidance is contained in clauses 64.7.2 and 65.8.2:

"*tie shall, in assessing any delay or extension of time…take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of tie that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs.*"

15.3 There are no equivalent provisions where an extension of time is granted within the context of clause 80. Clause 80.4.8 does provide that the Estimate issued by Infraco in the context of clause 80 should contain the proposals which Infraco has to mitigate the impact of the associated tie Change. That suggests that mitigation is a relevant factor in assessing the extent of the extension of time, although that proposition would be stronger if there were clear words to that effect in clause 80.

15.4 Clause 6.3 provides that both Infraco and tie:

"[undertake] *to co-operate with* [each] *other in order to facilitate the performance of this Agreement and…shall…* [6.3.6] *take all reasonable steps to manage, minimise and mitigate all costs*".

15.5 Clause 119 contains a general provision in relation to mitigation:

"*In all cases where a Party seeks to establish or alleges a breach of this Agreement or a right to be indemnified or compensated or to be awarded costs in accordance with this Agreement, that Party shall be under a duty to take all reasonable measures to mitigate the loss which has occurred.*"

15.6 The wording makes no express reference to extension of time, and it is difficult to bring the award of time within the literal meaning of this clause.

15.7 Common law principles in relation to mitigation will be relevant in assessing length of any extension awarded: that means that Infraco ought not to be entitled to recover an extension of time to the extent that delay is caused by their failure to mitigate. That is reinforced by the provisions of clause 6.3.6 referred to above, and is consistent with the general principles in relation to causation discussed at paragraph 13 above.

15.8 It may be open to tie to contend that the length of the extension should be determined within the context of the provisions of clause 73.1 which provide that Infraco

"*shall…to the extent consistent with its obligations under this Agreement make arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision, and a combination of economy, efficiency and effectiveness*."[38]

15.9 The wording used in this clause is nebulous, and it is difficult to interpret it with any precision. Beyond that, the obligation is framed as existing only to the extent that it would be consistent with obligations under the contract: this is likely to be interpreted as meaning that this clause does not operate as a stand alone provision, but is essentially parasitic upon other provisions of the contract.

15.10 Certainly tie will be required to act fairly, within the provisions of the contract, in determining the length of time to be awarded. Clause 118 provides:

"*Wherever in this Agreement a Party is required to make any determination or to give any decisions, instructions, opinions or consents or to express satisfaction or approval or otherwise take any action, 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*."

16 Compliance with contractual mechanisms: clause 65 Compensation Events[39]

16.1 Where a Compensation Event has been the cause of delay in achieving the relevant contractual dates, Infraco are entitled to apply for an extension of time.

16.2 Clause 65.2 goes on to provide that "*to obtain such extension of time…the Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause…*" provide certain information.

16.3 That information consists of the following:

16.3.1 A Compensation Event Notice which:

[37] Clauses 64.3 and 65.3
[38] These words being broadly taken from the provisions of the Local Government in Scotland Act 2003
[39] There are equivalent provisions in relation to clause 64 – Relief Events

(a) Informs tie that Infraco intends to claim an extension of time;

(b) Gives full details of the nature of the Compensation Event;

(c) Includes the likely duration of the Compensation Event: it is likely that was meant here was the likely duration of the *impact* of the Compensation Event;

(d) Gives full details of the extension of time required;

(e) Gives Infraco's estimate of the likely effect of the delay on the Programme;

(f) Sets out mitigation measures adopted and why they were unsuccessful;

(g) Sets out any acceleration or other measures which the Infraco could take to mitigate the effects of delay.

However, Infraco will be relieved from the obligation to provide the detail in the Compensation Event Notice if (i) they inform tie that it is not practicable to do so, giving reasons, and providing such interim information as is available; and (ii) they update the interim particulars (there is no stipulated time period or interval for so doing).

16.3.2 A demonstration to the reasonable satisfaction of tie that:

(a) Infraco (and Infraco Parties, other than the SDS Provider) could not reasonably have avoided the Compensation Event;

(b) The Compensation Event is the direct cause of the delay; and

(c) Infraco is using its reasonable endeavours to perform its obligations under the contract.

16.4 There is a stateable argument[40] available to tie that compliance with clause 65.2.2 is a condition precedent to the granting of an extension of time: that argument is based on the words "*to obtain such extension of time…Infraco must…*", and is fortified by the opening words of clause 65.3 which state that the contractual completion date will be postponed "*in the event that the Infraco has complied with its obligations under Clause 65.2.2.*"

16.5 Whilst this argument is stateable, it is by no means certain of succeeding. If it were successful, it would result in a situation where Infraco would be exposed to liquidated damages even where they had been delayed by events which fell within tie's risk. In that situation, a court might not be prepared to allow liquidated damages to be claimed.

16.6 Even if tie were able to establish the existence of a condition precedent, a number of further considerations arise:

[40] See for example the case of *Education 4 Ayrshire Limited* v *South Ayrshire Council* [2009] CSOH 146

16.6.1 It has been noted that Infraco have generally complied with their obligation to issue Compensation Event Notices as soon as practicable and in any event within 20 Business Days[41]. If that is correct, the Infraco have at least in part satisfied the condition precedent.

16.6.2 It is likely that relatively high level compliance with clause 65.2 will be treated as being sufficient for satisfying the condition precedent. For example, the requirement to estimate the likely impact of delay on the Programme is unlikely to extend to detailed critical path analysis, and the threshold is likely to be relatively low. Similarly, it may be sufficient for Infraco to state in general terms that there are no relevant mitigation or acceleration measures in terms of 65.2.2.3 and 65.2.2.4.

16.6.3 If Infraco are late in submitting their Compensation Event notice, then clause 65.4 provides that "*Infraco will not be entitled to any relief in respect of or during the period for which the information is delayed.*" This provision may operate to reduce Infraco's entitlement proportionately to the length of the delay in submitting the notice, and may not extinguish it altogether.

16.6.4 The submission of a timeous and compliant statement that it is not practicable to provide certain of the information will relieve Infraco from providing that information. Even if it were subsequently found that Infraco could have provided the information, it is unlikely that this will be fatal to their entitlement to an extension of time.

16.6.5 The requirement to provide certain information "*to the reasonable satisfaction*" of tie is likely to be construed with regard to the factual context. For example, the requirement to demonstrate that the Compensation Event is the direct cause of the delay is (as above) unlikely to extend to the level of proof or detail that would be required in formal dispute resolution proceedings.

16.6.6 To the extent that tie have reviewed the notifications and submissions made by Infraco and commented on those submissions, it may be that Infraco would be entitled to argue that tie have waived their entitled to insist on strict compliance with clause 65.2 (unless tie have expressly reserved their entitlement to do so), or are personally barred from relying on strict compliance.

16.7 In each case, further factual investigation would be required in order to assess whether Infraco could be said to have failed to comply with the provisions in such as way as to extinguish their entitlement to an extension of time: each Notice would require to be considered individually within the context of the considerations described above.

16.8 It should be noted that in order for tie to be entitled to rely on a breach of these provisions as constituting grounds for tie Termination on Infraco Default, consideration would require to be given to whether the breach had "*materially and adversely affected the carrying out and/or completion of the Infraco Works*" or constituted a material breach in terms of clause 56.7.1 (subject to the comments at paragraph 28 below in relation to this ground). The issue of termination generally is addressed in more detail at paragraphs 24 to 35 below. However, an initial consideration suggests that this might be difficult for tie to bring

[41] See paragraph 1.4.2 of the draft Acutus report dated 24 December 2009

themselves within these limbs. Failure to comply with these provisions goes to Infraco's entitlement to an extension of time. If Infraco fail to comply, they risk imperilling their own entitlement; that is a different matter to materially and adversely affecting the execution of the Infraco Works, or constituting a material breach sufficient to justify termination.

17 **Clause 80 – tie Changes**

17.1 The comments below in relation to clauses 34.1 and 80.15 have been reviewed by Richard Keen QC, who concurs with the views expressed.

17.2 Where tie accept that a Notified Departure has occurred, they rely on three principal issues in relation to the operation of clause 80:

(a) That Infraco have delayed in submitting the Estimates;

(b) The quality of the information included in the Estimates; and

(c) The failure of Infraco to proceed with work in the absence of an agreed Estimate.

17.3 These issues are considered below by reference to the various categories of tie Change.

Notified Departure

17.4 Where the facts and circumstances differ from the Base Case Assumptions, that constitutes a Notified Departure, which is deemed to be a Mandatory tie Change[42].

17.5 Where this happens, the contract provides for the following sequence of events:

(a) Infraco notify tie that there has been a Notified Departure[43];

(b) tie are deemed to have issued a tie Notice of Change on the same date as that notification takes place[44];

(c) Infraco deliver an Estimate within 18 Business Days of that same date[45] (in certain circumstances this period may be extended – see below).

Where tie dispute that a Notified Departure has occurred

17.6 In terms of clause 3.5 of Schedule Part 4, if the facts and circumstances do *not* differ from the Base Case Assumptions (for example as a result of the issues referred to above in the context of Pricing Assumption No.1), then it ought to follow that there has been no Notified Departure, and therefore no Notice of Change is deemed to have been issued

17.7 In this context, tie's principal contention ought to be that where tie do not accept that a Notified Departure has occurred, the provisions of clause 80 are irrelevant. The deeming provisions in relation to the

[42] Clause 3.5 of Schedule Part 4.
[43] Clause 3.5 of Schedule Part 4. That clause also provides for tie to notify Infraco that there has been a Notified Departure, although in practical terms this is unlikely to be applicable
[44] Clause 3.5 of Schedule Part 4.
[45] Clause 80.4 of the conditions of contract

existence of a Mandatory tie Change and the issue of a tie Notice of Change will not bite where there has been no Notified Departure.

17.8 That contention is reinforced by the wording of clause 80.1, which states that "*tie Changes shall be dealt with in accordance with this clause*". On tie's analysis, no tie Change has occurred, and the parties have not yet moved into the territory of clause 80.

17.9 This would mean that the various provisions of clause 80 would not apply in the context of a disputed Notified Departure. For example:

17.9.1 Infraco's obligation to provide an Estimate in terms of clause 80.4 would not yet have arisen.

17.9.2 The interpretation of the wording of clause 80.13, and issues in relation to whether tie are entitled to instruct Infraco to proceed with a tie Change in circumstances other than those covered by clause 80.15 would not yet have arisen.

17.10 However, in this situation, the provisions of clause 34.1 may be relevant. Clause 34.1 states:

"*The Infraco shall construct and complete the Infraco Works in strict accordance with this Agreement and shall comply with and adhere strictly to tie and tie's Representative's instructions on any matter connected therewith (whether mentioned in this Agreement or not) provided that such instructions are given in accordance with the terms of this Agreement and will not cause Infraco to be in breach of this Agreement.*"

17.11 There is a reasonable argument available to tie that these words entitle them to issue instructions to Infraco (with which Infraco must comply) as long as those instructions do not conflict with any other provisions of the contract.

17.12 Where there is a dispute about the existence of a Notified Departure, following the line of argument referred to above, an instruction to proceed with work under clause 34.1 would not conflict with the words in clause 80.13 which state that "Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order", because the work in question is not accepted to be a tie Change.

17.13 In terms of clause 34.3, Infraco will be entitled to treat the instruction under clause 34.1 as a Compensation Event or a Notified Departure

If in pursuance of Clause 34.1…tie's Representative shall issue instructions which involve the Infraco in delay or disrupt its arrangements or methods of construction or so as to cause the Infraco to incur cost then such instructions shall be a Compensation Event under Clause 65 (Compensation Events) except to the extent that either such instructions have been required as a consequence of the Infraco's breach of its obligations under this Agreement or such delay and/or extra cost result from the Infraco's default. If such

instructions require any variation to any part of the Infraco Works, tie shall be deemed to have issued a tie Notice of Change requiring such variation, which tie Change shall be a Mandatory tie Change.

17.14 This provision safeguards Infraco's legitimate entitlements: if they comply with tie's instruction to carry out the work, and it eventually transpires that the work was properly a Notified Departure, or a variation to any part of the Infraco Works, then Infraco will be entitled to recover the time and cost consequences of carrying out the work. Put simply, the work will progress – and the issue of who bears the cost will be resolved at a later stage.

17.15 Infraco may seek to argue that an instruction issued under clause 34.3 will automatically constitute a Compensation Event. That contention ought to be rejected. Where work forms part of Infraco's scope, then they cannot be said to have sustained delay or disruption in carrying that work: the instruction was simply directing them to proceed with something which they should have been executing in any event.

17.16 This interpretation carries the force of common sense, and avoids the outcome that Infraco contend for (and indeed which has actually occurred), which is that they are entitled to hold up the progress of the work until a dispute in relation to the existence of a Notified Departure is resolved – particularly in circumstances where the only issue between the parties is who should pay for the work in question, where the scope and nature of it is clear.

17.17 An alternative argument available to tie in the event that clause 80 is held to apply to disputed Notified Departures is that clause 80.13 can be read in such a way as to entitle tie to issue instructions to Infraco at any time, and not only in the circumstances envisaged by clause 80.15.

17.18 Clause 80.13 deals with what is to happen after an Estimate has been agreed: tie may either issue a tie Change Order, or withdraw the tie Notice of Change (other than in relation to Mandatory tie Changes, which include Notified Departures). Clause 80.13 ends with the words:

"*Subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order unless otherwise directed by tie.*"

17.19 Clause 80.15 provides that tie is entitled to issue a tie Change Order in the following circumstances:

(a) A disputed Estimate has been referred to DRP but no determination has been issued or agreement reached;

(b) tie, acting reasonably, consider that the proposed tie Change is urgent and/or has a potential significant impact on the Programme;

(c) Infraco do not exercise their right to refuse to carry out work on the grounds set out in clause 80.12 (*e.g.* lack of legal capacity on the part of tie to instruct the work, illegality, technical feasibility, increase of the risk of a non-compliance by Infraco, outwith relevant competence of Infraco);

(d) the relevant work is not work by the SDS Provider and its value is not agreed.

Where tie issue this "peremptory" tie Change Order, Infraco will be entitled to claim their demonstrable costs in implementing the tie Change "*prior to determination of the Estimate*".

17.20 Infraco's position is that clause 80.13 should be read in such a way as to mean that tie are only entitled to direct Infraco to proceed with work in the specific circumstances set out in clause 80.15, and that they are not entitled to "*otherwise direct*" where an Estimate has not been referred to DRP – and by extension, that tie are not entitled to issue such a direction either where there is a dispute about the existence of a Notified Departure or Infraco have failed to produce an Estimate.

17.21 The wording of clause 80 is difficult to interpret as a whole, but there is a stateable argument available to tie that the entitlement to "otherwise direct" does arise independently of clause 80.15 – and that this entitlement will arise in situations where it is accepted that there has been a tie Notice of Change. This argument would be supported by the following:

17.21.1 Infraco's interpretation gives no meaning to the words "*unless otherwise directed by tie*". It would be enough for the clause to read "*subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order*", as the opening words of the sentence would be sufficient to enable the clause 80.15 exception to stand.

17.21.2 The words "*subject to clause 80.15*" at the opening of the relevant paragraph should be interpreted as meaning "*unless prohibited, or contradicted, by clause 80.15*". Infraco's interpretation gives no meaning to these words.

17.21.3 Infraco's interpretation does not make sense in the context of the words "*until instructed through receipt of a tie Change Order.*" The 80.15 mechanism envisages tie issuing a tie Change Order in any event. It does not refer to some "lesser" instruction in the form of a "direction", and there would be no need to use the words "*unless otherwise directed by tie*" if all that was intended was that Infraco should proceed on the basis of tie Change Orders.

17.21.4 It makes little commercial sense for Infraco to be entitled to frustrate the progress of the work where the only debate is about who will bear the ultimate cost of the work in question, and there is no controversy about the nature or scope of the work. tie's interpretation would enable work to proceed, but still protect Infraco's entitlement to make recovery for it in the event that it transpires that tie should be responsible for its cost and time consequences.

17.22 However, the proposition that tie are entitled to issue directions in this way is not without risk, and Infraco's interpretation might be upheld. For example, the detailed provisions in clause 80.15 set out a very specific set of circumstances in which tie can direct work to proceed, and that might be seen to sit oddly with the non-specific wording of clause 80.13, which makes no reference to carving out the provisions of clause 80.12, or the situation in relation to the SDS Provider.

17.23 If Infraco refuse to act on tie's instructions either under clause 34.1 or under clause 80.13, then tie's recourse would be to take the issue of the interpretation of clause 34.1 and/or clause 80.13 to DRP.

17.24 If tie's argument was upheld, the consequence would be that Infraco would be in breach of contract where they had failed to comply with the instructions. To the extent that their breach had caused delay, they would not be entitled to an extension of time or relief from liquidated damages for the relevant period.

17.25 Beyond that, the breach might be capable of forming the basis of a tie termination for Infraco Default. The issue of termination is dealt with in more detail at paragraphs 24 to 35 below.

Where tie accept that there has been a Notified Departure

17.26 If it is agreed that a tie Change has arisen by way of a Notified Departure, then clause 80.4 provides that Infraco shall deliver an Estimate within 18 Business Days. That time limit will start to run from the date on which either party notifies the other that a Notified Departure has arisen.

17.27 Clause 80.3 entitles Infraco to seek an extension to this period if it reasonably considers that the Estimate is too complex to be provided within the 18 Business Days time period. That extension is to be for a reasonable period of time, to be agreed by both parties acting reasonably.

Late Estimate where it is accepted that there has been a Notified Departure

17.28 There is no provision for what is to happen if the Estimate (or the request for an extension to the time limits for providing an Estimate) is late. Unlike the provisions of clause 65.2, there is no wording which would point towards timeous submission being a condition precedent. As referred to at paragraph 12.4 above, there is no wording in clause 80 which explicitly provides for an extension of time to be awarded in the event of a tie Change; as a corollary to this, there is no condition precedent to that award. In other words, where a tie Change arises from a Notified Departure, and Infraco do not submit an Estimate in time, then there is no express sanction against them, and they do not forfeit their entitlement to an extension of time.

17.29 This interpretation is reinforced by the loose wording in clause 80.3, which provides for "*a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties both acting reasonably*". If it had been intended that timeous submission was to be a condition precedent, then it would be reasonable to expect a greater degree of precision in the words used.

17.30 For the reasons referred to above, where Infraco fail to provide an Estimate in relation to an agreed Notified Departure, it is possible to interpret the provisions of clause 80.13 in such a way as to conclude that tie are entitled to instruct Infraco to proceed.

17.31 Indeed, the argument may even carry more force in this context: where it is agreed that there has been a Notified Departure, the only controversy between the parties is the *quantum* of Infraco's entitlement, and

there is no dispute about which party is to bear the risk. In those circumstances, it would be even more surprising if Infraco were to be entitled to frustrate progress.

17.32 To the extent that Infraco are held to be in breach if they have failed to comply with a clause 80.13 direction:

17.32.1 This will be relevant to an assessment for delay caused by that non-compliance (they will not be entitled to an extension of time where their failure to comply has caused delay); and

17.32.2 This may be capable of forming the basis of a tie termination for Infraco Default. The issue of termination is dealt with in more detail at paragraphs 24 to 35 below.

17.33 A breach of an obligation to comply with a clause 80.13 direction should be distinguished from the failure to provide an Estimate timeously, which in itself is unlikely to constitute a sufficiently material breach for the purposes of termination on Infraco Default.

17.34 To the extent that Infraco's failure to comply with its obligations in relation to the provision of an Estimate has in itself *caused* delay, then that will be relevant in assessing who bears responsibility for that delay. This is considered in the context of the principles in relation to causation and concurrency referred to in paragraph 13 above.

Inadequate Estimate where it is accepted that there has been a Notified Departure

17.35 Clauses 80.4, 80.5 and 80.7 set out the information which is required to be included in an Estimate.

17.36 In many cases, tie consider that the information contained is inadequate or non compliant.

17.37 In that situation, tie's options are essentially:

(a) To enter into dialogue with Infraco in order to seek improved information; or

(b) To invoke the DRP, treating the Estimate as disputed; or

(c) To issue directions in accordance with clause 80.13, subject to the provisos referred to above in relation to the strength of this argument.

17.38 As with failure to provide timeous Estimates referred to above, a failure to provide sufficient information is unlikely in itself to constitute a valid basis for tie termination on Infraco Default. However, the failure to comply with a direction under clause 80.13 might be capable of constituting a valid basis for termination.

17.39 Furthermore, to the extent that Infraco's failure to comply with its obligations in relation to the content of an Estimate has in itself *caused* delay, then that will be relevant in assessing who bears responsibility for that delay.

Where tie Change arises as a result of a tie Notice of Change

17.40 Where tie Change arises as a result of a tie Notice of Change, then there will be no dispute between tie and Infraco as to whether a tie Change has occurred.

17.41 In that case, the comments above in relation to the late and inadequate submission of Estimates will apply.

Where tie Change arises as a result of clause 80.20

17.42 In terms of clause 80.20, where Infraco consider that compliance with tie instructions would constitute a tie Change (*i.e.* the position in circumstances other than a tie Notice of Change or a Notified Departure) then:

17.42.1 "*Infraco shall comply with the instruction*"; and

17.42.2 Infraco shall notify tie within 20 Business Days of receipt of the instruction that the instruction constitutes a tie Change; and

17.42.3 At the same time, produce an Estimate which complies with clauses 80.4 and 80.5.

17.43 It can be seen that in this context, there is an express provision which requires Infraco to comply with the instruction; failure to do so would constitute a breach of contract. This express provision is difficult to reconcile with the wording in clause 80.20 which states that clause 80.15 will apply to the work carried out by Infraco in compliance with the instruction, from the date of receipt of the Estimate. Clause 80.20 states that Infraco *shall* comply with the instruction, clause 80.15 states that tie may in certain circumstances instruct Infraco to comply. It is not clear whether the reference to clause 80.15 is intended to restrict the circumstances in which Infraco are obliged to comply with the instruction.

17.44 The Estimate which is provided in terms of clause 80.20 is required to comply with the requirements of clause 80.4 and 80.5, in terms of the information which it must be include. It does not need to comply with the requirements of clauses 80.7 or 80.8.

Dispute resolution proceedings in relation to clauses 34.1 and 80.13

17.45 It is open to tie to refer the proper interpretation of clauses 34.1 and 80.13 to the DRP

17.46 That would involve first following the mechanisms laid out in Schedule Part 9, through internal resolution, mediation and adjudication – unless agreement can be reached with Infraco at an earlier stage that the issue should be referred to the court.

17.47 Once a court action is commenced, it is likely to be many months before a decision is obtained at first instance; that will particularly be the case if either party wishes to have factual issues considered, beyond issues of strict interpretation. Even if a favourable decision is achieved by tie, it is likely that this decision would be appealed by Infraco, adding considerably to the length of the process.

17.48 As part of the Schedule Part 9 process, the issue of interpretation could be referred to an Adjudicator on the legal panel. Those legal adjudicators are:

Lord Dervaird (Professor John Murray QC)

Gordon Coutts QC

Robert Howie QC

Nick Ellis

17.49 tie are entitled to propose which adjudicator they prefer to hear the dispute, but Infraco essentially have the right of veto over that selection.

18 Specific issues in relation to time

18.1 The foregoing paragraphs 11 to 17 of this report have addressed some of the general and contractual principles that will inform the way in which the risk of overrun falls to be considered.

18.2 The following paragraphs 19 to 22 address some specific issues which have arisen as work has progressed, and considers the extent to which these will affect the respective entitlements of tie and Infraco.

18.3 Those issues are:

(a) Utilities Works;

(b) The SDS Provider;

(c) Infraco's management of sub-contractors

(d) Other provisions

19 **Utilities Works**

19.1 To the extent that MUDFA or Utilities Works not carried out by Infraco have caused a delay in achieving completion of the Infraco Works, or Sections thereof, by the relevant contractual completion dates, then this will entitle Infraco to an extension of time. In terms of the two stage test referred to paragraph 13.6 above, delay caused by the Utilities Works is a non-Infraco risk event.

19.2 That entitlement can arise under a number of different contractual routes. These include the following:

19.2.1 The execution of any Utilities Works or MUDFA Works is a Compensation Event[46], and the provisions of clause 65 referred to above will apply.

19.2.2 Completion by the MUDFA Contractor and/or Utilities of the diversion of utilities in accordance with the requirements of the Programme is a Pricing Assumption[47]. If the diversion of the utilities is not completed in accordance with the requirements of the Programme, that will constitute a Notified Departure which is a Mandatory tie Change in terms of clause 80.

19.2.3 The programming assumptions set out in Schedule Part 15 are a Pricing Assumption[48], and include milestone dates for completion of the Utilities Works. If the programming assumptions do not remain "true" (in the wording of Schedule Part 4), that will constitute a Notified Departure which is a Mandatory tie Change in terms of clause 80.

19.3 There are other potential routes contractual routes which would lead to an extension of time[49], but each of those leads either to a Compensation Event or a Notified Departure. It is open to Infraco to select whichever route they wish, and which they consider will afford them the best chance of recovery. Indeed, in the context of a formal DRP, it is likely that they would rely on a number of different routes to entitlement in order to protect their position.

19.4 It is accepted by tie that some delay has been sustained by Infraco as a result of the Utilities Works. Indeed, the second extension of time of nine months offered by tie to Infraco appears to have been offered in the context of discussions in relation to the Utilities Works, and in particular Revision 8 of the MUDFA Programme.

19.5 There does not appear to have been any notification by tie to Infraco which expressly links this extension of time to the Utilities Works. Nor does there appear to have been any information given to Infraco as to how the length of the extension was assessed – indeed, it is not clear what the basis of this assessment was. Infraco have recently indicated that they do not accept the extension of time that was offered.

[46] Compensation Event (d)
[47] Pricing Assumption no. 24 in clause 3.4 of Schedule Part 4
[48] Pricing Assumption no. 32 in clause 3.4 of Schedule Part 4
[49] For example, that failure to give access to Infraco as a result of the Utilities Works constitutes a failure to give exclusive licence in terms of clause 18, and is therefore a Compensation Event. It may also be that the Infraco Construction Programme, and hence the milestones, are terms of the contract. If that is the case, failure to adhere to meet the milestones would constitute a tie breach and therefore a Compensation Event.

19.6 These factors may require to be unravelled in the event of future DRP's in relation to time: tie will require to explain how much time has been awarded in relation to which Compensation Events and which Notified Departures.

19.7 Crucially in the context of the 9 month extension, the offer was not made in full and final settlement of all entitlement that Infraco might have in relation to Utilities Works as at the point at which it was awarded. Indeed, the DRP that had been initiated was simply suspended by agreement between tie and Infraco.

19.8 The second part of the two stage test referred to at paragraph 13.6 above is whether the Utilities Works have *caused* a delay in achieving the relevant contractual completion dates. This will be assessed by reference to the principles described at paragraphs 11 to 17 above, requiring a detailed analysis of the critical path, underpinned by factual and forensic investigations.

19.9 One of the issues which has arisen in this context is the extent to which Infraco are entitled to insist on *all* Utilities Works being completed in a physical section of the work before commencing their own work. They rely on the provisions of clause 18.1.2. in this respect, namely:

"*tie…hereby grants a non-exclusive licence to the Infraco to enter and remain upon the Permanent Land for the duration of the Term and an exclusive licence to the Infraco to enter and remain upon the Designated Working Area for the duration of the time required (pursuant to Schedule Part 15 (Programme)) for completion of the Infraco Works to be executed on such Designated Working Area… in either case only in so far as the same is required for the purposes of carrying out the Infraco Works* ".

19.10 Infraco conclude that because the MUDFA Contractor or the Utilities remain on the Designated Working Area, an *exclusive* licence has not been granted, and this therefore constitutes a Compensation Event in terms of clause 65.

19.11 There are a number of ways in which this argument can be attacked, which include:

19.11.1 Firstly, Infraco's interpretation does not take account of the words at the end of the excerpt quoted above: "*in either case only in so far as the same is required for the purposes of carrying out the Infraco Works*". It is possible to interpret those words as meaning that to the extent that Infraco are able to progress the Infraco Works *without* the exclusive licence (*i.e.* whilst some Utilities Works are still ongoing), they should do so, without the need for the exclusive licence being granted.

19.11.2 Secondly, Infraco are only entitled to apply for an extension of time to the extent that a Compensation Event "*is the direct cause of a delay*"[50]. Where it is evident that other work could be carried out (for example because the Utilities Works occupy a small proportion of a larger area), then it is arguable that the *cause* of the delay is not the failure to grant an exclusive licence, but the refusal of Infraco to progress when there are workfaces available to them. This argument would require to be supported by factual and expert planning evidence.

[50] Clause 65.1.1

19.11.3 Thirdly, Infraco is entitled to such extension of time as would be "*reasonable for such a Compensation Event, taking into account the likely effect of delay and on Infraco's ability to perform its obligations under this Agreement.*"[51] Again, it would be arguable for tie that it would not be reasonable for Infraco to refuse to progress work where appropriate workfaces where available to them. As before, this would require to be supported by factual and expert planning evidence.

19.11.4 Fourthly, an extension of time only falls to be awarded where "*Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in the progress of the Infraco Works…*"[52]

19.11.5 Lastly, it should be noted that even if Infraco are correct in their approach, the issue arises only in the context of a claim by them to be entitled to a Compensation Event. It does not arise in the context of a claim that there has been a Notified Departure.

19.12 If these arguments on the part of tie are sustained, the impact will be felt in relation to the length of the extension of time to which Infraco are entitled. It will not extinguish their entitlement to an extension of time in relation to the Utilities Works.

19.13 The same principle applies in relation to any failure on the part of Infraco mitigate delay or offer options for acceleration: those failures may impact upon the extent of the extension of time that Infraco will be entitled to, but they will not automatically extinguish it.

[51] Clause 65.3.1
[52] Clause 65.8.1

20 **The SDS Provider and delay**

20.1 To the extent that delay is caused by SDS Services (and in particular, the late issue of design information), various provisions of the contract require to be reconciled in order to arrive at a conclusion as to whether the risk associated with that delay sits with tie or Infraco.

20.2 Clause 11.4 provides that:

"*The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services*."

20.3 The "*required management activities*" are not defined, and it is not clear whether the words are intended to mean the obligations on the part of Infraco contained within clause 11 (for example, the obligation in 11.6 to procure the attendance of the SDS Provider at meetings), or some more general, though unspecified, management duties. Either way, it is clear that some degree of management is required.

20.4 The conclusions of Blair Anderson in his draft report dated February 2010 include the following:

"*Infraco since alignment, based on the information provided, have failed to manage the Designer and the Design process and could be considered negligent in their duties to manage the Designer SDS.*"

20.5 Clause 11.4 provides that Infraco's obligations in relation to the SDS Provider are subject to any express limitations or rights in relation to the performance of SDS Services.

20.6 The contract expressly provides that in, certain circumstances, a Compensation Event or a Notified Departure will arise in connection with the performance by the SDS Provider of the SDS Services. For example:

20.6.1 There will be a Compensation Event where there is:

"*save as excluded by Clause 19.19, failure of the SDS Provider to achieve the release of Issued for Construction Drawings by the date identified in the Programme for the release of such Issued for Construction Drawings*"[53]

Clause 19.19 in turn provides that there will be no Compensation Event where the Infraco Design is:

"(i) not submitted to the SDS Provider in accordance with the Consents Programme and Schedule Part 14 (Review Procedure and Design Management Plan); or (ii) is rejected by the Approvals Body on grounds of content or quality but not, for avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals."

[53] Compensation Event (t)

It will be a question of fact in each case whether the 19.19 exception applies (subject to issues in relation to the proper interpretation of design principle, scope, form or specification which are addressed in paragraphs 4 to 9 of this report).

To the extent that the clause 19.19 exception does not apply, then Infraco may be entitled to an extension of time within the terms of clause 65. This point is addressed in more detail below.

20.7 Separately there will also be a Compensation Event where there is:

"*any material breach (as distinct from (t) above) by the SDS Provider of its obligations under the SDS Agreement or in delict in relation to the quality of the Deliverables under the SDS Agreement*"[54].

20.8 Pricing Assumption 2 provides that "*Design delivery by the SDS Provider has been aligned with the Infraco construction delivery programme as set out in Schedule Part 15 (Programme)*". To the extent that the "*facts and circumstances*" differ from this assumption, there will be a Notified Departure which is a mandatory tie Change in terms of clause 80.

20.9 Pricing Assumption 32 provides that the programming assumptions set out in Schedule Part 15 will remain true in all aspects. Programming Assumption no. 2 provides that:

"*Version 26 of the SDS design programme has been used to establish milestone dates for the Issue for Construction drawings. We have assumed that there will be no amendments to the SDS design programme*. "

Accordingly, to the extent that there are amendments to the SDS design programme, this will constitute a Notified Departure and be a Mandatory tie Change.

20.10 In order to assess whether delay associated with SDS Services is capable of leading to an extension of time *via* either clause 65 or clause 80, or whether it is an Infraco risk, regard must be had to the *cause* of each delay. The delay will be at Infraco's risk only if it can be established that it was Infraco's failure to manage the SDS Provider which caused the design to be late, inadequate *etc.*

20.11 However, if:

(a) *Either* Infraco's failure to manage the SDS Provider did not have any impact on the critical path and was not a cause, or a dominant cause of delay;

(b) *Or* Infraco fulfilled their obligations to manage the SDS Provider, but despite that, the SDS Design was still late or defective in some other way

[54] Compensation Event (u)

Then Infraco may be entitled to an extension of time, subject to the other provisions of clauses 65 and 80. What is relevant in both of these sets of circumstances is the extent to which delay has been caused by the SDS Provider, or by the way in which Infraco have exercised their management obligation.

20.12 In order to assess whether a failure to manage the SDS Provider has been an operative cause of delay, the principles discussed at paragraph 13 above in relation to causation and concurrency will require to be considered. A detailed analysis of the critical path and the factual position will also be required.

20.13 To the extent that Infraco's failings in connection with their management obligations:

(a) Constitute a breach which materially and adversely affects the carrying out and/or completion of the Infraco Works; or

(b) Constitutes a material breach (subject to the comments at paragraph 28 below in relation to this ground),

Then they may in principle form the basis of a tie termination for Infraco Default. Termination is addressed in more detail at paragraphs 24 to 35 below. However, in general terms, a consideration of whether or not Infraco breaches of this type are capable of falling within either of the categories referred to above is likely to turn to a significant extent on the impact that the failure has actually had on the progress of the work. If the Infraco failings were not an operative cause of delay, then it is less likely that they will satisfy either of the tests referred to.

21 Management of sub-contractors

21.1 There are three principal areas where tie consider that Infraco are in breach of contract in relation to sub-contractors:

(a) A failure to obtain tie's consent to the appointment of certain sub-contractors;

(b) A failure to enter into sub-contracts timeously; and

(c) A failure to provide collateral warranties from sub-contractors.

21.2 Clause 28 provides a two part regime in relation to the appointment of sub-contractors. The first is where sub-contractors are deemed to have been already approved by virtue of being in certain categories referred to in clause 38.1.

21.3 The second category is where tie are required to make a decision on the suitability of a particular sub-contractor. Clause 28.3 sets out the way in which this decision making process is to operate. tie are not entitled to unreasonably withhold or delay their approval, but there are two specific criteria in relation to which tie appears to have an unqualified entitlement to withhold approval:

(a) tie considers that the proposed sub-contractor has an unacceptable safety record[55]; or

(b) the sub-contractor will not provide a collateral warranty in the form required, subject to an important qualification considered in more detail below.[56]

21.4 The interpretation of this second category referred to above is a difficult one: the approval process is clearly envisaged to take place before a sub-contractor has been appointed. That is the reason for the process. However, a collateral warranty is – by definition – collateral to another contract: in other words it will only be provided at the point at which the sub-contract is actually entered into. It may be that the intention of these words is that if a sub-contractor gives an indication – in advance – that he will not be prepared to enter into a collateral warranty, then this will constitute a valid ground for tie refusing to grant approval.

21.5 However, this will only be the case "*unless Infraco provides a collateral warranty in accordance with clause 28.10*." Clause 28.10 in turn provides that if:

(a) Infraco can demonstrate to tie's satisfaction that it has used its reasonable endeavours to obtain a collateral warranty (and it is likely that this might extend to no more than asking the sub-contractor to provide one; it is unlikely to extend to paying a premium to the sub-contractor for the warranty); *and*

(b) Infraco have been unable to obtain the warranty

Then Infraco *shall*, if asked by tie, provide an equivalent warranty.

21.6 In other words, it will usually be the case that failure by a sub-contractor to agree to provide a warranty does not, of itself, constitute a valid ground for withholding approval to that sub-contractor, as a result of the provisions of clause 28.10.

21.7 Furthermore, to the extent that Infraco have tried and failed to obtain a collateral warranty, there is an obligation on them to warrant the sub-contractor's work: in terms of clause 28.10, that expressly does *not* constitute a breach of contract.

21.8 Accordingly, the failure to procure collateral warranties is unlikely to provide the basis for any meaningful remedy on the part of tie (other than the entitlement to seek a warranty from Infraco).

21.9 To the extent that the failure has caused delay to completion of the Infraco Works, the failure to provide a collateral warranty might in theory be relevant to an assessment of extension of time: however, that would be subject to being able to establish what the delaying impact consisted of, and how it interacted with any concurrent delays. It is difficult to see how the failure to obtain a collateral warranty, in circumstances where Infraco are required to provide an equivalent warranty on request, is capable of causing delay to completion. Equally, it is difficult to see how any costs associated with that failure would be more than nominal. However, if it is the case that tie consider that cost or delay have been sustained in relation to the warranties, that can be investigated further.

21.10 Where clause 28.10 applies, the failure to obtain a sub-contractor warranty will not constitute a breach of contract, and it will therefore not be capable of forming the basis of a tie termination for Infraco Default.

21.11 Where Infraco have failed to obtain tie's consent, there is no express contractual provision in relation to what the consequences of that failure are. The failure is a breach of contract, and tie ought therefore to be entitled to recover any costs associated with the failure to obtain consent. Infraco ought not to be entitled to any extension of time where delay has been caused by their failure. However, where delay or cost has been occasioned by the way in which a sub-contractor has executed their work, a more usual way to approach the issue would be on the basis that Infraco remain liable for the Infraco Works in accordance with the Agreement, irrespective of whether part of those Infraco Works was sub-contracted to a third party, whether approved by tie or not.

21.12 A similar consideration will apply in relation to a failure to enter into sub-contracts timeously. There is no absolute provision whereby Infraco warrant that they will enter into sub-contracts on particular dates. However, they are subject to a general obligation to:

"*progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme. Notwithstanding the generality of*

[55] Clause 28.3.1

the foregoing, the Infraco shall complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion in respect of each Section or Certificate of Service Commencement (as appropriate) to be issued…by the Planned Service Commencement Date or the relevant Planned Sectional Completion Date."[57]

21.13 To the extent that failure to procure sub-contracts in a timely way causes delay to completion of the Infraco Works, or Sections thereof, then that will in turn constitute an Infraco delay for which Infraco will not be entitled to an extension of time. The principles of causation and concurrency referred to in paragraph 13 above will fall to be applied.

[56] Clause 28.3.2
[57] Clause 60.1

22 **Other provisions**

22.1 There are a number of other breaches which tie has identified in the way in which Infraco is carrying out its obligations under the contract.

22.2 The first of these categories is the provisions of clause 6 in relation to project partnering, which include the following:

22.2.1 At 6.1:

"*The Parties agree to work in mutual co-operation to fulfil their agreed roles and responsibilities and apply their expertise to carry out and complete the Infraco Works in accordance with this Agreement*."

22.2.2 At 6.3:

"*Subject to Clause 6.4, each Party ("First Party") undertakes to co-operate with the other ("Second Party") in order to facilitate the performance of this Agreement and in particular the First Party shall:*

6.3.1 approach all Permitted Variations on a collaborative and Open Book Basis;

6.3.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;

6.3.3 comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the Second Party;

6.3.4 not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;

6.3.5 take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive); and

6.3.6 take all reasonable steps to manage, minimise and mitigate all costs."

22.3 In each of these cases, the obligations are essentially parasitic: in other words, they explain the way in which the parties must carry out their other obligations under the contract. They are unlikely to be capable of forming a basis of a cause of action against Infraco independently of Infraco's underlying obligations.

22.4 This point was considered by Calum MacNeill QC in an opinion provided for tie on 30 June 2009 in which he stated:

"*Clause 6 sets down a general approach of how the parties will manage their relationship and any complaints or failures to comply with Clause 6 would have to be instanced by specific failures to approach matters in the way stipulated*."

22.5 Clause 6.3 is expressly subject to the provisions of clause 6.4, which states that "*nothing in Clause 6.3 shall…interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit (in compliance with Law) in order to exercise its rights and perform its obligations under this Agreement (in compliance with Law)…or…relieve either Party from any obligation contained in this Agreement…*"

22.6 The provisions of clause 6 may be relevant to the way in which other substantive obligations are considered: for example, the comments above in relation to mitigation in the context of an award of an extension of time. They are unlikely to create a substantive obligation in their own right.

22.7 The same applies to the provisions of clause 7, which include:

22.7.1 At 7.2:

"*Notwithstanding the specific responsibilities set out in Clause 7.3, the Infraco undertakes to tie that in carrying out and completing the Infraco Works it has exercised and undertakes to continue to exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity. The Infraco acknowledges that tie will rely upon the skill, care and diligence of the Infraco in connection with all matters for which the Infraco is responsible under this Agreement*."

Calum MacNeill QC also noted in the same opinion:

"*Clause 7.2 is not a standalone provision. By that I mean that it would not be sufficient to raise proceedings against the Infraco stating only that they had breached that Clause. Such an allegation or complaint would required to be supported by specific instances of a failure or failures to comply with the required standard of care, and those specific instances would have to be examples of the Infraco failing to apply that standard of care when carrying out particular obligations under specific provisions of the Infraco Contract…*"

22.7.2 At 7.5:

"*The Infraco shall…use reasonable endeavours to ensure that in carrying out the Infraco Works, it… [7.5.5] minimises cost*."

Whilst this provision might be relevant to assessing cost in relation to individual cases where such an assessment is required, it does not create an independent obligation.

22.8 In each case, what is required is to interrogate the underlying substantive obligations of Infraco and consider whether in each case they have breached those obligations, and then to consider what the consequences of such a breach would be.

23 Breach by the SDS Provider

23.1 There is a further avenue which requires to be explored in the context of breaches by the SDS Provider, and the recourse available for those breaches.

23.2 The development of that line will require detailed factual investigation, as well as expert input. That process has commenced. It would be appropriate to carry out contractual analysis on this issue in conjunction with the aforementioned forensic activity.

24 Bringing the contract to an end

24.1 The contract contains provisions which entitle either party to terminate the contract in certain specific circumstances. The contract further provides that that it can only be terminated on the basis of those provisions that have been expressly set out in the contract[58]. There are therefore unlikely to be any additional common law rights beyond the specific circumstances explained below which will entitle either Infraco or tie to terminate.

24.2 Beyond rights of termination, the contract may be brought to end as a consequence of a repudiatory breach by one party. This issue is considered further at paragraph 35 below in the context of the consequences of wrongful termination.

25 Grounds for termination

25.1 The grounds for termination (other than expiry by the passage of time) expressed in the contract are:

(i) Termination by Infraco for tie Default (clause 88);

(ii) Voluntary termination by tie (clause 89);

(iii) Termination by tie for Infraco Default (clause 90);

(iv) Termination by reason of Force Majeure (clause 91);

(v) Termination for corrupt gifts and fraud (clause 92);

(vi) Persistent breach. (clause 93).

25.2 Of these, the only relevant grounds for present purposes are likely to be on the basis of tie Default (clause 88) or Infraco Default (clause 90).

25.3 The others are unlikely to be relevant because:

25.3.1 Voluntary termination (or what has colloquially been described by tie as "termination without just cause") is only available after the expiry of three years after the issue of the first Certificate of Service Commencement. That route is therefore not available to tie at the current stage of the project;

25.3.2 The Force Majeure Events provided for in the contract are extremely limited in scope and have no current relevance.

25.3.3 Similarly, issues of corrupt gifts or fraud do not arise.

[58] Clause 77.10

25.3.4 The right to terminate for Persistent Breach in terms of clause 93 only arises after the first Sectional Completion Date when Infraco is performing Maintenance Services.

26 **Infraco Default**

26.1 The events defined in Schedule Part 1 as Infraco Defaults are as follows:

"(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;

(b) the occurrence of an Insolvency Event in relation to the Infraco or either of the Infraco Members;

(c) the Infraco fails to commence the Infraco Works within 90 days of the Commencement Date or permanently abandons the Infraco Works (or a material part of them) at any time;

(d) the Service Commencement Date or Sectional Completion Date (as appropriate) in respect of a Section is not achieved or is programmed to not be achieved (as set out in the Programme) on or before the date falling 12 months after the Planned Service Commencement Date or Planned Sectional Completion Date (as appropriate) except as a result of a Compensation Event, Relief Event, Force Majeure Event, tie Change, Accommodation Works Change, a Change in Law (where compliance with such Change in Law is the sole reason for the Infraco failure to achieve the relevant date) and any legitimate suspension of the Infraco Works by the Infraco pursuant to Clause 87 (Suspension of Work);

(e) the Infraco does not confirm its agreement in writing to a Liquidated Damages Cap Increment in accordance with Clause 62.10;

(f) a breach by the Infraco of its obligations to take out and maintain the Required Insurances which is not remedied by the Infraco within 10 days of written notice from tie to the Infraco specifying the relevant breach and requiring it to be remedied;

(g) the issue of four or more Underperformance Warning Notices in any 12 month period;

(h) NOT USED

(i) the Infraco has reported a change in the legal status of the Infraco or a Change in Control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works; or

(j) the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from tie's Representative a written notice to proceed."

26.2 From the information available it would be appear that, of these, the relevant defaults are likely to be (a) and (g). Both of these turn on issues to do with Infraco breach and materiality which involve similar

considerations. The mechanism to be followed in relation to each may differ. These points are all addressed in more detail below.

27 **Infraco Default (a): breach which materially and adversely affects the carrying out and/or completion of the Infraco Works**

27.1 There is no contractual definition in relation to whether a breach is to be treated as material and adverse: it will be a question of fact, and degree, in each case. However, the way in which these words should be interpreted is in the context of a breach which is *substantial* and detrimental, and which goes to the very root of the way in which the Infraco Works are to be executed.

27.2 A court will view the exercise of a right to terminate as a serious issue, given the significance of its impact on the party who is terminated. Provisions will therefore be construed strictly, and the hurdle of establishing that a breach is sufficiently serious to give rise to a right to terminate will be a high one for tie to overcome.

27.3 The consequences to tie in proceeding with a purported termination where the definition of an Infraco Default has not been squarely met are severe (and are addressed in more detail below).

27.4 The possibility of whether various Infraco breaches are capable of being a valid basis for determination has been touched on in the context of specific breaches referred to above. In summary:

27.4.1 Infraco's failure to comply with instructions issued under clause 34.1 or directions under clause 80.13 may be capable of treated as having a sufficiently material and adverse impact, provided that issues discussed above in the context of the interpretation of clause 80 have been resolved;

27.4.2 Failures to issue notices on time, provide sufficient information or comply with obligations in relation to planning are, on the basis of information currently available, unlikely to be treated as having a sufficiently material or adverse impact on the execution of the Infraco Works to justify termination on this ground;

27.4.3 Failure to progress the Infraco Works with "*due expedition and in a timely and efficient manner without delay*"[59] cannot be considered in isolation: the extent to which Infraco can be said to be in breach will turn on how responsibility for delay is allocated, and specifically whether Infraco are entitled to an extension of time. It is only if the outcome of that exercise is a conclusion that Infraco are in breach of their obligations that issues of whether their breach had materially and adversely affected the execution of the Works would arise;

27.5 To the extent that tie are able to establish that there has been an Infraco Default within the meaning of ground (a), the consequence of this would entitle tie to issue a Remediable Termination Notice (RTN) pursuant to clause 90.1.2.

[59] Clause 60.1

27.6 Following issue of an RTN, Infraco are entitled to, but not *obliged* to, submit what is described as a "comprehensive rectification plan". tie, at its own absolute discretion, can decide whether to accept or reject that plan. In other words, once a valid RTN has been issued, tie has an absolute discretion in relation to whether or not to proceed to termination – even if Infraco comes up with a plan which would rectify the underlying breach[60].

28 **Infraco Default (g): the issue of four or more UWNs in any 12 month period**

28.1 The mechanism of the issue of Underperformance Warning Notices ("UWNs") is contained within clause 56.7, which sets out two separate sets of circumstances where these notices may be issued.

28.2 The second category relates to the period in time where System Acceptance Tests are being carried out, and is therefore not relevant. The first category is set out in clause 56.7.1 as applying:

"*if at any time the Infraco has committed any material breach of it obligations under this Agreement.*"

28.3 There is a considerable difficulty in this context of reconciling different sections of the contract: clause 56.7 quite clearly envisages two different sets of circumstances where tie are entitled to issue a UWN, and these are set out in two separate sub-clauses: 56.7.1 and 56.7.2. However, the definition of UWN in Schedule Part 1 states:

"*"Underperformance Warning Notice" means a notice issued to the Infraco by tie pursuant to clause 56.7.2*"

Accordingly, the definition of UWN does not encompass a UWN being issued under 56.7.1. There is a clear clash between these two provisions, such that something has clearly gone wrong with the wording of the contract.

28.4 For a number of reasons, an interpretation which allows a UWN to be issued under clause 56.7.1 ought to be preferred:

28.4.1 Given the express wording of clause 56.7, it is more reasonable, and has more common sense, to assume that a reference to clause 56.7.1 has simply been omitted from the definition, than to assume that the whole of clause 56.7.1 was included in error.

28.4.2 The contract envisages a two part regime in relation to UWNs: some provisions relate solely to a UWN issued under 56.7.2[61], whereas others make no distinction between the two limbs[62]. There would be no logical sense in making this distinction if the only route to a UWN were to be via 56.7.2.

[60] If tie do not accept Infraco's plan (or, indeed, Infraco do not submit a plan), then tie can terminate on 5 Business Days' written notice.
[61] For example, clauses 56.8, 56.9.2, 56.9.3 and 90.1.2
[62] For example, clauses 56.9.1, 56.10, 56.11, 90.1.1

28.5 The proposition that material breach entitles tie to issue a UWN is an arguable one; however, given the context of this discussion (namely the termination of the contract), the proposition ought to be tested further, in conjunction with senior counsel, before embarking on any course leading towards termination.

28.6 It has been suggested that clause 56.7.1 ought to be interpreted in such a way as to apply only to material breach in the context of Maintenance Services, on the basis that the sub-clause appears in the context of clause 56 as a whole which relates to "*Service Performance and Quality Monitoring*".

28.7 There are arguments available to tie that 56.7.1 could be interpreted in such a way as encompass a breach which occurs at any time during performance of the Infraco Works. For example:

28.7.1 The clear and unambiguous wording of clause 56.7.1 which states "*at any time*". This is unrestricted.

28.7.2 That can be contrasted with the opening of clause 56.7.2, which carefully defines the relevant period as being "*following the issue of the Reliability Certificate*";

28.7.3 Clause 56 does not apply exclusively to the period after service has commenced. For example, it requires Service Quality Reports to be issued by reference to every Reporting Period. Those Reporting Periods occur throughout the construction phase, and are not restricted to the period after the Service Commencement Date.

28.7.4 That in turn suggests that the word "service" can have a dual meaning within the contract. Indeed, it is not a defined term. In the context of a Certificate of Service Commencement, it is a date after the substantial completion of Section D[63], and is therefore associated with the operation of trams. In the context of a Service Quality Report, it relates to something which happens throughout the currency of the contract, and is therefore perhaps more properly associated with the generic concept of the provision of service or services.

28.7.5 Accordingly, the heading "*Service Performance and Quality Monitoring*" does not require to be interpreted as meaning a reference only to the period after the Service Commencement Date, and indeed there are reasons for concluding the contrary.

28.7.6 Furthermore, the contract expressly provides at clause 2.14 that "*headings…in the Agreement shall not be deemed to be part thereof or be taken into consideration in the interpretation or construction…of the Agreement*."

28.8 In summary on this point, there is an argument available that a material breach committed at any time can form a valid basis for the issue of a UWN. However, given the context of this discussion (namely the termination of the contract), this argument ought to be tested further in conjunction with senior counsel, if it were intended to utilise this provision and particularly if it was intended to be relied upon in the context of termination.

[63] Clause 45.1

28.9 The test for whether there has been a material breach is likely to be a similar one to that under ground (a) in relation to a breach having a material and adverse impact on the execution of the Infraco Works. In order to be material, a breach must be substantial and go to the root of the contract. In the context of ground (g), it is the breach itself which must be material, rather than the impact on the execution of the Infraco Works: strictly speaking, a breach may be material even if the consequences of that breach are not, in themselves, material. However, in assessing whether a breach is material, the effect that it has on the works is likely to be a highly relevant factor.

28.10 In terms of ground (g), there are required to be four or more UWNs in a year. Only one UWN may be served in any one Reporting Period (28 days)[64]. UWNs in relation to material breach can be served in consecutive Reporting Periods[65]. It is unlikely that the contract is to be interpreted in such a way as to entitle tie to serve more than one UWN in relation to the *same* breach.

28.11 Where tie rely on a material breach of contract, there is no provision for Infraco to be entitled to put forward a Rectification Plan under clause 56.8.

28.12 Furthermore, if there have been four UWNs issued for material breach in a year, there is no requirement for the RTN process referred to above to be followed, and tie may terminate on giving 7 Business Days written notice[66].

29 **tie Default**

29.1 Infraco are entitled to terminate the contract where they are able to make out one or more of the grounds of tie Default[67]:

"(a) the failure of tie for more than 30 days following the final date for payment to pay to the Infraco an amount in excess of £250,000 which has been certified for payment… except where tie has exercised contractual rights of set-off or retention…"

(b) a breach by tie of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the Infraco to perform any material part of its obligations under this Agreement for a continuous period of 45 Business Days;

(c) an Insolvency Event in relation to tie;

(d) breach by tie of Clause 98[68]; or

(e) Change in Law which makes completion of or carrying out of a material part of the Infraco Works either impossible or illegal."

[64] Clause 56.9.1
[65] The restriction in 56.9.2 on serving UWNs in consecutive periods only applies to UWNs issued pursuant to clause 56.7.2, and not to those issued pursuant to 56.7.1
[66] Clause 90.1.1
[67] Schedule Part 1
[68] Clause 98 restricts tie's ability to transfer its interest.

29.2 In addition, clause 87.2 provides for an additional ground of tie Default in relation to suspension for more than six months, where other conditions are also met.[69]

29.3 If the tie Default is capable of being rectified, the tie has 30 Business Days to rectify it. If the tie Default is not capable of being rectified, or tie fail to rectify it, then termination will be 30 Business Days after Infraco issue their termination notice.

29.4 Similar principles will apply to those discussed above in relation to the requirement for materiality in connection with ground (b): as an example, excluding Infraco from the whole site would be likely to constitute a valid ground.

30 **Consequences of lawful termination by either party**

30.1 The consequences of termination will depend on whether the termination – by either party - has been effected validly under the contract and the relevant Default relied upon has been properly made out: in short, whether the termination is lawful, or whether it is wrongful.

30.2 This report addresses only the principal provisions in relation to the payments to be made following termination: it does not address issues such as title to trams, equipment, Deliverables, transitional arrangements, and so on. DLA Piper Scotland LLP have addressed some of these issues in their report dated 19 February 2010.

30.3 In general terms, there are two issues which require to be considered in the context of termination: the *amount* which will be payable to Infraco and the *timing* of that payment.

31 **Introduction - what is payable on termination?**

31.1 Clause 94.3 provides that:

"*any termination or expiry of this Agreement shall not prejudice or affect the accrued rights or claims of either Party*".

31.2 Accordingly, irrespective of whether the contract is terminated for tie Default or Infraco Default, all of Infraco's claims for payment which have already accrued (for example, for work already done) will remain outstanding, and will require to be resolved (subject to the comment below in relation to the timing of payment).

[69] The grounds in this case are if (i) tie have suspended the works for a period of six months; and (ii) this suspension is not otherwise provided for under the agreement or necessary as a result of default by Infraco; and (iii) Infraco serve a notice on tie's representative seeking for permission to proceed with the works (or the part which is suspended), within 20 days of that notice; and no such permission is given; then Infraco may either treat the suspension as a Mandatory tie Change and delete it from the scope of the Infraco Works or, where the suspension affects the whole Infraco works, and Infraco is not able to perform any material part of its obligations for 45 Business Days, then this constitutes a tie Default.

31.3 Thus, to the extent that there is a dispute between the parties in relation to entitlement for payment for work which Infraco claim is a Notified Departure, that dispute will remain a live one, notwithstanding the termination.

31.4 Similarly, Infraco's claims for the costs which they say are associated with the Utilities Works delays will survive termination, and will require to be resolved.

31.5 If termination occurs before any of the contractual completion dates, then no rights to the payment of liquidated damages will have been triggered, even though it may ultimately be determined that Infraco bear responsibility for much of the overrun.

31.6 Subject to the comments below in relation to the timing of payments, following termination, either party may initiate the DRP in relation to any issues, including payments to be made following termination. It does not require to be the terminating party who instigates proceedings. Thus, even if Infraco terminate for tie Default, it is open to tie to take the initiative in invoking the DRP.

31.7 In cases of both Infraco and tie Default, there are equivalent provisions which state:

"*No compensation shall be payable by tie to the Infraco for termination of this Agreement in terms of this Clause 88…whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under clause 88.8.*"[70]

31.8 Clause 77.11 states:

"*Both Parties acknowledge and agree that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination or expiry. Each Party hereby waives all other rights and remedies arising from such termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 77.11 exclude the right of either Party to claim remedies expressly conferred on them by this Agreement.*"

31.9 Accordingly, the entitlements on termination will be as set out in the provisions referred to below.

32 **Infraco Default – what is payable on termination?**

32.1 Where termination arises for Infraco Default, a balancing exercise requires to be carried out between the sums to which Infraco are entitled for having executed work prior to termination, and the additional, or extra over, cost associated with getting the work finished:

(a) **Infraco are entitled to**[71]:

[70] Clause 88.8. Clause 90.11 is in almost identical terms.
[71] Clause 90.12

(i) The amount (if any) which has been reasonably earned and not yet paid in respect of work actually done by Infraco. For the reasons explained above, this will include unresolved claims;

(ii) The value of any unused or partially used goods and material which are under the control of tie or CEC as a result of the termination, and for which Infraco has not yet been paid;

(b) **tie are entitled to**[72]:

(i) The costs of completing the Infraco Works and "*all other costs and expenses properly incurred by tie*" (which are not defined), less the costs which Infraco would have received for completing the Infraco Works: in other words, the extra over cost of other contractors completing the Infraco Works;

(ii) The extra over which tie will spend on the Maintenance Services with another contractor, beyond what it would have paid to Infraco for those Maintenance Services.

32.2 A balancing exercise will be carried out between these categories, and the net balance paid either to Infraco or to tie as appropriate.

33 **tie Default – what is payable on termination?**

33.1 Where termination arises for tie Default, then tie will not be entitled to recover the additional costs of completing the project with another contractor. The following will apply:

(a) **Infraco will be entitled to**[73]**:**

(i) The value of all work carried out prior to the date of termination. For the reasons explained above, this will include the value of claims in relation to that work;

(ii) The amounts payable for preliminary items where work or services have been actually carried out;

(iii) A proper proportion of (i) whether items have been partially carried out;

(iv) The cost of materials and goods already reasonably ordered, which have already been delivered, or which the Infraco is legally liable to accept (these will become tie's property after payment is made);

(v) The reasonable cost of removing Infraco's Equipment;

[72] Clause 90.14
[73] Clause 88.8

(vi) All other expenses "*properly, demonstrably and reasonably incurred*" by Infraco arising from the termination of the Agreement. This will include sums which Infraco is required to pay to terminate any sub-contracts (including the Tram Supply Agreement and the Tram Maintenance Agreements) – although only so far as those sub-contracts are on reasonable commercial terms;

(vii) Where termination occurs before the Service Commencement Date[74], loss of profit at 10% "*for civils*", and 17 % "*for track and systems*" "*calculated with reference to demobilisation costs*". This is a difficult provision: there is no definition of civils/track and systems, nor is it clear what significance the demobilisation costs are to have.

In each case, Infraco are obliged to use their reasonable endeavours to minimise and mitigate cost, and tie are not obliged to make payment for costs incurred without reference to this duty, or as a result of Infraco's breach or negligence.

(b) **tie will be entitled to:**

(i) Only those claims which have already accrued prior to termination – such as contra charges or counterclaims which pre-date termination.

33.2 It is evident from the foregoing that tie's position is considerably improved in the event of tie termination for Infraco Default, in that an entitlement arises for additional costs associated with completing the Infraco Works and performance of the Maintenance Services. Clearly this will only be a factor to the extent that tie proceed with those works and services with another contractor.

34 **When is payment to be made after termination**

34.1 Where tie terminate for Infraco Default, the balancing exercise referred to above requires to be carried out, and the balance certified, within six months of the completion of the Infraco Works (excluding the Maintenance Services) which remained to be executed as at termination[75]: in other words, no payment will fall to be made in either direction until the Infraco Works have been completed by another contractor.

34.2 The only exception to this if there is actually a saving to tie in having another contractor carry out the Infraco Works and/or the Maintenance Services: in that case, tie may issue an interim certificate.

34.3 The contract does not expressly provide for what is to happen if tie either delay in proceeding with the Infraco Works with another contractor, or cancel the project in its entirety. In that situation, Infraco would be entitled to be paid for the work already done, and for certain goods and materials.

34.4 If the project were formally cancelled, then it would be reasonable to assume that parties intended any payment due to Infraco to flow at that stage. The issue would be more complex if there is simply a delay

[74] After the Service Commencement Date, the amount to be paid is equivalent to payment for one Reporting Period (clause 88.8.5.2)
[75] Clause 90.14

in proceeding with the Infraco Works: Infraco might well seek to argue that they should not be kept out of their entitlement indefinitely. One interpretation might be that Infraco would be required to wait for a reasonable amount of time whilst tie addressed issues such as funding, authority to proceed and the appointment of an alternative contractor. However, if no steps were reasonably being taken towards the appointment of another contractor, then a court might be prepared to conclude that Infraco would be entitled to payment.

34.5 Where termination is for tie Default, clause 88.3 provide that tie will be required to make payment to Infraco 30 Business Days after receiving a VAT invoice: that invoice can be issued at any time after termination. If the sum in the invoice was disputed, or otherwise unpaid, Infraco's recourse would be to the DRP (which survives the termination in terms of clause 94.6).

35 **Consequences of unlawful purported termination by either party**

35.1 An attempt to terminate the contract by either party will be held to be unlawful or wrongful if:

(a) The ground of default relied upon has not been properly made out;

(b) Or the mechanism has not been followed properly – for example, provisions in relation to notification or time limits.

35.2 As referred to above, these requirements will be construed strictly in the context of termination. Where a party purports to terminate in circumstances where the requirements have not been met, that will constitute a material breach or repudiation of the contract.

35.3 In general terms, where a defaulting party commits a repudiatory breach (such as wrongful termination), the other "innocent" party is entitled to choose whether to accept the breach, thereby rescinding the contract and treating it as being at an end – or to refuse the accept the breach, and hold the contract as if it were still ongoing.

35.4 Clause 77.10 of the contract purports to restrict the ability of the "innocent" party to accept a repudiatory breach and treat the contract as being at an end:

"*neither Party shall be entitled to exercise a right to…rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation).*"

35.5 On one view, this provision may be ineffective on the basis of the proposition that a defaulting party, who has in breach of contract treated the contract as being at an end, cannot at the same time purport enforce performance by the other, innocent, party and require the innocent party to treat the contract as ongoing. On that analysis, the party on the receiving end of a wrongful termination might be entitled to seek compensatory damages, to put him in the position that he would have been in had the contract been

performed. For example, Infraco might seek to argue that they were entitled to recover the profit that they would have otherwise have earned if they had been allowed to continue in the contract.

35.6 However, on another view, this clause is effective: in that case, the remedy of the "innocent party" would be to treat the wrongful termination as a default which in turn entitled them to terminate. Thus, for example, if tie purported to terminate on invalid grounds, Infraco would be entitled to treat that as a tie Default and effect an Infraco termination for tie Default.

35.7 These preliminary comments would require to be developed in conjunction with senior counsel, with considerable further analysis required, if this avenue were to be under consideration.

36 **Time periods in relation to the DRP**

36.1 Schedule Part 9 deals with the procedures to be followed for the resolution of disputes. Clause 10 states:

"*In the event that any Dispute is not resolved by the Internal Resolution Procedure within a period of twenty Business Days from Notification (or longer if so agreed by the Parties) then the following provisions of this paragraph 10 shall apply;*

10.1 The Chief Executive (or equivalent) of the Infraco and the Chief Executive (or equivalent) of tie (or their respective deputies in the event of their unavailability) shall, within a further period of five Business Days, seek to agree that the Dispute shall be resolved by any one of the following procedures:

10.1.1 mediation in accordance with paragraphs 11 to 13; or

10.1.2 adjudication in accordance with paragraphs 14 to 54; or

10.1.3 litigation before the Court of Session, Scotland, in which event the Summons in any such litigation shall be signeted and served within ten Business Days of the date of expiry of the period of 60 Business Days following the conclusion of the internal resolution procedure under paragraphs 9 and 10."

36.2 The interpretation of these provisions is not straightforward. In particular, the time limit imposed in clause 10.1.3, which requires proceedings to be raised and served within 70 Business Days of the end of the internal resolution procedure under paragraphs 9 and 10.

36.3 Paragraphs 9 and 10 are, in turn, the Internal Resolution Procedure, which involve the following escalated steps in the event that agreement is not reached:

(a) Notification;

(b) Meeting of Representatives;

(c) Position Paper;

(d) Meeting of Chief Executives;

(e) Attempt by Chief Executives to agree whether the dispute should be resolved by mediation, adjudication or litigation;

(f) If the Chief Executives cannot agree which method of dispute resolution should be adopted, then:

(i) Mediation;

(ii) Adjudication.

(g) Clause 3 of Schedule Part 9 provides that neither party shall commence any court proceedings until the procedures in paragraphs 9 to 54 (Internal Resolution Procedure, Mediation, Adjudication) have been completed.

36.4 It is not clear whether the time limit referred to above is intended to refer to:

(a) Starting court proceedings where the Chief Executives agree at step (e) above that litigation is the best course of action – such that proceedings must be raised within 70 Business Days of that agreement; or

(b) Starting court proceedings where other means of dispute resolution provided for have been exhausted – such that court proceedings must be raised within 70 Business Days of the issue of an adjudication decision.

36.5 If the latter interpretation is correct, that would require court proceedings to be raised and served in relation to the Dispute referred to Mr Wilson by no later than 14 April 2010[76] (being 70 Business Days after his decision was issued).

36.6 Clause 7 of Schedule Part 9 does suggest that there may be a relaxation of the time limits in certain circumstances:

"*Except in relation to the matters provided for in paragraphs 14 to 54* [mediation and adjudication] *and subject to the provisions of paragraph 8* [waiver of failure to adhere to time limits], *in the event that either Party following the referral of any Dispute pursues such Dispute under the Dispute Resolution Procedure, and in the event that such Party fails to observe any time limit or timescale provided for in this Schedule Part 9 (Dispute Resolution Procedure) in relation to the pursuit or progression of such Dispute, such Party shall, upon such failure occurring and upon the expiry of 90 days following written notification from the other Party requiring the first Party to pursue the Dispute Resolution Procedure, be deemed to have irrevocably waived any right to pursue or progress such Dispute any further*."

36.7 This wording appears to enable the "*other Party*" to trigger a 90 day period during which the "*first Party*" is required to pursue the Dispute Resolution Procedure and failure to do so is deemed to constitute a waiver of the right on the part of the "*first Party*" to pursue the Dispute in question any further.

36.8 The foregoing begs a number of questions: what happens if the 90 day trigger is not operated? Does it mean that failure to adhere to the 70 Business Days time limit is fatal? If so, why would the "*other Party*" ever serve notice pursuant to clause 7 after the expiry of the 70 Business Days limit?

36.9 The safest (no risk) course is to proceed on the basis that the 70 Business Days time limit is critical. This matter warrants further discussion with senior counsel.

McGrigors LLP
5 March 2010

[76] Assuming that CEC recognise Good Friday and Easter Monday as public holidays. This should be checked.

APPENDICES

APPENDIX 1 - FACTUAL BACKGROUND TO PRICING ASSUMPTION 1

Edinburgh Tram Network

Factual background in relation to Pricing Assumption 1[1]

1 The agreement between tie and the SDS Provider was entered into on 19 September 2005. The SDS Provider developed the Employer's Requirements from a high level as part of their scope of work under the SDS agreement, although some development of the Employer's Requirements was also carried out by tie themselves.

2 From the issue of the invitation to negotiate on 3 October 2006 until the end of October 2007, there were two bidders in live competition: Infraco (Bilfinger Berger and Siemens) and Tramlines (Laing O'Rourke, Grant Rail and Bombardier). During this period, tie sought to evaluate the bids in order to arrive at a preferred bidder and a reserve bidder. The bidders had full access to the design as it had evolved, and to the SDS Provider.

3 On 22 October 2007, tie and the Infraco entered into an agreement in relation to selection for appointment as preferred bidder[2]. tie and Tramlines entered into an equivalent agreement. The preferred bidder agreement was based upon "the Draft Deal". Part of that Draft Deal was a schedule in relation to price. The price schedule at that time consisted of a contract price analysis (which still required further development). It was also a term of the preferred bidder agreement that the preferred bidder would have the SDS Provider (and the tram supplier, CAF) novated to them, contemporaneously with execution of the construction contract. It was subsequently agreed that CAF would instead join the BBS consortium.

4 In the run up to the selection of the preferred bidder, both bidders made their Best and Final Offer. BBS' BAFO was £208,700,342.

5 On 5 November 2007, the BBS consortium was appointed preferred bidder. That appointment almost immediately triggered a series of negotiations in relation to contractual, commercial and technical issues, which went far beyond the scope of the Draft Deal. Bilfinger Berger were represented by Pinsent Masons, and Siemens by Biggart Baillie. The aim was to achieve financial close during the week commencing 11 January 2008.

6 To this aim, the final business case was issued by tie on 7 December 2007[3]. One of the key drivers was that there would be a single point of responsibility for design, construction, integration, commissioning and maintenance. In relation to design, this would be achieved by novating the SDS Provider to the Infraco. The business case was to be presented to City of Edinburgh Council on 20 December 2007 for acceptance by formal full council resolution whereby specific delegated authority to execute the contracts would be granted to tie.

7 On 11 December 2007, tie wrote to BB[4] to ask them to, amongst other things, fix their price save in relation to a few specified exceptions where the design was not available. This letter was essentially the

[1] Taken from discussions on 17 February 2010 with Steven Bell and Dennis Murray of tie and Andrew Fitchie of DLA Piper; discussions with Geoff Gilbert on 24 February 2010 and correspondence/e-mails provided by Stewart McGarrity
[2] Document B
[3] Document C
[4] Document D

opening salvo in the negotiations which to take place in Wiesbaden later in the same week. One of the purposes of those negotiations was to reach a landing on how the risk in relation to design was to be apportioned. It was recognised that the level of much of the design was preliminary at that stage. The principal issue for tie was balancing cost with risk.

8 BB's response was sent on 12 December 2007[5]. In relation to price confidence, they stated that "*we have considered fixing our price on the information provided and believe that we are able to do this in all areas where the design is available.*" They then made reference to a schedule of items which had previously been described as "provisional", but in relation to which a fixed price would be agreed essentially upon payment of an additional premium, which totalled £8.12m. The letter also contained a list of assumptions on which their price and programme were based. Those assumptions appear to be the genesis of what eventually became the pricing assumptions in Schedule Part 4.

9 On 13 December 2007, a reply to the BB letter of 12 December 2007 was e-mailed by Julie Thomson of tie to Willie Gallagher and Matthew Crosse, for Willie Gallagher to sign[6]. It is not clear whether that letter was ever give to BB or not. The letter appears to have been drafted by Jim McEwan, possibly with the input of Geoff Gilbert. It states:

"*I refer to your letter of 12th December 2007 and have to convey to you the deep disappointment that I and my team feel on its content. This letter is the product of the labours undertaken since the announcement of BBS as the preferred bidder and yet it gives little of the required certainty we are seeking and without which we cannot proceed. The seriousness of this in the context of the approval of this Project cannot be overstated and unless we can find some a way forward which removes the uncertainty, then my recommendation to the City of Edinburgh Council will be that the Project should not proceed, I would see that as my duty and professional responsibility.*

In reviewing your response to our 'particular points 1 to 5 ', I have outlined below the form and assurance we require against each:-

1) Price Confidence – We will fix our price in accord with the attached schedule…

5) Employer's Requirements – We have submitted our updated compliance matrix which aligns with our proposal."

10 The letter attached a detailed excel schedule (in contra-distinction to the brief schedule attached to the BB letter of 12.12.07). It also attached a revised version of the BBS Assumptions document headed "*we have modified your assumptions to a form which we believe is required*". Comparing the tie version with the BB version in relation to design, the majority of the BB wording has been scored out:

"Assumptions
~~*In respect of our pricing and programming certainty exercise we have made the following assumptions:*~~
Design
~~*In those locations where the design is absent, we are not able to fix our price. Typically these include: Picardy Place, St. Andrews Square, London Road, York Place, Forth Ports Area etc.*~~
~~*In areas where design is partial, we have made reasonable assumptions based upon our experience and the existing design information provided. Notwithstanding material design changes we have a high level of confidence in our pricing, e.g. Track Slab, Roads and Pavements, Drainage connections, all as identified in our initial main submission.*~~

[5] Document E
[6] Document [ ]

- See attached file "AnticipatedPrice.xls"
In respect of pavements, we have assumed full reuse of existing curbs and flags and minimal reinstatement behind curb lines. i.e. not wall to wall. ~~Design must be delivered by the SDS in line with our construction delivery programme previously submitted.~~"

11 Following this exchange of correspondence, there was a meeting between senior representatives of tie and BB, which took place in Wiesbaden. The meeting commenced on 13 December 2007. The discussions at that meeting generated what is known by the parties as the Wiesbaden agreement, executed on 20 December 2007[7]. tie had no external legal input into the drafting or execution of the Wiesbaden agreement. This agreement forms the basis of the pricing assumption wording which eventually found its way into Schedule Part 4, and in particular contains the exclusionary wording in relation to design development.

12 In the run up to the Wiesbaden Agreement, an internal briefing note was produced by tie and e-mailed by Geoff Gilbert to Matthew Crosse and Willie Gallagher on 13 December 2007[8]. This was essentially a script for the negotiations which were to take place, formulated as a response to what had been said in BB's letter of 12 December 2007. The key points were:

12.1 BB had had access to design information for some time, and had a greater knowledge of the design than was reflected in their proposal;

12.2 The BB price based on the preliminary design included "*risk for emerging detailed design changes (accepted not fundamental design changes)*";

12.3 tie's proposal for firming up the BB price was BB would provide a firm price for various specific components (structures, highways, tramstops, earthworks). This would "*be for BBS taking the risk of design development to construction stage, excluding changes to design principles and adding scope. This is to include the scope referred to in Normalisations.*" *N.B.* this appears to be the first use of the phrase "design principle" which eventually found its way into Pricing Assumption 1.

12.4 tie recognised that there were "*certain things* [that] *cannot be included as a fixed price within the deal.*" These were utilities diversions to be transferred from MUDFA, changes to design at Edinburgh Airport, ground conditions risks beyond the agreed baseline, frontage to frontage finishes along Leith Walk and Bernard Street. It was noted that "*this list must be definitive in any final deal*".

12.5 Reference was made to the £8m figure in the BB letter of 12.12.07, which tie wanted to reduced to acknowledge, amongst other things, "*the design development contingency allowances in* [BB's] *original pricing (included in the rates)*".

12.6 A list of possible concessions which could be made during the course of the discussions was:

- Exclude St Andews Square from firm price
- Take Balgreen Road out of fixed element of structures
- Firm up of Earthworks price following remeasure of sections from MX Model
- Accommodation works.

[7] Document G
[8] Document [ ]

13 There was a series of e-mails leading up to the execution of the Wiesbaden agreement[9].

13.1 At 9.48am on Monday 17 December 2007, Stewart Hardy of tie e-mailed Geoff Gilbert a document which was described as "*BB Deal*"[10]. It is not set out as an agreement, but is a series of notes which presumably records the agreement which tie considered that they had reached at Wiesbaden. It included the following:

"*Detailed designs being developed by SDS. BBS included the construction cost risk for the development and completion of detailed designs, save for:-*

a) *Any elements of the design for construction works which are substantially different to those forming the scheme currently being designed.*
b) *Items designated provisional in the Price Summary ('Normalisation')*
c) *Excluded elements, to the extent they are excluded.*"

13.2 At 13.47 on the same day, Geoff Gilbert sent an e-mail to Matthew Crosse[11] which attached what appears to have been the first draft of the Wiesbaden Agreement, and which essentially converted the notes which had been e-mailed earlier that day into a draft agreement. Geoff Gilbert asked Matthew Crosse whether he wished to send the draft to BBS.

13.3 An internal tie meeting appears to have been held on 18 December 2007 to discuss the proposed agreement. In an e-mail sent at 10.23 that day[12], Jim McEwan of tie e-mailed Stewart McGarrity, Alistair Richards, Geoff Gilbert, Matthew Crosse and Steven Bell to say:

"*A meeting has been convened today at 2pm in the Brunel room to discuss and clarify issues with respect to the BBS deal in its current form with especial focus on the overarching position on Risk and the facets of what sits with whom, and the related positions on Employer's requirements and VE. This meeting is a 3 line whip at the express wish of the Executive Chairman.*"

13.4 In advance of that meeting, at 10.46 Geoff Gilbert sent to Stewart McGarrity, Alistair Richards and Jim McEwan a copy of the note headed "BB Deal" which Stewart Hardy had e-mailed to him at 9.48am on the morning of 17 December 2007[13]. The e-mail did not attach a copy of the draft agreement itself. The e-mail noted:

"*Enclosed is the latest position on the draft deal for your review and to inform discussions at 2pm. Please note that this is still under discussion with BBS to get full and final agreement to the words. I'll keep you all posted.*"

13.5 Stewart McGarrity also circulated an internal e-mail in advance of the meeting addressed to Steven Bell, Jim McEwan, Alistair Richards, Geoff Gilbert and Matthew Crosse[14] in which he said:

"*We've agreed to have a meeting at 2pm this afternoon to discuss the list below. We won't solve all of this afternoon but the end result* ***must*** *be a reasonable view of where the numbers fall for the presentation thereof to TPB tomorrow…*

[9] Document F
[10] Document [ ]
[11] Document [ ]
[12] Document [ ]
[13] Document [ ]
[14] Document [ ]

what level design development risk they are actually taking off our hands…

How all of the above impacts upon our view on the prospective outcome on the Infraco line versus base costs budget – we previously told TPB it was £10m+

The adequacy of our remaining risk pot to deal with uncertainties to Financial Close and remaining public sector risk thereafter".

13.6 At 13.47 on 18 December 2007 (and before the 2pm meeting which had been convened by Willie Gallagher), Geoff Gilbert sent a revised draft of the Wiesbaden Agreement dated 18 December 2007 to Richard Walker of Bilfinger Berger[15], stating "*I have amended the figure to the correct sum and clarified that BBS have not allowed for completion beyond March 2011. Please could you confirm that this is now agreed.*" The draft attached was in similar form to that dated 14 December 2007, and the only change in relation to the design development provisions was the addition of the following words after clause 3.3(c) "*in respect of pavements, full reuse of existing curbs and flags and minimal reinstatement behind curb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted*".

13.7 In an e-mail sent at 8.37am on 19 December 2007, BB stated that their "*firm price including the additional £8m[16] to fix the 'variable sums noted in our tender is based on all the additional information which we received from SDS via the 4 No. CDs. The last of which was delivered to us on 25th. November 2007. We therefore insist that our contract be related to this.*" The design information delivered up to 25 November 2007 was what eventually became defined in the contract as the Base Date Design Information. In other words, BB's e-mail links their price with the BDDI.

13.8 tie responded initially in terms of Geoff Gilbert's e-mail at 9.11am that morning[17], in which he noted "*don't understand what this really means and will call now to discuss*".

13.9 An update was sent by Geoff Gilbert at 11.43am on the same date, and in relation to BB's point notes "*Scott* [of BB] *has had a discussion with Matthew* [of tie]. *Based on that discussion there would be no reason to change the current wording on design – which was acceptable to you yesterday*".

13.10 It is not clear what the "*current wording*" was at that stage, but at 1.29pm on the same date tie sent BB a draft version of the Wiesbaden agreement which was "*amended…in red italics…for the wording we agreed.*" The draft appended to that e-mail stated:

"2.1 *The negotiated price for Phase 1a is £218,262,426*...

2.2 [Value engineering]

2.3 [Provisional sums]

2.4 *All other prices are fixed and firm, based on the Basis of the Price as set out below.*

[15] Document [ ]
[16] *i.e.* the £8.12m referred to in the schedule to BB's letter of 12 December 2007
[17] Document [ ]

3.0 *Basis of the Price*

3.1 The price is based on the following:

3.2 Employers Requirements Version 3…

3.3 Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-

(a) *Any future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS, as typically represented by the drawings issued to BBS with the design information drop on 25th November 2007.*

(b) *Items designated as provisional in the Appendix A4.*

(c) *Excluded items, to the extent described in 3.4 below.*

In respect of pavements, full reuse of existing curbs and flags and minimal reinstatement behind curb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted.[18]

3.4 *Excluded items are:- [list of specific items of work]*

13.11 BB responded to this draft in terms of their e-mail of 2.45pm on 19 December 2007, at which point there appeared to be broad agreement, subject to confirmation from Siemens.

13.12 At 7.43pm on 19 December 2007, tie circulated a further version of the draft which contained some minor changes following discussion at tie board level.

13.13 In their e-mail sent to Geoff Gilbert at 6.07am on 20 December 2008, BB appeared to have undergone a significant shift in approach, stating "*we still have issues with accepting design risk. We have not priced this contract on a design and build basis always believing until very recently that design would be complete upon novation. With the exception of the items marked provisional which we have now fixed by way of the 8 million we cannot accept more drain development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution.*"

13.14 Geoff Gilbert forwarded the BB e-mail to Matthew Crosse and Steven Bell at 8.48am this same morning, with only the comment "!!!".

13.15 An internal e-mail was sent from Geoff Gilbert to Steven Bell at 13.03 on 20 December 2007. The heading was "*BBS Agreement words*". This contained a substantial re-working of clauses 3.3 and 3.4, and introduced a new 3.5. These new words were in almost identical form to those which were eventually

[18] Presumably the blue italics are earlier BB changes

used in the draft sent by Geoff Gilbert to BB at 14.07 on the same day (see below). There are no other words in the e-mail other than the draft wording for the agreement, and it is not clear what the purpose of the e-mail was, nor the genesis of the words – in particular, it is not known whether the words were proffered by tie or by Infraco. It is not known whether tie sought any engineering input in relation to the words.

13.16 In a further draft sent by tie to BB at 2.07pm on 20 December 2007, there had been a substantial re-working of clauses 3.3 and 3.4 as follows:

"3.3 The BBS price for civils works includes for any impact on construction cost arising from the normal development and completion of designs based on the design intent for the scheme as represented by the design information drawings issued to BBS up to and including the design information drop on 25th November 2007. The price excludes:-

~~*Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-*~~

a) ~~Any future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS, as typically represented by the drawings issued to BBS with the design information drop on 25th November 2007.~~

~~b)~~ a) Items designated as provisional in the Appendix A4.

b) Any material changes to the design resulting from the impact of the kinematic envelope of the CAF tram vehicle on the civils design.

c) Excluded items, to the extent described in 3.4 below.

In respect of ~~pavements~~ footways, full reuse of existing kerbs and flags and minimal reinstatement behind ~~curb~~ kerb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted.

For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.

3.4 The BBS price for systems works is fixed save for:-

a) Items designated as provisional in the Appendix A4.

b) Any agreed material impact of the CAF tram vehicle specification on the traction power supply system as demonstrated by power simulation modelling.

3.5 In all other respects the BBS price is fixed"

13.17 The agreement was executed later that same day. This appears to have been done some time before 17.49, as at that point Geoff Gilbert e-mailed a copy to Stewart McGarrity and others at tie, noting that BBB had signed it, but not Siemens. At that stage, the document was in the form which had been e-mailed at 14.07, save that it was a clean draft rather than a redlined version. There had been a progress meeting scheduled to take place for 2 hours at 11am on 20 December 2007, which Richard Walker appears to have been intended to attend. The first item on the agenda was the signature of agreements. However, given that a draft was being circulated at 14.07, it appears unlikely that it was executed at that meeting.

13.18 The meeting of City Edinburgh Council at which formal approval for proceeding was given took place on the evening of 20 December 2007, and there was some pressure on tie to have the agreement in place for that meeting.

13.19 On the following day, 21 December 2007, Geoff Gilbert added in a new 3.4(c) in manuscript. The change appears also to have been initialled on behalf of BB, but the initials are not clear on the copy. The manuscript words say:

"*In the event of any conflict between the obligations in the Employer's Requirements and the SDS design the obligations in the Employer's Requirements shall prevail.*"

14 At the point at which the Wiesbaden agreement was executed, tie's commercial objective remained to achieve price certainty as far as that was possible. It was recognised by tie that, in certain specific areas, the design was not fully evolved – and in those cases, it would not be possible to achieve price certainty. There therefore required to be some form of contractual mechanism which dealt with that issue.

15 On 7 February 2008, the parties entered into what has become known as the Rutland Square agreement[19]. The rationale for this agreement, from tie's perspective, was to seek to control the continuing growth of the contract price, and to draw a line in that process.

16 During the period from January to April 2008, schedule Part 4 was developed. In its original form (*i.e.* when the preferred bidder agreement was entered into), this schedule took the form of a contract price analysis[20]. tie were seeking as detailed a breakdown as possible in order to assist them in managing change after contract formation, and during the construction phase.

17 BB proposed a significantly different version of schedule part 4, which was predicated on a series of base case assumptions[21]. There followed a series of iterations of Schedule Part 4. There was a proposal to introduce an element of materiality into the exclusionary words into what became pricing assumption 1, but that was resisted on behalf of the Infraco. Beyond that, there does not appear to have been any significant discussion in relation to the wording of pricing assumption 1. Their driver for this was interpreted by DLA, on behalf of tie, as being to reflect an agreement which had already been reached, rather than to address a specific concern. On this basis, they were not prepared to enter into negotiations in relation to the way in which Wiesbaden was imported into Schedule Part 4, other than to agree a

[19] Document H
[20] See for example the early version of schedule part 4 e-mailed by tie to BB on 16 January 2008 at document I
[21] See for example the e-mail from BB to tie dated 4 February 2008 at document I

concession in relation to the incorporation of the words "*save to the extent caused by a breach of contract by Infraco, an Infraco Change or a Change in Law*" in the definition of Notified Departure[22].

18 During the period that led up to the execution of the contract, there does not appear to have been any specific discussion around the wording of pricing assumption No. 1 (other than in relation to *e.g.* approval bodies). There were changes in the wording of clause 3.4.1 of Schedule Part 4[23], and the number of pricing assumptions grew.

19 tie's understanding of pricing assumption 1 is that is was intended to address the extent to which the design had developed at contract formation in a way that was fair to both parties:

19.1 If a design developed in such a way as to reach what might be called its "normal conclusion", then the cost implications of construction should be neutral. In other words, there might be a saving to BB - in which case BB would retain the benefit of that saving, and tie would not seek to recover it, or there might be additional cost – in which case BB would bear that cost themselves and would not seek to recover it from tie. The consequences of normal design development would be at BB's risk, in the way in which would be expected from any design and build contractor: it ought to be for Infraco to explore more cost effective design solutions, for their own benefit. Beyond that, as part of their due diligence exercise in relation to the design[24], the Infraco were aware of the extent of the development of the design, and hence ought to have been able to reflect this in their price.

19.2 If there were substantial or material changes in the intent of a design from one design to another, then tie would expect that there would be cost consequences flowing. If the changed design was more expensive to execute, then BB would be entitled to recover the additional cost; if the amended design was more cost effective, tie would have the benefit of that saving. An example of what would constitute such a substantial or material change was given by Geoff Gilbert as being a change from one type of bridge (*e.g.* a suspension bridge) to another (*e.g.* a slab and beam bridge). BB had not bought out all of the risk in relation to these items. The commercial driver behind this was that the premium which BB would have sought for buying out this risk would have been excessive for tie.

19.3 If a design was at a preliminary stage of development, then the development of that design falls within the ambit of normal design development and ought not to be treated as a Notified Departure. As an example, if the design for a particular section is at such a high level that it does not show drainage details, the Infraco ought to include for drainage in their price: any competent design and build contractor ought to make such a provision. This would be part of the design envelope. If, however, a drainage scheme changed from a simple scheme to a complex one, that takes it beyond design development.

19.4 If changes to the design were for "buildability" reasons, namely to suit Infraco and for their benefit, then tie would not have expected that Infraco would be able to make any further recovery.

19.5 If the design simply did not address a part of the Employer's Requirements, then Infraco would not be entitled to make recovery for constructing the "missing" part of the design, as long as the requirement was expressed in the Employer's Requirements.

[22] In addition clause 1.4 was inserted into Schedule Part 4 to address tie concerns in relation to Infraco's insistence on giving Schedule Part 4 precedence over the contract conditions, in terms of clause 4.3 of the contract conditions. There were also a few further inconsequential minor revisions

[23] See the iterations of this schedule at document I

[24] Document J

19.6 To the extent that design was defective, or negligent, then tie would have expected:

(a) That SDS would be obliged to rectify the defective design and be responsible for all design associated costs; and

(b) That the Infraco would have identified the defect during their design due diligence. To the extent that they had not done so, that would be a matter for them, and the associated construction cost would not be borne by tie.

20 tie did not consider that the Infraco's price was tied to the BDDI. If that were the case, there would have been no requirement to have included pricing assumption no. 19, which states that in respect of certain specific areas (*e.g.* Lindsay Road retaining wall), "*Infraco shall only be obliged to carry out works to be the extent shown in accordance with the Base Date Design Information*". Indeed, if it were to be the case that the price was tied to the BDDI, there would have been no necessity for any pricing assumptions other than no. 1.

McGrigors LLP
26 February 2010

APPENDIX 2 - SCHEDULE OF DOCUMENTATION

Edinburgh Tram Network

Schedule of documentation leading up to formation of contract

Date	Document	Description
19.09.05	SDS agreement	tie and PB
31.01.06	OJEU advertisement for construction contract	
06.09.06	Pre ITN bidders' meeting	Para 2.11: "*tie explained the status of the SDS design information and the Employers' Requirements. Bidders' will need to propose a costed solution that meets the functional requirements. This may use the PB designs as the bidder sees fit. The PB designs are not warranted to comply with the requirements but have been developed to allow progress on an acceptable solution and to gain third party approvals*."
03.10.06	ITN	Para 3.2.2: "*The Infraco is liable for the design of the [ETN] (using the design already prepared by [PB] and is obliged to carry out all works required for the [ETN] to be fully constructed and capable of entering into full public service. The Infraco will also be responsible for the design, construction, delivery and testing of the Trams to run on the completed [ETN].*"
		Para 3.2.3: " *tie has been in contract with the SDS Provider in respect of the development of the design for the Edinburgh Tram Network since 19th September 2005 and in the intervening period, the SDS Provider has been advancing the design for the construction of the Edinburgh Tram Network and the required utilities diversion works…Under the terms of the Infraco Contract, the Infraco will be required to procure works, services and supplies from the SDS Provider (design of the Edinburgh Tram Network), the Tram Supplier (design, manufacture, testing and delivery of Trams) and the Tram Maintainer (maintenance of Trams) under their respective contracts and it is proposed that tie's contracts with each of these parties will be novated to the Infraco, with each novated party providing an assignable collateral warranty to tie in respect of the performance of its obligations under the relevant contract.*"

		Para 3.7.1: "*[PB] has been engaged by tie to provide [SDS] and to develop a detailed design of the [ETN]. This detailed design is being developed from the substantial design and investigative work which has already been carried out for tie in support of the parliamentary process…It is the intention of tie that the SDS Agreement will, in due course, be novated to the Infraco. A detailed scope of the services being provided by the SDS Provider and a copy of the executed SDS Agreement is set out at Part 6 of Volume 4.*"
12.01.07	BBS tender	Item 3 Schedule of Clarifications: "*due to unavailability of design information and the uncertainty of the final delivered solution all prices are based on similar technical solutions offered for Tram systems, out with the UK. The prices quoted, whilst as accurate as possible, are therefore indicative and do not form an offer which can be accepted.*" (this comment also repeated throughout the tender) Item 6 Schedule of Clarifications: "*due to the current design status a detailed evaluation of risk cannot be undertaken. In the meantime we have allowed for a notional allowance of 10% on Civil and 6% on Systems and Track within our Proposal*".
30.03.07	ITN Information release	This sought consolidated tenders on the basis of additional/revised information. Para 3.2 refers to proposed amendments to the ER's: "*The amendments to the Employer's Requirements have been developed in four main categories:* • *Amendments in response to specific comments from parties to the project. These comments generally relate to making the Requirements more clear or to accord with other project deliverables.* • *Amendments to resolve inconsistencies within the technical requirements.* • *Amendments to align the technical wording with the wording used elsewhere within the ITN documentation. This has lead to the extension of the list of Defined Terms used in the Employers Requirements as given in Part 3a of the document.* • *Amendments required to provide a definition of the deliverables against Phases 1a and 1b. There has also been some clarification provided on the procurement of elements of the Edinburgh Tram Network outwith the scope of Infraco (e.g. pantograph and ticket machines).* *It is accepted that there may be further amendments proposed to the Employer's Requirements to reflect the developing nature of the Infraco scope as Bidders Proposals are evaluated and accepted.*"

		Paras 4 deals with design information: "*4.1 Progress to Date* *There have been several formal releases of structural design information to date. The information had been used to develop the Bill of Quantities that was issued with the ITN and the Bidders were expected to price. The expectation is that Bidders will consider the available design information and pricing documents so that they offer back to* ***tie*** *proposals for implementation. The proposals will need to define a fully priced technical solution that takes account of all of the relevant project constraints. In this way the Bidder would need to confirm the veracity of the ITN design information and pricing schedules or amend them to suit, highlighting any such amendments.* *4.2 Developed Structural Design Information* *A set of developed design documents is now provided in the Appendices (previously released in several batches phased over a number of days due to the availability of the information). This consists of information that provides greater detail to the preliminary design already included with the ITN. The structures that represent the majority of the cost of all the ETN structures have been targeted for release at this time. This should allow the Bidders to reassess their pricing of these structures and reduce the risk allocation made at Stage 1 Tender Returns.* *4.3 Submission Requirements* *Bidders should update their proposals and pricing submissions as part of the Consolidated Proposals. A detailed pricing breakdown of each structure is required by* ***tie*** *to allow a comparative evaluation leading to the selection of a Preferred Bidder. The structure and detail of the Bills of Quantities provided with the ITN are appropriate but Bidders must ensure that the quantities presented back with the Consolidated Proposals represent the technical proposal being made by the Bidder*."
12.07.07	Minutes of technical meeting tie: David Powell, Michael Jesuarul, Bob Dawson. BBS also attending	Para 8.0 headed "management of SDS": • "*BBS very keen to fully integrate the SDS team into the consortium with an understanding of deliverables and division of scope between PB/Halcrow and others.* • *BBS will consider passing design delivery to in-house teams and additional external consultants if need be but needs detailed discussion with PB first. BBS to provide an indication of which disciplines they will have designed by others and those where there is no point in PB continuing to develop detail designs*."
05.09.07	Letter from tie (Geoff Gilbert) to BB	Informs BB that a virtual data room has been set up containing SDS data in accordance with an attached list[1]. The letter concludes: "*Please provide definitive requirements and priorities for the information that you wish to see to satisfy yourselves that the designs will deliver the performance set out in the Employers Requirements and satisfy yourselves as to the adequacy of the designs to meet the performance requirements*."

[1] We do not have a copy of the list itself

22.10.07	Agreement between tie and BBS in relation to selection for appointment as preferred bidder (executed by William Gallagher on behalf of tie)	The basis of this agreement is the "Draft Deal", defined as the draft contract package, including a document in relation to price. The draft contract package is contained in appendices to the agreement[2]. 2.1 provides: *"[BBS] and tie agree and confirm that the Draft Deal constitutes the entirety of its proposal to deliver the [ETN] and, therefore, the terms on which it will be appointed as [preferred bidder], should this be tie's decision."* *2.2 provides:* *"Subject only to clause 3 [BBS] and tie accordingly agree that any appointment of [BBS] as [preferred bidder] by tie is solely on the basis that the Bidder and tie adhere in all respects to the terms of the Draft Deal, and that unless otherwise agreed, [BBS] or tie will neither require, propose or procure circumstances to cause any change to the terms of any aspect of the Draft Deal or to any other matter relating to the Submission, the Infraco Contract, the SDS Contract or the Tramco Contract other than to resolve the PB Finalisation Issues".* *3.1 provides:* *"tie and [BBS] acknowledge and agree that there are a number of matters contained in the Draft Deal, the Infraco Contract, the SDS Contract and the Tramco Contract which must be resolved before tie seek CEC approval to enter into the Infraco Contract with [BBS] ("PB Finalisation Issues")…more particularly set out in Appendix 7.1*"
05.11.07	Letter from tie (Matthew Crosse) to BB	BB confirmed as preferred bidder on the basis of the agreement of 22.10.07. The letter identifies 20.11.07 as a critical milestone in relation to "*conclusion of contract negotiations on core terms and SDS and Tramco alignment*".
07.12.07	Final business case v2 (subsequently approved by CEC)	Under the heading "Procurement strategy and risk allocation": "*1.77 The Procurement Strategy followed by **tie** responds to feedback from the National Audit Office (NAO) in 2004 on the effectiveness of light rail schemes. The objectives of the Procurement Strategy are summarised as follows:* *• Transfer the design, construction and maintenance performance risks to the private sector;* *• Minimise the risk premium (and/or exclusions of liability) that bidders for a design, construct and maintain contract normally include. Usually at tender stage bidders would not have a design with key consents proven to meet the contract performance obligations and, hence, they would usually add risk premiums for this…* *• Mitigation of utilities diversion risk (i.e. potential impact of delays to utilities diversion programme on Infraco works)…*"

[2] We do not have a copy of the appendices, but one has been requested from Andrew Fitchie

		Strategy is described at 1.80 onwards[3]: "*The entire strategy has been developed to help facilitate the speedy implementation and completion of the construction phase of the project and to remove uncertainty and, therefore, cost from bidders' proposals i.e. to deliver value for money.* *1.81 In summary, the key attributes of the strategy are…* *• Early commencement of design by the SDS contractor – To reduce scope and pricing risk in Infraco and Tramco bids and to reduce the overall project programme…* *• Re-aggregation of the supply chain at the point of award – By novation of the SDS and Tramco contracts to Infraco, thereby creating single point responsibility for design, construction, commissioning and subsequent maintenance of the tram system, with consequential transfer of performance risk to the private sector…* *• Validation of the SDS designs by a Technical Support Services (TSS) consultant – To provide comfort that the designs produced will deliver the required performance;* *1.82 These arrangements provide early involvement of the tram system operator, risk transfer to the private sector at an affordable level, a shorter overall programme and a single point of responsibility for the delivery of the operating tram system and subsequent maintenance*."
		The most significant risks retained by the public sector are described at para 1.85 as follows: "*As the project moves towards physical construction, the following are the most significant risks which could impact on the delivery of the project on time and within the capital cost estimates (including risk allowances):* *• **Utility diversions**…* *• **Changes to scope or specification** – A great deal of care has been taken in defining the scope and specification of the tram project throughout the Parliamentary process and during design development, with input from TEL and Transdev and extensive consultation with CEC and TS. However, significant unforeseen changes to scope and specification could have a very significant impact on the deliverability of the project. Similarly, any changes introduced by stakeholders that are over and above the approved scope will increase the project estimate. Effective management of the consideration of changes through the Governance processes implemented for the project will be vital to mitigate this risk; and* *• **Obtaining consents and approvals**...*"
		The background to the procurement strategy is described at para 7.7: "*tie's Procurement Strategy has resulted in it taking a greater degree of control over the process during the early 'development' phase, compared to what the public sector has done on other projects. This has resulted in tie progressing the overall project sufficiently in advance of seeking bids from Infraco bidders such that it was able to offer the private sector Infraco and Tramco bidders **a better defined basis** on which to bid and a less onerous risk allocation (and in particular **reducing the extent of design and approval uncertainty** at bid stage). Therefore the*

[3] Repeated in part at 7.13

		*private sector were able to **price their bids with a greater degree of accuracy** and certainty than has been achieved on other projects. In this way, **tie** believes it has significantly reduced the cost of the overall project, having considerably de-risked certain of the elements of the project that fall to the private sector to deliver. This is shown by the minimal risk allowance included in the Infraco and Tramco bids.*"
		In relation to SDS, the procurement approach is described as follows: "7.48 *Commencement of design early in the procurement process, followed by a novation of the contract to the Infraco at financial close (as described below), is a key element in delivering the objectives of **tie**'s Procurement Strategy objectives of reducing construction contractor risk premiums, reduced delivery programme and single point responsibility for delivery of the tram system.* 7.49 *Development of the design ahead of and during the Infraco tender has helped to create improved scope and cost certainty and is significantly reducing the overall project programme and, in particular, the lead time between approvals and commencement of construction…This is born out by the low level of risk pricing included in the Infraco and Tramco bids.* 7.50 *The anticipated novation of the SDS contract to the Infraco will mean that responsibility for the design and all risks arising are transferred to the private sector system integrator (Infraco), without the normal disadvantage of an increased risk premium, that bidders would apply due to uncertainty, if they had to carry out all of the design work post contract award.* 7.51 *It is expected that the Infraco will benefit significantly from the SDS provider's work and its experience of the planning and utilities diversion processes. The planned novation to Infraco incentivises the SDS provider to consider issues of practicality, cost and 'constructability' more than if it were simply tie's consultant. The Infraco bidders have prepared their bids on the basis of the emerging SDS designs and the successful bidder is required, following a process of due diligence of the design, to adopt the SDS provider's design as at the date of Infraco contract signature. **Variations to this design can be introduced with the agreement of tie, but at the risk of the Infraco unless they represent changes to tie's Employer's Requirements (ERs)**, which are at cost to the public sector…* 7.53 *The original assumption was that overall design work to Detailed Design would be 100% complete when the Infraco contract is signed. Due to a number of delays, largely outwith **tie**'s control, this is now not achievable. However, by identifying key risk areas and prioritising SDS activities, **tie** is completing several key elements of the Detailed Design in time to inform the Infraco bids on price-critical items. This has enabled the Infraco bidders to firm up their bids based on the emerging Detailed Design and thereby reduce the provisional scope allowances and design risk allowances that they would otherwise have included.* 7.54 [Detailed information in relation to the status of the SDS design at the time]… 7.55 *tie is monitoring the quality of the solutions being developed by the SDS provide with the assistance of the TSS provider and Transdev, and drawing on the significant experience of other schemes gained by the tie team members. In particular TSS are reviewing that SDS have delivered their contract obligations in respect of design, including verifying that the designs will deliver the specified tram system performance.*

		7.56 *This process, together with value engineering exercises, is mitigating the risk of 'gold plating' the design of the system, and any tendency towards low risk/high cost solutions which do not provide the overall best value for money that tie is seeking. tie has been tracking the estimated cost of the system throughout the design period, so that cost overruns could be identified quickly and mitigating actions taken while there is still scope to change the solution…* 7.59 *The risk transfer to the SDS is substantial and the separation of designer from the delivery contractor during the procurement phase affords tie control over scope definition that would not otherwise be achieved where design is undertaken by the delivery contractor after contract award under more conventional procurement approaches.* 7.60 *Following novation of SDS, after completion of the design due diligence process at Financial Close, the design risks pass to Infraco (although tie will retain a collateral warranty over the work of the SDS provider), but without the disadvantage of substantial risk premiums applied by Infraco bidders where design works are executed post contract award. Therefore, tie's approach will provide the benefits of having a designer involved in the project from an early stage, whilst retaining substantial risk transfer to the private sector.*"
		In relation to Infraco, the procurement approach is described as follows: "*7.100 The principal attributes of the procurement approach for this contract are:* *• Scope – Single point responsibility for detail design, construction, integration and commissioning into service of Phase 1a of the ETN (capital works) and its subsequent maintenance. Options included for subsequent Phases;* *• Design liability and capability transferred by novation of SDS contract into Infraco;* *• Tram vehicle supply, commissioning and subsequent maintenance liability and capability transferred by novation of Tramco contract into Infraco;* *• Approximately three year contract duration for delivery into service of Phase 1a. Maintenance duration of up to 15 years;* *• Lump sum price for delivery into service of the tram system. Thereafter lump sum payment each period for maintenance works, subject to performance adjustment;* *• Maintenance price adjusted for inflation by applying RPIx (Retail Price Inflation index excluding mortgage payments);* *• Maintenance prices include for market price reviews at yearly intervals over the duration of the contract;* *• Milestone payment mechanisms for capital works with performance related payment mechanism for maintenance;* *•Liquidated damages for delay to completion;* *• Parent company guarantees, bonds and warranties to secure redress in the event of major default on capital works and maintenance; and* *• Contractor's liabilities capped at predetermined but significant levels*."
		The risk allocation as between Infraco and tie is described as follows: 7.111 *The key benefits of the Infraco procurement strategy are primarily through the award of a single turnkey fixed price contract and in the novation of the SDS and Tramco contracts and the transfer of risks to the Infraco.*

		The benefits include: *• Single system integrator responsible for implementation of design and construction of the ETN and its subsequent maintenance;* *• Full design risk passed to Infraco post contract award, including critically the deliverability of the design;* *• Full vehicle risk passed to Infraco post contract award, including the deliverability of the vehicle design and compatibility with the infrastructure and systems;* *• Reliability of Infraco supply chain and products to be supplied within it;* *• Infrastructure and vehicle maintenance risk passed to Infraco ;* *• Value for money of maintenance contract market tested through variant bids;* *• Enables the Infraco bidders to minimise risk pricing; and* *• Enables delivery of the tram system within the optimum programme.* 7.112 *Risks remaining with the public sector are as follows:* *• Maintenance and lifecycle risks beyond the chosen maintenance contract period;* *• Costs incurred above the Infraco contract liability caps in the event of default; and* *• 'Political' risk associated with planning and Prior Approvals*."
		The procurement process to financial close was described as being: 7.119 *The key steps to concluding the procurement process to financial close and award of the Infraco contract are:* *• Release of detailed design information to preferred bidders for them to undertake due diligence;* *• Mobilisation and advance works agreements to be placed with Infraco and Tramco to enable a swift start on site at Contract Award and to mitigate programme and cost risks;* *• Facilitated Infraco / Tramco negotiations (facilitated by tie);* *• Facilitated Infraco / SDS negotiations (facilitated by tie);* *• Conclusion of various value engineering initiatives;* *• Final negotiations with Tramco and Infraco;* *• Conclusion of the basis for contract award with both Tramco and Infraco;* *• Confirmation of contract award recommendations; and* *• Award of Infraco and Tramco contracts and concurrent novation of SDS and Tramco to Infraco.*" *i.e.* no reference at this stage to a design freeze, or for the need to assumptions being built in
		Para 7.127 deals with "value for money risk transfer mechanisms", which include: "*Consistent with the principals of **tie**'s Procurement Strategy, value for money risk transfer mechanisms have been incorporated into the principal contracts, namely Tramco and Infraco. In summary these mechanisms are:* *a) The creation of a single point contract, Infraco, with responsibility for the design, construction, system integration, commissioning and subsequent maintenance of the Edinburgh Tram system, including tram vehicles.*

		This transfers the following responsibilities and hence risks to the private sector: *• System integration – That all components, subsystems and systems are integrated together such that ETN delivers the specified performance and maintenance delivered such that level of specified performance is delivered during operation;* *• Design – That the design completed by SDS delivers the required tram network performance; and* *• Interface management – The effective management of the interfaces between suppliers and sub contractors to deliver the specified performance within the agreed programme;* *b) The creation of the Infraco contract as a lump sum contract transfers the pricing risk to the private sector. Finalisation of certain 'Edinburgh specific' elements, such as structures, of the Infraco contract price on the basis of SDS Detailed Design significantly reduces their scope and performance risk pricing premium that would otherwise be necessary under conventional design and construct or PFI approaches…* 7.128 *The above mechanisms provide VFM through a prudent and affordable risk allocation to the private sector with the requisite incentivisation and sanctions. In addition,* ***tie****'s strategy of separate procurement of the principal elements of the supply chain, and their subsequent reaggregation, further improves VFM by reducing overall programme duration, and hence cost, plus avoiding the risk premia that bidders would inevitably otherwise include under PFI style arrangements. This is achieved by:* *• Procuring the design early via the SDS contractor thereby reducing scope uncertainty at the close of the Infraco and Tramco bids…*"
		Section 10 contains the financial analysis, and states at 10.26: "*Design work has continued to refine the requirements of the utilities, Infraco and Tramco contracts. The utility design work has been used as the utility work has been implemented since summer 2007. During the tender process in 2007, the Infraco and Tramco bidders were provided with details of the emerging designs for the main price-critical items which allowed them to incorporate these in their final bids, as well as to develop proposals for value engineering. Although the final acceptance of the design is subject to bidders' due diligence and final negotiations, the consultative approach taken will have reduced the scope and pricing risks normally included in bid prices under a traditional procurement approach. In overall terms, the design work is being completed within the aggregate allowed for in the November 2006 estimate, plus approved changes….* 10.35 *A risk contingency sum has been retained in the final cost estimate. The level of contingency reflects the reduced risk attaching to project costs, in the light of the further work described above and, in particular, the conclusion of negotiations on the Infraco and Tramco contracts. This allowance provides an uplift of 15% on the construction period base cost estimates of Phase 1a, calculated using the QRA at this point in time. Added to the balance of the committed funding available for the tram, this allowance currently provides a headroom of 29% over the future Phase 1a costs. This is considered a very reasonable allowance for headroom.*"

		Section 11 deals with risk management. At 11.6, the risks to the scheme are categorised as follows: "• ***Development risk****: design and development, scheme approvals and procurement of all scheme components and activities to be concluded prior to commencement of construction of the network;* • ***Construction risk****: advance works including utility diversion, main infrastructure construction and integration, project management and commissioning related risks and trial running;* • ***Performance risk****: standards, defects and delays related risks occurring during and post-construction; and* • ***Operation risk****: repair and replacement risks impacting the scheme during operation of the system (outwith DPOFA Operator risks).*" Table 11.1 includes the following as Development risks: "• *Incomplete definition of scope to implement the operational tram system.* • *Failure to design to brief.* • *Continuing design development…* • *Changes in design required by the Operator.* • *Changes in design required by stakeholders*." Para 11.7 states "*many of the Development and Construction risks are now either crystallized, superseded or effectively mitigated, through management action or transfer to the private sector.*" At 11.12, mitigation of design related risks is described as follows: "*An integrated team approach involving experts from tie, SDS and CEC continues to mitigates design related risks in obtaining Prior Approvals…The Infraco bidder will undertake a due diligence exercise on the SDS designs and tram designs as part of the procurement process*." Para 11.14 identifies the following risk and associated mitigation: "*SDS deliverables are below the desired quality levels leading to delays to approval of Planning Consents and issue of design information to Infraco bidders: This is mitigated by independent validation of the design, as it emerged, supported the issue of price-sensitive information to the bidders throughout the bid process. Further, the Infraco bidder will perform a due diligence exercise before accepting the SDS design. Therefore, this aspect of the risk is mitigated*."

Para 11.50 sets out the allocation of risk during the development period:

Risk allocation during the Development Period				
Risk	Public sector	MUDFA contractor	SDS designer	Utilities
Land acquisition	✓			
Planning (Prior Approvals)	✓		✓	
Temporary and permanent TROs	✓		✓	
Design risks	✓		✓	
Major utility diversion quantity	✓		✓	✓
Major utility diversion cost	✓	✓		✓
Major utility diversion delay	✓	✓		
Delays to utilities agreement	✓			✓
NR related delays	✓			
Required approvals from HMRI	✓		✓	
Incorrect cost estimate	✓			
Incorrect timetable assumptions	✓			

Para 11.58 sets out the equivalent risk during the construction period:

		Risk allocation during the Construction Period **Category** / **Risk** / **Public sector** / **Infraco contractor** / **MUDFA contractor** Design: Changes in fundamental design and performance requirements. — Public sector ✓ Design: Changes in construction design and failure of design post award of Infraco. — Infraco contractor ✓ Design: Award of Prior Approval consents. — Public sector ✓ Design: Provision of adequate submissions necessary to obtain Prior Approval and TRO consents. — Infraco contractor ✓ Utilities: Major utility diversion quantity. — Public sector ✓ Utilities: Major utility diversion unit cost. — Public sector ✓ — MUDFA contractor ✓ Utilities: Major utility diversion delay. — Public sector ✓ — MUDFA contractor ✓ Utilities: Minor utility diversion quantity. — Infraco contractor ✓ Utilities: Minor utility diversion cost. — Infraco contractor ✓ Utilities: Minor utility diversion delay. — Infraco contractor ✓ Construction: Force Majeure. — Public sector ✓ — Infraco contractor ✓ Construction: 3rd party claims. — Public sector ✓ — Infraco contractor ✓ Construction: Ground condition. — Public sector ✓ — Infraco contractor ✓ Construction: Archaeology. — Public sector ✓ — Infraco contractor ✓ Construction: Site safety. — Public sector ✓ — Infraco contractor ✓ Construction: Technology risk. — Public sector ✓ — Infraco contractor ✓ Construction: Compliance with street possessions. — Infraco contractor ✓ Commissioning: System integration failure. — Infraco contractor ✓ Commissioning: Failure to meet standards. — Infraco contractor ✓ Commissioning: Inappropriate vehicle. — Infraco contractor ✓ Commissioning: Required approvals from ICP, HMRI and others. — Infraco contractor ✓ Contractual / Financial: Weaknesses in contractual interfaces. — Public sector ✓ Contractual / Financial: Incorrect cost estimate. — Infraco contractor ✓ Contractual / Financial: Incorrect programme assumptions. — Infraco contractor ✓ Para 11.59 refers to risks associated with design: "*Changes in design which are required by the public sector after the signing of the Infraco contract will be at the risk of the public sector. The progress of detailed design has somewhat mitigated this risk. However, a significant failure in the agreed design will effectively be transferred to the Infraco contractor following novation. Provision of consents* *for Prior Approvals and Temporary and Permanent TROs by the statutory authorities remains a public sector risk, but provision of the necessary information in the required format and timescales will be at the risk of SDS and / or Infraco.*" Risks retained by the public sector described at 11.69 include "*the design development*".
11.12.07	Letter from tie (Willie Gallagher) to BB	"*Your news today that BBS are unable to achieve the pricing objectives we set you is extremely disappointing. In recent weeks we have talked at length about tie's critical milestone on 20th December where the full Council finally accept the project business case and Infraco and Tramco deals. Their acceptance on the 20th December paves the way to achieve financial close on the 28th January 2008. We have made it very clear to you at each of the last four weekly progress meetings that the end result of all of the circa 40 technical and commercial meetings is to enable*

		tie to make a firm recommendation to Council that the deals can proceed to contract award. Our visit to Germany on Thursday is focussed on cementing the final deal and particularly finalising the price. As it stands today we are not in a position to consider the results of the repricing exercise and therefore question the value of the visit to Germany. Unless you are able to confirm that, by the end of Thursday's meeting, we will have been able to consider, and agreed the following items then I must state that tie will not attend and we will need to revisit the entire preferred bidder programme. *1. Price confidence: we ask you to consider fixing your price, save for a very few notable exceptions where for example the design itself is absent.* *2. Price level: we ask that, having been through the value engineering exercise including the targets agreed at preferred bidder date - your price level and VE savings are confirmed at a level that enables our project business case target to be met.* *3. Programme confidence: Following the meetings with SDS, CEC and tie, we ask that you confirm that you can achieve the programme opening dates i.e. revenue service commencing 11 February 2011 for Line la contained within the proposal - together with any key assumptions.* *4. Contracts closure: After a large number of contract meetings your team appear to have become entrenched in respect of finalising the positions on a number of important legal/commercial issues. These have been reviewed today and a timeline agreed on their resolution, We need your definitive responses on each and conclusion of these issues tomorrow.* *5. Employers Requirements: we need your team's provisional agreement on the compliance matrix and confirmation of alignment with your proposal*."
12.12.07	Letter from BB to tie (Willie Gallagher)	"*Further to your letter of 11th December 2007 and our telephone conversation, we too are disappointed at our combined inability to achieve all the measures necessary to fully achieve the pricing objectives of* ***tie****. However, we are firmly wedded to achieving the goals leading to contract award and a successful contract for all stakeholders. Our response to your particular points 1 to 5, are detailed below:* *1) Price Confidence – we have considered fixing our price on the information provided and believe that we are able to do this in all areas where the design is available. See attached schedule.* *2) Price Level – we believe that with the willingness and co-operation of all concerned parties, we will be able to achieve the VE savings targets agreed at preferred bidder date.* *3) Programme Confidence – we are confident that we can achieve revenue service commencement in February 2011, providing the following assumptions are met:* *a) SDS design is delivered in line with our programme submitted as part of our August 7th Submission* *b) Relaxation on multiple junction working in Edinburgh City Centre is achieved* *4) Contract Closure – Following yesterday's meeting, we believe that all contractual issues can be cut through and resolved in line with our commitment.*

		5) *Employer's Requirements – We have submitted today our updated compliance matrix, which we believe aligns with our proposal.* *We therefore believe that with the due cognizance of our assumptions (see attached) and the willingness and co-operation of all parties, we will greatly be able to achieve the objectives and move towards a contract award on 28th January 2008. We look forward to meeting with you in Wiesbaden.* " There is a schedule of clarifications attached to the letter, which lists specific items of work, previously dealt with as provisional sums, in relation to which it is stated that the "*price can be fixed by adding*" a specific sum of money – essentially a premium for a fixed price. There is also a document headed "assumptions" attached to the letter. In relation to design, it states: "*In those locations where the design is absent, we are not able to fix our price. Typically these include: Picardy Place, St. Andrews Square, London Road, York Place, Forth Ports Area etc.* *In areas where design is partial, we have made reasonable assumptions based upon our experience and the existing design information provided. Notwithstanding material design changes we have a high level of confidence in our pricing, e.g. Track Slab, Roads and Pavements, Drainage connections, all as identified in our initial main submission.* *In respect of pavements, we have assumed full reuse of existing curbs and flags and minimal reinstatement behind curb lines. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted.* " There are also a number of specific assumptions in relation to *e.g.* earthworks where the price has been fixed.
13 and 14 December 2007	Meeting in Wiesbaden	Described in the "Financial Close Process and Record of Recent Events" document (see below) as a meeting of senior representatives at which the contract price was concluded within the business case budget of £498m, supporting revenue service in spring 2011. Close was anticipated in early January 2008.
13.12.07 13.02	Internal tie e-mail from Geoff Gilbert to Matthew Crosse and Willie Gallagher attaching briefing document for negotiations	The document is essentially a script for the negotiations, and proposes that a response to the BB letter of 12.12.07 should be: "1.*We have reviewed your proposed letter and it is not acceptable:-* • *Had access to design information for some time and have greater knowledge of design than is reflected in your proposal* • ***Your price based on prelim design includes risk for emerging detailed design changes (accepted not fundamental design changes)*** • *It does not represent a real firming up of price* *Not good value for tie – couldn't sell this to our board* *2. Our proposal to firm up price is:-*

		• *BBS provide a firm price for*
		  ○ *Structures*
		  ○ *Highways (excluding additional cost of Forth Ports current design, Picardy Place, York Place)*
		  ○ *Tramstops*
		  ○ *Earthworks*
		• ***This is to be for BBS taking the risk of design development to construction stage, excluding changes to design principles and adding scope**. This is to include the scope referred to in Normalisations*
		• *We recognise that certain things cannot be included as a fixed price within the deal. These are:-*
		  ○ *Utilities diversions to be transferred from MUDFA*
		  ○ *Changes to design at Edinburgh Airport*
		  ○ *Ground conditions risks beyond the agreed baseline*
		  ○ *Frontage to frontage finishes along Leith Walk*
		  ○ *Bernard Street*
		(This list must be definitive in any final deal)"

13.12.07 4pm	Internal tie e-mail to Willie Gallagher and Matthew Crosse from Julie Thompson	The e-mail attached a letter and attachments to BB for Willie Gallagher to sign and hand over to BB. It is not clear whether this letter was ever given to BB or not. It is a response to the BB letter of 12.12.07 and appears to have been drafted by Jim McEwan, possibly with input from Geoff Gilbert. "*I refer to your letter of 12th December 2007 and have to convey to you the deep disappointment that I and my team feel on its content. This letter is the product of the labours undertaken since the announcement of BBS as the preferred bidder and yet it gives little of the required certainty we are seeking and without which we cannot proceed. The seriousness of this in the context of the approval of this Project cannot be overstated and unless we can find some a way forward which removes the uncertainty, then my recommendation to the City of Edinburgh Council will be that the Project should not proceed, I would see that as my duty and professional responsibility.* *In reviewing your response to our 'particular points 1 to 5 ', I have outlined below the form and assurance we require against each:-* *1) Price Confidence – We will fix our price in accord with the attached schedule…* *5) Employer's Requirements – We have submitted our updated compliance matrix which aligns with our proposal*." The letter attaches a detailed excel schedule (in contra-distinction to the brief schedule attached to the BB letter of 12.12.07). It also attaches a revised version of the BBS Assumptions document headed "*we have modified your assumptions to a form which we believe is required*". Comparing the tie version with the BB version in relation to design, the majority of the BB wording has been scored out:

		"Assumptions *~~In respect of our pricing and programming certainty exercise we have made the following assumptions:~~* *Design* *~~In those locations where the design is absent, we are not able to fix our price. Typically these include: Picardy Place, St. Andrews Square, London Road, York Place, Forth Ports Area etc.~~* *~~In areas where design is partial, we have made reasonable assumptions based upon our experience and the existing design information provided. Notwithstanding material design changes we have a high level of confidence in our pricing, e.g. Track Slab, Roads and Pavements, Drainage connections, all as identified in our initial main submission.~~* *- See attached file "AnticipatedPrice.xls"* *In respect of pavements~~,~~ we have assumed full reuse of existing curbs and flags and minimal reinstatement behind curb lines~~.~~ i.e. not wall to wall.~~ Design must be delivered by the SDS in line with our construction delivery programme previously submitted.~~"*
17.12.07 09.48	E-mail from Stewart Hardy of tie to Geoff Gilbert of tie headed "*BBS Deal (1)*"	The e-mail attaches what is described as the "*BBS Deal*". It is not set out as an agreement, but as series of notes. "*1) Proposed Price* *The price negotiated for Phase 1a is £220,117,432. Details of the build-up to this price are set out in Appendix A.* *The general Value Engineering items included in the price are set out in Appendix A3. These sums are fixed reductions save for the conditions listed in the Appendix.* *Normalisations included within the price are as set out in Appendix A4. These allowances are provisional sums for the work described.* *All other prices are fixed and firm, based on basis of the price set out below.* *2) Basis of the Price* *The price is based on the following:* *Employers Requirements Version 3 as qualified by the BBS Compliance Matrix, save for:-* - *Prior Approvals and other consent allocation of risk and responsibility is as set out in **tie** (G Gilbert email dated XXXX December 2007)* - *OHLE – fixed termination system from Haymarket to Newhaven and catenary system from Haymarket to Edinburgh Airport. Stepped poles will be adopted throughout.*

		- *Trackform will be as the BAM Rail System (Check) except in open countryside from Depot to Airport.* *Detailed designs being developed by SDS.* ***BBS included the construction cost risk for the development and completion of detailed designs, save for:-*** *d)* ***Any elements of the design for construction works which are substantially different to those forming the scheme currently being designed.*** *e) Items designated provisional in the Price Summary ('Normalisation')* f) *Excluded elements, to the extent they are excluded.*"
17.12.07 13.47	E-mail from Geoff Gilbert of tie to Matthew Crosse of tie	The e-mail attaches a draft of the Wiesbaden Agreement dated 14 December 2007 and a one page summary of the commercial position. The draft appears to translate the note which had been sent to Geoff Gilbert at 9.48 that morning into a draft agreement. The e-mail enquires whether Matthew Crosse wishes to send the documents on to BBS. The wording of the proposed clause 3.3 is very similar to that which appeared in the earlier note: *3.3 Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-* *a) Any future changes to elements of the design for civils works that are substantially different compared to those forming the current scheme being designed by SDS.* *b) Items designated as provisional in the Appendix A4.* *c) Excluded items, to the extent described in 3.4 below.* "
17.12.07 15.48	E-mail from Geoff Gilbert of tie to Richard Walker of BB	Richard Walker was in Belfast and presumably could not access attachments or documents. Geoff Gilbert sent him extracts from the wording of the draft agreement dated 14.12.07.
18.12.07 10.23	Internal tie e-mail from Jim McEwan of tie to Stewart McGarrity, Alistair Richards, Geoff Gilbert, Matthew Crosse and Steven Bell	"*A meeting has been convened today at 2pm in the Brunel room to discuss and clarify issues with respect to the BBS deal in its current form with especial focus on the overarching position on Risk and the facets of what sits with whom, and the related positions on Employer's requirements and VE. This meeting is a 3 line whip at the express wish of the Executive Chairman.*"
18.12.07 10.26	Internal tie e-mail from Geoff Gilbert to Stewart McGarrity, Alistair Richards and Jim McEwan	Geoff Gilbert circulated a copy of the note headed "BB Deal" which Stewart Hardy had e-mailed to him at 9.48am on the morning of 17 December 2007. The e-mail did not attach a copy of the draft agreement itself. The e-mail noted: "*Enclosed is the latest position on the draft deal for your review and to inform discussions at 2pm. Please note that this is still under discussion with BBS to get full and final agreement to the words. I'll keep you all posted.*"
18.12.07	Internal tie e-mail from	The e-mail referred to the internal meeting to take place at 2pm that day and noted:

11.23	Stewart McGarrity to Alistair Richards, Geoff Gilbert, Matthew Crosse, Steven Bell and Jim McEwan, cc Willie Gallagher	"*We've agreed to have a meeting at 2pm this afternoon to discuss the list below. We won't solve all of this afternoon but the end result* ***must*** *be a reasonable view of where the numbers fall for the presentation thereof to TPB tomorrow*." In the list, under the heading "*3. The documentation of the conditions in the Infraco price deal we hope to get signed today with particular ref to*", it was noted "*what level design development risk they are actually taking off our hands*" with reference to: "4. *How all of the above impacts upon our view on the prospective outcome on the Infraco line versus base costs budget – we previously told TPB it was £10m+* *5. The adequacy of our remaining risk pot to deal with uncertainties to Financial Close and remaining public sector risk thereafter*"
18.12.07 13.47	E-mail from tie (Geoff Gilbert) to BB (Richard Walker)	This attached a draft of the Wiesbaden Agreement dated 18.12.07. The covering e-mail stated: "*I have amended the figure to the correct sum and clarified that BBS have not allowed for completion beyond March 2011. Please could you confirm that this is now agreed*." The draft attached was in similar form to that dated 14 December 2007, and the only change in relation to the design development provisions was the addition of the words "*in respect of pavements, full reuse of existing curbs and flags and minimal reinstatement behind curb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted*" after clause 3.3(c).
18.12.07 14.00	Internal tie meeting	Called by Willie Gallagher, requiring the attendance of Jim McEwan, Stewart McGarrity, Alistair Richards, Geoff Gilbert, Matthew Crosse and Steven Bell. There is no record available of what was discussed at the meeting.
18.12.07 14.11	E-mail from Andrew Fitchie of DLA to Alistair Richards, Stewart McGarrity, Geoff Gilbert, Matthew Crosse, Jim McEwan cc'ed to Steven Bell and Graeme Bisssett	Andrew Fitchie had that morning been sent the draft agreement by Alistair Richards for comment. His comments do not touch on design development, and he concludes "*I am uncertain, to be honest, what me expressing an opinion on this will achieve - the document has been put to BBS, it is qualified and it has Appendices I do not have, particularly regarding status of negotiations summary*".
19.12.07 08.37	E-mail from BB to tie	"*Our firm price including the additional £8m to fix the 'variable' sums noted in our tender is based on all the additional information which we received from SDS via the 4 No. CDs. The last of which was delivered to us on 25th. November 2007. We therefore insist that our contract be related to this.*"

19.12.07 09.11	E-mail from tie (Geoff Gilbert) to BB (Richard Walker)	In relation to the point quoted above in the e-mail of 8.37am, Geoff Gilbert noted: "*Don't understand what this really means and will call now to discuss*"
19.12.07 11.43	E-mail from tie to BB	"*Scott has had a discussion with Matthew. Based on that discussion there would be no reason to change the current wording on design – which was acceptable to you yesterday.*"
19.12.07 13.29	E-mail from tie to BB enclosing draft Wiesbaden Agreement	2.1: *The negotiated price for Phase 1a is £218,262,426. Details of the build-up to this price are set out in Appendix A.* 2.2 [Value Engineering items] 2.3 [Provisional sums] 2.4 All *other prices are fixed and firm, based on the Basis of the Price as set out below.* 3.0 *Basis of the Price* *3.1 The price is based on the following:* *3.2 Employers Requirements Version 3 as qualified by the BBS Compliance Matrix contained within BBS's Email dated 12 December 2007, save for [some specific exclusions]* *3.3 Detailed designs – BBS included in their price for the construction cost risk in the development and completion of detailed designs being prepared by SDS, save for:-* *a) Any future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS, as typically represented by the drawings issued to BBS with the design information drop on 25th November 2007." [red represents tie changes*]…
19.12.07 14.45	E-mail from BB to tie	Broad agreement in relation to terms of draft
19.12.07 18.11	E-mail from Matthew Crosse to BB (Including Richard Walker and Michael Flynn), cc to Susan Clark, Steven Bell and Geoff Gilbert	The e-mail refers to a progress meeting to be held on 20 December 2007 at 11am, and sets out an agenda which includes at item 1: "Sign agreements (Mobilisation and Contract price Agreement)"
19.12.07 19.42	E-mail from tie to BB	Further draft circulated with minor changes following board meeting
20.12.07 6.07	E-mail from BB to tie	"*we still have issues with accepting design risk. We have not priced this contract on a design and build basis always believing until very recently that design would be complete upon novation. With the exception of the items*

		marked provisional which we have now fixed by way of the 8 million we cannot accept more drain development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution."
20.12.07 8.48am	Internal tie e-mail from Geoff Gilbert to Steven Bell and Matthew Crosse	This forwarded the BB e-mail of 6.07am, with no comment other than "!!!"
20.12.07 13.02	Internal tie e-mail from Geoff Gilbert to Steven Bell entitled "*BBS Agreement words*"	There is no text in the e-mail than draft wording for clauses 3.3 to 3.5, which are in almost identical form to that e-mailed to BB at 14.07 on the same day (changes between 13.02 and 14.07 are shown in redline below): "*3.3 The BBS price for civils works includes for any impact on construction cost arising from the normal development and completion of designs based on the design intent for the scheme as ~~typically~~ represented by the design information drawings issued to BBS ~~with~~ up to and including the design information drop on 25th November 2007. The price excludes:-* *a) Items designated as provisional in the Appendix A4.* *b) Any material changes to the design resulting from the impact of the kinematic envelope of the CAF tram vehicle on the civils design.* *c) Excluded items, to the extent described in 3.4 below.* *In respect of footways, full reuse of existing kerbs and flags and minimal reinstatement behind kerb lines is assumed. i.e. not wall to wall. Design must be delivered by the SDS in line with our construction delivery programme previously submitted.* *For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification* *3.4 The BBS price for systems works is fixed save for:-* *a) Items designated as provisional in the Appendix A4.* *b) Any agreed material impact of the CAF tram vehicle specification on the traction power supply system as demonstrated by power simulation modelling.* *3.5 In all other respects the BBS price is fixed*"

20.12.07 14.07	E-mail from tie to BB	tie send a revised draft almost in the form eventually executed, save that there is no 3.4(c) in this version 20.1 The agreement was executed later that same day, in the form of the draft referred to above, save that additional words were added in manuscript as a new 3.4(c): "*In the event of any conflict between the obligations in the Employer's Requirements and the SDS design the obligations in the Employer's Requirements shall prevail.*"
20.12.07	Wiesbaden Agreement – executed by Willie Gallagher and Richard Walker	New 3.3 (replaces the version referred to above): "*The BBS price for civils works includes for any impact on construction cost arising from the normal development and completion of designs based on the design intent for the scheme as represented by the design information drawings issued to BBS up to and including the design information drop on 25th November 2007. The price excludes [specific items]. For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.*" New 3.4: "*The BBS price for systems works is fixed save for:-* *a) Items designated as provisional in the Appendix A4.* *b) Any agreed material impact of the CAF tram vehicle specification on the traction power supply system…* 3.5 *In all other respects the BBS price is fixed.*"
20.12.07 17.49	E-mail from Geoff Gilbert to Stewart McGarrity and others at tie	The e-mail attached the agreement executed by BB
21.12.07	Wiesbaden Agreement amended	A new 3.4(c) was added in manuscript by Geoff Gilbert: *"In the event of any conflict between the obligations in the Employer's Requirements and the SDS design the obligations in the Employer's Requirements shall prevail."* The change appears to have also been initialled on behalf of BB, but it is not clear by whom.
January to	Further negotiations –	"*Negotiations in the period from October to December 2007 were conducted in a constructive if robust manner.*

March 2007	no contemporaneous correspondence, but referred to in the "Financial Close Process and Record of Recent Events" of 12.05.08	*However, from January 2008, it became increasingly concerning that the BBS consortium was operating in a manner which militated against an efficient Close. The behaviours included lack of competent senior commercial management involvement, leadership on commercial as well as legal issues by BBS's lawyers, lack of a cohesive approach between the consortium partners and their use of different law firms, consistent re-opening of apparently agreed positions and lack of focus on important matters in favour of volumes of detailed points.* *A consistent additional problem was the under-performance and unhelpful approach of PB. This was critical as PB needed to enter into the tri-partite Novation of their design contract. CAF played a more constructive and passive role.* *Extended negotiations took place in which the prevailing theme was the attempt by tie to remain close to the draft terms which supported preferred bidder selection in the face of attempts by BBS to improve their position.* *These negotiations led to a further summit meeting in March 2008, when a further series of lines were drawn. This "Rutland Square Agreement"[4] included different (offsetting) cost and risk transfer terms which drove the overall cost to £508m. The delay in reaching close meant that revenue service could not now commence until July 2011. The negotiations at this stage were substantially driven by Siemens.* "
07.02.08	Rutland Square Agreement (executed by Matthew Crosse and Richard Walker)	The "Construction Contract Price for phase 1a is £222,062,426 (as opposed to the "negotiated price for phase 1"of £218,262,426 in the Wiesbaden agreement. Para 2 states that the parties agree that "*under no circumstances shall the Construction Contract Price…be increased prior to formal signature of the [contracts] except in respect of:* *2.1 the formalisation of the price for changes to the Employer's Requirements Version 3.1; and* *2.2 the resolution of the SDS Residual Risk Issue.*" Para 4 states that "*The SDS Residual Risk Issue relates to the provision of adequate design information and particularly earthworks design by SDS and the recovery by the BBS Consortium of costs and expenses from SDS in the event that their designs are inadequate.*"
18.02.08	BB's design due diligence summary report	Executive summary, page 3/9: "*Contrary to the tie's original intention for this project stage, the design in incomplete and will require significant further development. Several sections are currently under re-design and the final concepts for these are unknown to us. According to the SDS document tracker more than 40% of the detailed design information has not been issued to BBS at all by the above mentioned cut-off date. Where the detailed design is available, it is mostly of acceptable standard. However this does not apply throughout…*

[4] The Rutland Square agreement actually appears to have been executed on 07.02.08, not in March as stated in the report

		For many areas the 3rd party approval status is not clear. Formal tie / CEC design approvals are generally outstanding. Not a single design element has received final approval and has been issued for construction. *The latest available SDS programme is version V23. This shows a slippage of more than a year compared to the programme in the SDS agreement. It schedules the release of issue for construction information from April 2008 to the end of 2008. This is based on optimistic approval periods for which no contractual reference could be found.* *In accordance with tie's original procurement concept a complete and issued for construction design would have been novated to the Infraco. The current design is far from meeting these requirements and, as consequence, a novation is considered to present significant and unforeseeable risks to the project.*"
February to 30.04.08	Further discussions – no contemporaneous correspondence, but referred to in the "Financial Close Process and Record of Recent Events" of 12.05.08	"*Negotiations over detailed documentation continued, although BBS's approach continued to cause concern and delay. On 14th April, senior representatives of BB and S visited tie and marginal residual issues were agreed. The meeting concluded with confirmation that all terms were agreed and the final documents should proceed to final legal quality control and then signing on 2nd May.* *On 30th April 2008, in a telephone call to Willie Gallagher, BB (Richard Walker) requested a last minute and largely unsupported price increase of £12m. This was at the final point before the pre-agreed timing of contract approval for signature. No such request had emerged from Siemens or from CAF or indeed SDS. The anticipation had been that the contracts would be signed on 2nd May and a preparation period of 36 hours was needed.* *An emergency meeting of those members of the Tram Project Board who were available plus tie / TEL / CEC representatives was held on 30th April. The options available were discussed and it was concluded that we should deploy tough tactics, but not stonewall the BB request completely as it was felt that the alternatives were likely to be worse notwithstanding the intense frustration at BB's tactics.*"
01.05.08 – 09.05.08	Final negotiations – no contemporaneous correspondence, but referred to in the "Financial Close Process and Record of Recent Events" of 12.05.08	"*BB senior management visited Edinburgh on 5th May 2008, met by messrs Gallagher, Mackay and Bell. Their support for the price increase was sketchy and confused, focussing around an admitted failure on their part to assess or control their supply chain prices, £ / € movement and a claim for underwriting of central demobilisation cost which they had allocated to their bid for Phase 1B in the light of a more cautious view on the execution of 1B.* *All signs pointed to last-minute unprofessional brinkmanship. BB claimed their costs were actually £17m wrong, but that they had reworked internally to arrive at £12m, casting further doubt on their credibility. There were veiled threats that failure to meet the demand now would force BBS to seek every opportunity to create claims during the construction period to achieve their financial target. As a matter of record, tie is comfortable with its contractual position and the experienced people recruited to manage the contract effectively.* *The 5th May meeting culminated in a proposal from tie that tie would :* • *Absorb £3m of additional cost in return for tangible contractual and risk improvements ;*

		• *Agree to meet BBS allocated demobilisation costs of £3.2m in event that Phase 1B does not proceed* *The BBS response on 6th May was disjointed (different responses from different senior people in the BB team). A series of meetings involving messrs Gallagher, Mackay, Bell, Fitchie and Bissett concluded that a formal letter to BBS in the form of an ultimatum was needed to bring matters to a close. In addition to the continuing delay and attendant costs, and the unpalatable alternatives to concluding with BBS, there were concerns that Siemens, CAF and PB may also seek price increases if BB were seen to be making inappropriate progress.* *A letter was sent to BBS late on 6th May which reiterated the tie proposal described above. A response was received on 7th May which proposed :* • *A payment of £9m to BBS* • *Further examination of the contract terms surrounding the design management process, which although unclear pointed to an extended design and consent programme with potentially material adverse consequences for the construction programme.* *The letter was silent on tie's contractual requirements.* *A combined meeting of the TPB and tie Board was held (as scheduled) in the morning of 7th May. The meeting reviewed the position thoroughly and concluded that the approach which best protected the public sector's position would be to seek a conclusion with BBS within their demand for £12m.* *Further negotiations were conducted on 7th, 8th and 9th May and an acceptable conclusion reached. The final terms negotiated reflect agreement by tie to increased consideration and contingent cost underwriting in return for early progress to contract signing, improvement in terms and capping of cost exposures.* "
12.05.08	Financial Close Process and Record of Recent Events	Report prepared by tie[5] to recommend financial close on the basis of a number of amendments agreed during the negotiations in early May 2008 referred to above. These included an incentivisation bonus, which tie said was given in return for an improved risk profile: "*The incentivisation bonus should support programme adherence. In return for the financial amendments, tie has secured a range of improvements to the contract terms and risk profile. The elements of the aggregate risk contingency of £32m which are relevant to the improved position are :* *General programme delay £6.6m* *Delay due to design & consents £3.3m* *Contamination risk £3.4m*

[5] It is not clear who at tie prepared the report, but it was forwarded to us by Graeme Bissett

		Road reinstatement – direct costs £2.0m" In addition the report notes that "*all of tie's preferred positions in the Infraco contract which were under query by BBS and their lawyers would be accepted…The attempt by BB to revise the design process in a manner which would have created delay was also successfully rebuffed*"
12.05.08	Report on Infraco Contract Suite	Report produced by tie summarising the provisions of the contract. Under the heading "**price**" on p4: "*A contract price has been agreed. The detailed contract price and pricing schedules for carrying out the Infraco Works is contained in Schedules to the Infraco Contract. A substantial portion of the Contract Price is agreed on a lump sum fixed price basis. There are certain work elements that cannot be definitively concluded in price and therefore Provisional Sums are included. A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, Infraco is entitled to a price and programme variation known as "Notified Departure*". " Under the heading "**design expectations of the Infraco**" on p.8: "*The Infraco offer is based on design completed to date and a programme for future delivery of design. The offer is also based on those approvals achieved to date and a programme for achieving the remaining prior and technical approvals.* *The construction programme included in the final 'Infraco' proposal has been updated to match up with version 26 of the SDS design programme (dated 4 February 2008). The Novation Agreement is based on version 30 of the SDS design programme and the differences between these programmes has been documented and will form the basis of the expected Notified Departure referred to in the programme section above and which has been risk-assessed.* *The substantial progress with completion of the SDS design has reduced the risk of late production impacting on the construction programme and has given 'Infraco' greater certainty of the construction needed.*" Under the heading "**Infraco Proposals and the Employer's Requirements**" on p.9: "*tie has instructed SDS to carry out an exercise to bring the Employer's Requirements and the Infraco Proposals into alignment so that SDS Provider are able to confirm that their design will be in compliance the Employer's Requirements. This may result in further changes to the Employer's Requirements and/or the Infraco Proposals and/or the SDS design.* *The risk created by discrepancies between the version of the Employer's Requirements eventually settled on and the Infraco core terms and conditions lies in the Infraco attempting to exploit ambiguity to engineer the need for tie Change or Relief when none is in fact justified. tie project management will need to be vigilant in identifying and closing off such opportunities, using the mitigating contract provisions which impose duties on Infraco to respect*

		ambiguities and discrepancies and permits tie Representative to interpret provisions to avoid these difficulties."
Undated	Report on terms of financial report	Report to Tram Project Board, TEL Board and tie Board. Under the heading "2.3 Scope of Works – Employer's Requirements" (p.7): "*Since preferred bidder award, all of the ER terms have been reviewed in a three way technical alignment process:* o *BBS proposal → ERs.* *To ensure that BBS proposals comply with the ERs. This has involved removing all of the stated non-compliances noted at the preferred bidder stage by either relaxing the ER clause (without affecting the output requirements) or by updating the proposal to make it compliant. Commercial alignment of the ERs and the Infraco proposals has been concluded.* o *SDS design → ERs* *Because the SDS Design had responded to an up to date though not final draft of the ERs, the final alignment process produced no material mis-alignment issues. The final alignment review identified potential mis-alignment which was documented and assessed for its cost and programme implications and some minor amendments were agreed.* o *Proposal → SDS design* *To ensure that in areas where the ER terms allow flexibility in approach, it was necessary to ensure that the BBS proposed solution was consistent with the SDS design. A review of the final Proposals against the SDS design was executed and again some minor amendments were agreed. The main issue was the extent of road reinstatement and adequate allowance has been made in the final budget to accommodate this factor.* *In addition to these processes the ERs have also been reviewed in varying degrees of detail by three legal teams, DLA, BB's lawyers and Siemens lawyers (because a far larger part of the ERs relate to Siemens scope). In these cases the ERs were checked for consistency and alignment with the contract suite. All evident ambiguities, duplications and gaps have been dealt with to ensure that as a vital contract document it can be used effectively in the future.* *DLA have also undertaken a legal review to ensure that within the Infraco Contract there is a contractual mechanism for precedence of T&C's over the ER's in the event of ambiguity and for tie to instruct how any ambiguity or inconsistency is dealt with. tie do not anticipate any significant risks to CEC in this respect.* *The tie team is confident that the final version of the ERs, the contract version fully meets the requirements of the client, i.e. is consistent with the technical principles of final business case; and is consistent with both the SDS design and BBS proposals*."

		Section 8 deals with "risk assessment of in-process and provisional arrangements", and is described as "contributed by Stewart McGarrity, who reviewed those areas of the documents which are provisional in nature and the documents which will be in draft form at Close." 8.3 is headed "Infraco price basis and exclusions" (page 26): "*The Infraco price is based upon the Employers Requirements which have been in turn subject to thorough quality assurance and the significant areas where post contract alignment of the SDS design will be required. Crucially the price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements*." The report of 12.05.08 referred to above had identified the figure of £3.3m as being allocated to risk in relation to "*delay due to design & consents*". This report attributes that figure to "*post Financial Close consents and approvals risks which provides for the cost or programme consequences of imperfections which may arise in elements of the consents and approval risk transfer*" – *i.e.* this just relates to consent issues, and not design generally. No part of the risk allowance of £32m is described as relating to design issues. At page 28, the report notes: "*the Risk Allowance does not provide for the costs of:* • *Significant changes in scope from that defined in the Employers Requirements – whether such changes were to emerge from the consents and approvals process or otherwise*" Reference is made to a DLA report[6], and quotes from it: "*5.1 Employers Requirements (ERs) – Alignment issues* *There is a well understood and limited level of uncertainty with regard to the alignment of the ERs, the SDS design and the Infraco proposals (on which their price is based). The alignment work described at Section 2.3 above resulted in limited amendment to cost and risk contingencies.*" Appendix 1 to the report (page 33) is headed "SDS – Delivery and Consent Risk Management". Under the heading "background": "*Negotiations have taken place over a lengthy period of time with the objective of defining a process and set of contractual terms which will enable tie and CEC to manage the risks arising from the overlapping design and construction periods. This problem was not anticipated when the SDS contract was concluded in 2005. The recent discussions have taken place under the umbrella of the SDS Novation Agreement, but it is important to distinguish*

[6] We do not have a copy of the report

		two groups of issues: *<u>Cost certainty</u>: The primary objective of the novation approach was to ensure that design work could commence long before commitment to the construction contract suite generating maximum construction price certainty and transferring design risk to the construction partner.* *<u>Outstanding design risk</u>: SDS have resisted accepting liability to BBS for the timeliness of submission and approval of design packages after Financial Close. Their concern is that the risk is different from (and incremental to) the underlying risk arising from the quality of their work. A delay, they argue, could result in hefty exposure because of the linkage to construction programme delay. SDS did not anticipate this risk when committing to their contract - the expectation was that the majority of design scope and certainly all approvals would be complete prior to Financial Close. "* The report identifies risk to tie/CEC in relation to design packages which at financial close had either not yet been submitted, or had been submitted, but not yet approved. It was concluded that "*cost certainty and risk transfer*" had been achieved in relation to all other packages. The risk overview is at p.34: "*The risks which arise from the overlap of design and construction periods are summarised below :* *A. The Submitted packages are not of requisite standard, preventing CEC from providing consent timeously and creating delay to the construction programme.* *B. The Submitted packages are of requisite standard, but CEC fail to provide consent timeously, creating delay to the construction programme.* *C. SDS fail to provide the Outstanding packages on a timely basis relative to the agreed programme, preventing CEC from providing consent timeously and creating delay to the construction programme.* *D. SDS fail to provide the Outstanding packages to the requisite standard, requiring rework and delay, preventing CEC from providing consent timeously and creating delay to the construction programme.* *E. CEC provide consents and approvals timeously, but SDS then fails to provide IFC ("Issued For Construction") drawings to BBS timeously creating delay to the construction programme.* *F. SDS provide the Outstanding packages on time and to the requisite standard, but CEC fail to provide consent timeously, creating delay to the construction programme.* *It is not anticipated that the final Outstanding Packages will be delivered until Autumn 2008. The option of delaying Financial Close to eliminate the risk is therefore unattractive.* *SDS has resisted accepting any liability in the event of any of these scenarios. Since the point of investing in a procurement of a design appointment in Autumn 2005 was to secure a completed approvals process with an*

		advanced network design development, there was no allowance for the implications of a coincident design and construction process in the existing SDS agreement. Accordingly, tie /CEC's leverage over SDS on the issue is limited. *BBS have similarly resisted accepting any liability for the consequences of delay arising from the Submitted or Outstanding packages. Their position was reserved (as was Tramlines' position) at preferred bidder, pending due diligence on SDS, as they were aware of the issue at the Preferred Bidder stage, but again we have only limited sanction over them.* *There has been no sustained attempt by BBS to sidestep the transfer of design quality risk once the Submitted and Outstanding packages are eventually signed over to them with consent. In fact they have now explicitly accepted the design quality risk as part of the Agreement made on Friday 7 March for Contract Price adjustment. Accordingly, the remaining risk is focussed on construction programme delay as a result of late delivery of design and hence IFC drawings impacting construction.* *Resolving this issue has been made more difficult because of concern built up over a long period about the quality and timeliness of SDS's work on the part of tie, CEC and BBS.* *There is also a concern that performance against the agreed submission programme could be obfuscated with the intent (or at least result) that design packages fall outwith BBS / SDS responsibility because of claimed failure by CEC. This could happen in four ways:* 1. *Confusion about submission date if a package is returned by CEC for quality improvement* 2. *Swamping CEC with a high volume of design packages which cannot be processed within the 8-week period* 3. *BBS and SDS by some means acting in concert to subvert the process* 4. *Lack of clarity about the quality of submissions* *In summary therefore, tie / CEC are exposed to risks relating to timeliness of submission and / or quality. The risk could be heightened by deliberate or inadvertent actions by BBS / SDS. The next section describes the primary means by which these risks can be contained, through an effective management process controlled by tie / CEC. "*
Undated	Summary of changes in price	Summarises changes in price from preferred bidder (October 2007) to execution of the contract (May 2008)
14.05.08	Contract executed	NB Schedule 23 contains SDS novation agreement which provides for the development workshops, as follows: "*4.6* ***tie*** *warrants that it has received a report from the SDS Provider (annexed at Part B of Appendix Part 7) setting out the misalignments between the Deliverables completed prior to the date of this Agreement and the*

		Employer's Requirements and that it has issued initial instructions (in the form of the letter annexed at Part A of Appendix Part 7) to the SDS Provider in relation to addressing all such misalignments. Upon completion of the work entailed to resolve the misalignments, the SDS Provider confirms to ***tie*** *and the Infraco that such Deliverables shall be consistent with the Employer's Requirements.* *4.7 As soon as reasonably practicable, the Parties shall commence and expeditiously conduct a series of meetings to determine the development of the Infraco Proposals and any consequential amendment to the Deliverables (the "****Development Workshops****"). The matters to be determined at the Development Workshops shall be those set out in the report annexed at Part C of Appendix Part 7 (the "****Misalignment Report****"), together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4 to be dealt with in the following order of priority…* *At the Development Workshop, the Parties shall also develop a strategy for co-operation between the SDS Provider and the Infraco to manage design development and the necessary interface between the Infraco's design and the design developed by the SDS Provider.* *4.8 The product of the Development Workshops shall be a report signed by each of the Parties to detail the conclusions in respect of each matter and the payments to be made to the SDS provider in respect of the work to be carried out by the SDS Provider as a result of the conclusions set out in the report. Any consequential* ***tie*** *Change Orders or instructions shall be appended to such report as and when the same are issued.* ***tie*** *shall pay the SDS Provider for the work required for the Development Workshop on an hourly rate basis in accordance with the hourly rates set out in Appendix Part 8 and the SDS Provider agrees that the Infraco shall not be liable to make such payments to the SDS Provider. For the avoidance of doubt, the Infraco and* ***tie*** *agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in this report will be a Mandatory* ***tie*** *Change under the Infraco Contract, and a Client Change under the SDS Agreement*."

McGrigors LLP
16 February 2010

APPENDIX 3 - GENERAL CONTRACTUAL ISSUES

Introduction

1 A number of Notified Departures submitted by the Infraco have highlighted the question of whether, and to what extent, there is a link between the Employer's Requirements and the Infraco Proposals on the one hand, and the Base Date Design Information (BDDI), on the other.

2 The purpose of this paper is to consider that issue, and assess the relevance it may have to claims made by Infraco.

3 The paper also examines the requirements of a Notified Departure.

Is there a link between the Employer's Requirements/Infraco Proposals and the BDDI?

4 Infraco's obligation is to deliver the Infraco Works[1] for the Contract Price[2]. Infraco's obligations to carry out work are not contractually linked with, or defined by reference to, the Base Case Assumptions, although the Contract Price has been fixed on the basis of, amongst other things, those Base Case Assumptions[3].

5 The Infraco Works are defined[4] as:

"…the EAL Works and all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it, all in accordance with this Agreement and the Employer's Requirements."

6 The Contract Price includes the Construction Works Price, which is in turn defined[5] as:

"*…a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with this provisions of this Agreement.*"[6]

7 The introduction to the Infraco Proposals[7] states:

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[1] Clause 7.3 of the Agreement
[2] Clause 66.1 of the Agreement
[3] Clause 3.5 of Schedule Part 4
[4] Schedule Part 1
[5] Clause 3.1 of Schedule Part 4
[6] That definition appears to contain a typo: the Infraco Proposals are at Schedule Part 30. Schedule Part 31 consists of around 22 drawings showing the land available to Infraco.
[7] Schedule Part 30

"*1.1 BBS Proposals for Civil Works are the SDS Design, to be developed and finalised to Issued for Construction (IFC) status under the Design Management Plan…*

1.2 The Design is, at present, incomplete or not issued to BBS for some Sections of the Works…

1.4 The Design will, where possible, be developed and finalised in accordance with Section 3.4, Pricing Assumptions…"

8 The Base Case Assumptions consist of the following:

(a) The BDDI;

(b) The Base Tram Information;

(c) The Pricing Assumptions;

(d) The Specified Exclusions;

9 The BDDI, which is the SDS design, is defined[8] as "*the design information drawings issued to Infraco up to and including 25th November 2007*". The Agreement was entered into on 14 May 2008. There was therefore effectively a freeze on the BDDI some months before contract formation. The information consisted of drawings available to the Infraco in a data room, which gave named Infraco personnel access to live design information. In addition, design information was issued weekly on CD's. Initial investigations by tie are understood to indicate that the data room information is identical to the CD information, although that has still to be confirmed definitively.

10 The BDDI is then subject to normal design development: the BDDI which undergo normal design development are intended to yield the Issued for Construction (IFC) drawings. The definition of IFC drawings is "*those Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure*". That Review Procedure is set out in Schedule Part 14, which describes the process of design review.

11 What constitutes normal design development will depend in on the nature of each item of design: the design development envelope is an elastic one, but generally the less developed an element of design in the BDDI, the greater the extent of that envelope. If an element of design is already extensively developed at BDDI stage, this is likely to mean that less is required to develop that design to its completed, IFC, form.

12 The Notified Departure mechanism uses the Base Case Assumptions, including the BDDI, as a base line, and not the Employer's Requirements and/or the Infraco Proposals. A Notified Departure will entitle the Infraco to a Mandatory tie Change[9], with the consequent entitlements in terms of time and money.

[8] Clause 2.3 of Schedule Part 4
[9] Clause 3.5 of Schedule Part 4

13 A Notified Departure is defined[10] as:

"*Where now or at any time the facts and circumstances differ from the Base Case Assumptions save to the extent caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law*."

14 Drawing the foregoing strands together the linkage between the Employer's Requirements/Infraco Proposals and BDDI appears, at least in respect of the Civil Works, to be via the reference in the introduction to the Infraco Proposals to the SDS Design which is to be developed and finalised to IFC under the Design Management Plan which applies to Deliverables (which includes BDDI). However, the base line from which change is measured under a Notified Departure is the BDDI.

Analysis of other contractual provisions which may be relevant

15 There are a number of further contractual provisions which require to be considered. These include:

(a) Clause 4.4 of the Agreement;

(b) The provisions of the SDS Novation Agreement;

These are considered in turn below.

Clause 4.4 of the Agreement

16 Clause 4.4 of the Agreement provides that:

"*The Infraco confirms that it has studied in detail the Employer's Requirements and each document comprised therein and has satisfied itself that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco's Proposals. The Infraco acknowledges that it accepts all risks arising from any discrepancies, errors or omissions that subsequently appear within or between such documents and that, subject to Clause 4.2, 4.3 and 4.5, it shall not be entitled to make any claim against* ***tie*** *for an extension of time, additional payment, any relief or otherwise in respect of any such errors, discrepancies or omissions*."

17 The first sentence of Clause 4.4 effectively constitutes a warranty by the Infraco that they have checked the Employer's Requirements for internal inconsistencies, and checked for any inconsistencies between the Employer's Requirements and the Infraco Proposals.

18 The second sentence of Clause 4.4 passes the risk "arising from any discrepancies, errors or omissions that subsequently appear within or between such documents", subject to inter alia Clause 4.3, to Infraco in terms of time and money. Arguably the reference to "such documents" links back to "each document comprised" in the Employer's Requirements in the first sentence. However, even if it is construed more broadly so that it covers the Infraco's Proposals Clause 4.3 would prevail. It states:

[10] Clause 2.8 of Schedule Part 4

"Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing)".

19 Furthermore the Infraco will be able to rely on the provisions of clause 3.4 (3) of Schedule Part 4 in this respect, which contains a Pricing Assumption that "*the Deliverables prepared by the SDS Provider prior to the date of this Agreement* [which includes the BDDI] *comply with the Infraco Proposals and the Employer's Requirements.*"

20 Accordingly, to the extent that the BDDI does not "*comply with*" the Infraco Proposals, there will be a change in the "*facts or circumstances*" of the Pricing Assumptions which may mean that there has been a Notified Departure.

SDS Novation Agreement

21 Prior to contract formation, it was recognised that there were areas of inconsistency, or misalignment, between the BDDI produced by the SDS Provider and the Infraco Proposals.

22 Clauses 4.6 to 4.8 of the SDS Novation Agreement provides for a series of post contract formation Development Workshops at which this misalignment would be resolved.

23 Clause 4.8 of the SDS Novation Agreement makes reference to payment being made by tie to the SDS Provider for "*the work required for the Development Workshop*". That would appear to be a clear reference to the design work to be carried out by the SDS Provider. The clause continues:

"*For the avoidance of doubt, the Infraco and tie agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in* [the report which is the product of the workshops] *will be a Mandatory tie Change under the Infraco Contract, and a Client Change under the SDS Agreement.*"

24 The Deliverables in relation to each of the misalignment matters listed in Clause 4.7 of the Novation Agreement as at 14 May 2008 (the date of the Novation Agreement) is the base line for amendment. It is a question of fact whether in relation to each misalignment matter the Deliverables were still as per BDDI or whether they had been further developed.

25 The question arises as to whether the Notified Departure provisions have any application to the product of the Development Workshop. It is helpful to consider this question by considering Trackform which is one of the identified misalignment matters. The Infraco Proposals contain a Rheda City design solution which is therefore included in the Construction Works Price. The Rheda City solution is not shown in the BDDI. The Deliverables in respect of the civils element of Trackform as at 14 May 2008 comprised the BDDI. The product of the Development Workshop was IFC drawings which adopt the Rheda City solution. This is clearly an "amendment to the Deliverables completed prior to the date of this Agreement" the Deliverables being in this case the BDDI. The consequence is Mandatory tie Change which is the same consequence as a Notified Departure (Clause 3.5 of Schedule Part 4).

26 The Rheda City solution is a simpler solution from a civils perspective both in terms of design and construction than the solution set out in the BDDI. The valuation of the tie Change would result in a saving or a credit. Infraco will no doubt challenge this since the Rheda City solution formed part of the

Infraco Proposals and was therefore "provided" for in the Construction Works Price. However the position could have been different if the Rheda City Solution was in fact more expensive.

27 What does emerge from the foregoing is that to the extent the Deliverables as at 14 May 2008 (which in the case of Trackform was the BDDI) to IFC does involve amendment (Clause 4.8 of the Novation Agreement) a Mandatory tie Change occurs which triggers a valuation in terms of Clause 80.6. This could lead, depending on the facts, to an increase or to a decrease.

28 Beyond any amendment of Deliverables as at 14 May 2008 arising as a product of a workshop in respect of any of the misalignment matters resulting in a mandatory tie Change it would also be possible to get to this position via a Notified Departure by virtue of a specific Pricing Assumption having been departed from. This is well illustrated by roads which is one of the listed misalignment matters and which is also the subject matter of a specific Pricing Assumption, namely Clause 3.4.14. In valuing the Change the Pricing Assumption would be taken into account along with the Deliverables as at 14 May 2008 as the base line comparators for considering the design which was arrived at via the workshop.

Conclusion in relation to other contractual provisions

29 In relation to all matters **other** than those misalignment matters identified in Clause 4.7 of the Novation Agreement the foregoing contractual provisions do not alter the base line (BDDI) from which change is to be measured. In relation to the misalignment matters the base line in terms of Clause 4.8 of the Novation Agreement is the Deliverables in their form as at 14 May 2008 subject to any specific pricing assumptions.

Notified Departure

30 A Notified Departure will only arise if the Infraco can bring themselves within all the relevant criteria, and in those circumstances the Infraco will be entitled to a Mandatory tie Change. Those criteria may provide the basis for a challenge to the existence of a Notified Departure. The principal areas are (i) that the facts or circumstances (*i.e.* the IFC drawings) do not differ from the Base Case Assumptions; (ii) design development; (iii) an Infraco breach; (iv) and Infraco change.

No change in facts and circumstances

31 The Notified Departure mechanism is only triggered where the facts or circumstances differ from the Base Case Assumptions.

32 It may be open to tie to establish that there has not been any difference: where BDDI is relatively high level and undeveloped, there may be more scope for tie to show that the IFC design does not *differ* from the original design.

Design Development

33 "The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):

1.1 in terms of design principle, shape, form and/or specification be amended from the drawings forming the BDDI…

For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification."

34 The Infraco will therefore not be entitled to a Mandatory tie Change where the change has arisen as a result of design development of the BDDI produced by the SDS Provider. Whether change falls within design development (using the guidelines in Schedule Part 4 referred to above) will be a question of fact, and in particular, engineering judgement[11].

Infraco breach

35 There will be no Notified Departure where the change has arisen as a result of a breach of contract by the Infraco. The Infraco will not be held to be in breach of contract simply because their Proposals are not the same as the BDDI – provided that the Infraco Proposals do comply with the Employer's Requirements.

36 Separately, the issue of deficiencies in the BDDI has been raised, in the context of whether a breach by the SDS Provider in relation to its obligations in respect of the BDDI would also constitute a breach on the part of the Infraco.

37 There may well be instances where the BDDI is defective, and as a consequence of this the movement between that BDDI and the IFC design is considered to go outwith the parameters of normal design development.

38 There does not appear to be any provision of the Agreement nor the SDS Novation Agreement which would constitute a warranty by the Infraco in relation to the BDDI.

39 Clause 11.3 of the Agreement provides that "*the Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement*". That does not constitute a warranty in relation to the BDDI: indeed, the Infraco could be said to be complying with its obligations under this clause in procuring that the eventual IFC design is compliant, eliminating any deficiencies which had existed at BDDI stage.

40 Accordingly, in terms of the Notified Departure mechanism, an SDS breach in relation to BDDI does not of itself automatically constitute an Infraco breach. If the SDS Provider was professionally negligent in producing the BDDI, that would constitute a breach by them of their obligations under the SDS Agreement, and would in turn expose them to liability under it. However, absent any warranty by the Infraco in respect of the BDDI it is difficult to see what the Infraco breach could be said to be.

41 If the SDS breach does not translate into an Infraco breach, then this will not fall within the exception to the Notified Departure mechanism, with the resulting financial consequence for tie. tie may have

[11] See McGrigors' comment papers on DRP cases 5A, 5B and 5C

recourse against SDS in relation to that financial exposure via the SDS collateral warranty, if[12] negligence on their part can be established.

42 However, in relation to SDS breaches at IFC stage, an SDS breach may well constitute an Infraco breach if the IFC drawing is defective or the design fails to meet the Infraco's obligation to minimise costs[13]. For example, if SDS produce an IFC design which is over engineered, and results in unnecessarily high construction costs, that may constitute an Infraco breach. In this event the cost consequences should be borne by Infraco to the extent that they have been caused by an Infraco breach resulting from a breach by SDS. This would be achieved by founding on the Infraco breach exception in the definition of Notified Departure.

Infraco Change

43 There will be no Notified Departure where the change has been caused by an Infraco Change, which is defined as "*a change proposed by the Infraco in accordance with Clause 81.1 and approved by tie in accordance with Clause 80 (tie Changes) or Clause 81 (Infraco Changes.*"

44 A change proposed by the Infraco in accordance with clause 81.1 will occur "*If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2)*". The Infraco Works are in turn defined by reference to the physical works (as quoted above).

45 It will therefore be open to tie to argue that where the BDDI changes as a result of changes proposed by the Infraco then there will be no Notified Departure.

46 If the change to the BDDI is treated as an Infraco Change, then the provisions of clause 81 will apply. tie are required to serve a tie Notice of Change. Where the change will result in lower costs for the Infraco, then tie may require a reduction to the Contract Price. Where there is an anticipated increase to Infraco's costs, "*there shall be no variation to the Contract Price unless otherwise agreed by the Parties*".[14] Where the Infraco considers that a change could effect an indexed saving of £20,000 or more, the Infraco is required (at tie's option) to produce a value engineering report which addresses, amongst other things, the Infraco's proposals for a lump sum reduction to the Contract Price[15].

Conclusion

47 The base line comparator for determining whether the IFC drawings constitute a Notified Departure is the BDDI save in relation to those misalignment matters indentified in the Novation Agreement where the comparator is the Deliverables in the form in which they existed as at 14 May 2008 subject to any specific Pricing Assumptions. In a number of the misalignment matters, such as Trackform, the BDDI remained the Deliverables as at 14 May 2008 and the product of the workshop was the IFC drawings. In these cases a Mandatory tie Change is triggered without having to go through the tests laid down in relation to a Notified Departure.

[12] Clause 2.1 and 2.2 of the SDS collateral warranty
[13] Clause 7.5.5 of the Agreement
[14] Clause 81.2.2 of the Agreement
[15] Clause 81.3. of the Agreement

48 Both the Notified Departure route and the amendment of the Deliverables in the case of misalignment matters lead to Clause 80. The valuation of the Change may result, as is set out in Clause 80.4.10, to an increase or decrease in any sums due to be paid to Infraco.

McGrigors LLP
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