

**Exhibit 2 to Mediation Statement**

**Progress of the Works – clauses 34.1 and 80.13**

**Clause 34.1**

1 Clause 34.1 provides that:

2 *"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."*

3 Accordingly, tie is entitled to issue instructions to Infraco, and Infraco is obliged to comply with those instructions, provided that they do not conflict with any other provisions of the Infraco Contract.

4 Infraco's obligations to comply with the instruction are reiterated in clause 80.20, which is dealt with in more detail below, but which provides that *"Infraco shall comply with the instruction."*

5 Accordingly, in circumstances where there is a dispute or difference between tie and Infraco as to whether the work which is the subject matter of an instruction issued pursuant to clause 34.1 constitutes a Notified Departure, work should progress in the interim until that dispute or difference is resolved.

6 Where there has been no Notified Departure, then the deeming provisions of clause 3.5 of Schedule part 4 will not apply. Clause 3.5 states:

*"...If now or at any time the facts or circumstances differ in any way from the Base Case Assumptions...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 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..."*

7 Accordingly, to the extent that no Notified Departure has occurred, then there will be no deemed Mandatory tie Change, and tie will not be deemed to have issued a tie Notice of Change.

8 In the event that it eventually transpires that the work in question is 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 in accordance with the provisions of the Infraco Contract in the usual way. Infraco's legitimate interests in this respect are safeguarded by the provisions of:

(a) Clause 34.3; and

(b) Clause 80.20.

9 Clause 34.3 states:

*"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."*

10 Where it transpires that the work in question was not a Notified Departure, or did not constitute a variation to the Infraco Works, no Compensation Event will have arisen: the instruction issued to Infraco constitutes an instruction to proceed with work which forms part of its contractual scope of work, and in relation to which it is not entitled to additional payment or an extension of time.

11 Clause 80.20 of the Infraco Contract provides that:

*"If, having received instructions from tie or tie's Representative, the Infraco consider that compliance with those instructions would amount to a tie Change, then the Infraco shall comply with the instruction and shall within 20 Business Days of any instructions being received, notify tie of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by tie of such an Estimate, Clause 80.15 and 80.16 shall be deemed to apply mutatis mutandis to the work carried out by Infraco in complying with such instruction. If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a tie Change (either Party being entitled to refer the matter to the Dispute Resolution Procedure if the matter has not been agreed within 10 Business Days of the Estimate being received by tie) then the provisions of this Clause 80 (tie Changes) shall apply to such instructions."*

12 Clauses 80.15 and 80.16 provide as follows:

*"80.15 Where an Estimate has been referred to the Dispute Resolution Procedure for determination, but it is deemed by tie (acting reasonably) that the proposed tie Change is urgent and/or has a potential significant impact on the Programme, subject to Infraco's right to refuse to carry out a tie Change under Clause 80.12 and save where such proposed tie Change includes work by the SDS Provider and where the valuation of such work is not agreed, tie may instruct Infraco to carry out the proposed tie Change prior to the determination or agreement of the Estimate by issuing a tie Change Order to that effect.*

*80.16 Where tie issues a tie Change Order under Clause 80.15, Infraco shall implement the tie Change, and prior to determination of the Estimate shall be entitled to claim Infraco's demonstrable costs in implementing the tie Change calculated in accordance with Clause 80.6".*

13 Accordingly:

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- 13.1 If tie issues an instruction in relation to the Infraco Works, then Infraco must comply with such an instruction in accordance with the provisions of Clause 34.1;
- 13.2 If tie insists that the instruction is not a variation to the Infraco Works, and that there is accordingly no Notified Departure, then there will be no deemed Notice of Change pursuant to clause 3.5 of Schedule Part 4;
- 14 Consequently, the instruction would not amount to a tie Change;
- 15 If Infraco considers that the instruction does amount to a tie Change, then the provisions of clause 80.20 apply;
- 16 In such circumstances (what might be described as a disputed Notified Departure), then Infraco must proceed with the work as instructed. Thus, "*Infraco shall comply with the instruction.*"
- 17 Clauses 80.15 and 80.16 of the Infraco Contract do not apply to such an instruction. Rather, they "*shall be deemed to apply mutatis mutandis to the carried out by Infraco in complying with such instructions.*" This means that Infraco must carry out the work in compliance with the instruction, as if tie had issued a Change Order to that effect.
- 18 If the instruction is subsequently determined to be a tie Change, then Infraco will be entitled to claim its demonstrable costs as provided for by clause 80.16, prior to the determination of the Estimate in relation to it.
- 19 If the instruction is subsequently determined not to be a tie Change, then Infraco will not be entitled to make any recovery in relation to it.
- 20 The consequence of the foregoing is that where there is a Notified Departure, Infraco must comply with an instruction issued by tie and carry out the work as instructed. If the instruction is subsequently determined to be a tie Change then the instruction will be treated as if tie has issued a Change Order with the result that prior to the determination of the Estimate (only), Infraco will be able to recover its demonstrable costs.
- 21 In conclusion, the Infraco Contract should not be interpreted in such a way as to mean that Infraco is entitled to hold up the progress of the Project in circumstances where *firstly* the

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only issue between the Parties is who should bear the cost and time consequences of a particular item of work, but there is clarity in relation to the scope and nature of that work; and *secondly*, Infraco will be entitled to recover the cost and time consequences from tie in the event that it transpires that tie should bear those consequences.

22 This issue has not previously been ventilated between the Parties in any DRP, which remains untouched by the decision of Lord Dervaird in relation to clause 80.13 considered in more detail below. tie proposes to have the issue referred to DRP imminently.

**Clause 80.13**

23 The foregoing section of this statement addressed the situation where Infraco has failed to comply with instructions issued pursuant to clause 80.13 to progress the Infraco Works in circumstances where there is a disputed Notified Departure.

24 Infraco has further failed to comply with instructions to progress the Infraco Works in circumstances where it is agreed between the parties that a Notified Departure has occurred. In these circumstances, Infraco's position has been that it is only required to proceed in circumstances where an Estimate has been agreed, or a disputed Estimate has been referred to DRP in circumstances where the underlying tie Change is urgent and/or has a potential significant impact on the Programme. Notwithstanding that stated position, Infraco has failed to comply with tie's instructions even in these limited circumstances.

25 Infraco's position in relation to clause 80.13 is misconceived for reasons which include the following.

26 As referred to above, clause 34.1 entitles tie to issue instructions to Infraco as long as those instructions do not conflict with any other provisions of the Infraco Contract.

27 There is no conflict between clause 34.1 and clause 80.13.

28 Clause 34.1 is not a parasitic entitlement to issue instructions provided for elsewhere in the Infraco Contract. It creates a free standing entitlement on the part of tie to issue instructions which must be complied with.

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29 That is reinforced by the wording of clause 34.3, which refers to instructions issued "in  
*pursuance of clause 34.1*".

30 Clause 80.13 provides that tie is entitled to require Infraco to proceed with varied work in  
two ways:

31 The first is by issuing a tie Change Order;

32 The second is if tie "*otherwise direct*." This entitles tie to issue such directions, with which  
Infraco is required to comply.

33 The wording of clause 80.13.2 envisages the situation whereby tie instructs Infraco to  
proceed prior to the agreement of an Estimate without any tie Change Order having been  
issued:

*"[tie may...] except where the Estimate relates to a Mandatory tie Change, withdraw the tie  
Notice of Change, in which case Infraco shall be entitled to claim the reasonable additional  
costs incurred by the Infraco in complying with this clause 80 in relation to that tie Notice of  
Change including the cost of any abortive works where tie **has instructed Infraco to  
commence works prior to the agreement of the Estimate.**" [emphasis added]*

That correlates with an entitlement on the part of tie to "*otherwise direct*".

34 Accordingly, both clause 34.1 and clause 80.13 point to a clear contractual ability for tie to  
instruct work to proceed. Clause 34.3 envisages the connection between clauses 34 and 80.  
It states:

35 "*if such instructions [i.e. those instructions issued pursuant to clause 34.1] 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*".

36 Infraco's interpretation of the Contract produces a result which is commercially absurd. On  
Infraco's case, Infraco would be entitled to hold up progress of the entire project until its  
Estimate had been accepted, or taken through the Dispute Resolution Procedure for  
determination, even though there is no issue between the parties as to the nature and scope

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of the varied work, nor as to who should bear the risk of the consequences of that varied work, in terms of time and money. Infraco's legitimate interests are protected by the Infraco Contract if it proceeds with the varied work.

- 37 Furthermore, on Infraco's interpretation, Infraco could delay or fail to issue an Estimate at all, and tie would be unable to direct them to proceed. There is no commercial sense to such an outcome.
- 38 It would be both arbitrary and irrational if the Infraco Contract were to be interpreted in such a way as to give no ability to tie to direct work to proceed in the circumstances referred to above. It would, indeed, lead to an outcome whereby the purpose of the Infraco Contract (*"the development of a tramway which will stand favourable comparison with the best in Europe...in a spirit of partnership"*<sup>1</sup>) could be frustrated.
- 39 The issue of clause 80.13 has been ventilated between the parties in an adjudication before Lord Dervaird in relation to INTC 109 – Murrayfield underpass. Lord Dervaird decided that tie is not empowered by clause 80.13 to instruct or direct Infraco to proceed with the work where it is agreed that a Notified Departure has occurred. Lord Dervaird's decision leaves the provisions of clauses 34.1 and 80.20 untouched.
- 40 For the reasons set out above, it is considered that this dispute was wrongly decided. In particular, the decision does not explain what meaning is to be given to the words "*unless otherwise directed by tie*" at the end of clause 80.13.
- 41 It remains open to tie to have this issue examined afresh by the courts, a course of action which will be taken in the event that mediation proves unsuccessful.

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<sup>1</sup> Recital E of the Infraco Contract