



DLA PIPER SCOTLAND LLP

ADVICE NOTE

relating to

The works authorised by the *Edinburgh Tram (Line One) Act 2006*

and the *Edinburgh Tram (Line Two) Act 2006*

25 June 2009



1. INTRODUCTION

- 1.1 Steven Bell of **tie** Limited (hereinafter referred to as "**tie**") by e-mail dated 24 June 2009 requested DLA Piper Scotland LLP (hereinafter referred to as "**DLA**") to provide advice in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* to be carried out in terms of (1) the agreement dated 19 September 2005 (hereinafter referred to as the "**SDS Agreement**") between **tie** and Parsons Brinckerhoff Limited (hereinafter referred to as the "**SDS Provider**") for the provision of certain services (hereinafter referred to as "**Services**") by the SDS Provider; and (2) the contract dated 14 May 2008 (hereinafter referred to as the "**Infraco Contract**") between **tie** and (1) Bilfinger Berger UK Limited; (2) Siemens plc; and (3) Construcciones Y Auxiliar De Ferrocarriles S.A. (hereinafter collectively referred to as "**Infraco**") for the provision of the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* on or affecting areas of ground at or near Edinburgh Airport 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 (hereinafter referred to as the "**Infraco Works**").
- 1.2 Specifically, DLA were asked to consider the following questions in the context of the above mentioned contractual matrix.
 - 1.2.1 What are the obligations of the SDS Provider under the SDS Agreement in regard to the time for performance of Services?
 - 1.2.2 What are the obligations of the Infraco under the Infraco Contract in regard to procuring that the SDS Provider performs its obligations timeously in accordance with the terms of the SDS Agreement?
 - 1.2.3 What is the entitlement of the Infraco under the Infraco Contract to relief and/or additional time and/or additional money by way of (a) a Notified Departure; or (b) a Compensation Event; or (c) other compensatory mechanism in the event of a failure by the SDS Provider to perform its obligations under the SDS Agreement timeously?
 - 1.2.4 What are the circumstances in which the Infraco under the Infraco Contract would be disentitled to relief and/or additional time and/or additional money in the event of a failure by the SDS Provider to perform its obligations under the SDS Agreement timeously?
 - 1.2.5 What are the differences in the Infraco's entitlement to relief as a result of poor SDS performance as distinct from late performance (Compensation Event (u))?

2. ISSUES

2.1 What are the obligations of the SDS Provider under the SDS Agreement in regard to the time for performance of Services?

2.1.1 As a matter of a general duty of care the SDS Provider warrants to **tie** (Clause 3.2 of the SDS Agreement) that "in the performance of the Services and its other obligations under [the SDS] Agreement it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent system design services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity." (emphasis added)

2.1.2 In the context of whether or not the SDS Provider has achieved the appropriate standard of "diligence" in the performance of the Services it would be the case that the following questions would need to be considered in order to determine whether or not the SDS Provider has in fact breached the aforementioned duty of care in regard to the time for performance of Services - a common sense view can be taken but where a question of professional standards is disputed, this is decided with reference to the norms of the relevant profession which ultimately requires expert opinion to answer the questions:

2.1.2.1 Did the SDS Provider exercise the standard of an ordinarily skilled system design services provider?

2.1.2.2 Did the SDS Provider act in accordance with general and approved system design services provider practice?

2.1.2.3 Would the majority of system design services providers under these circumstances have acted the same way as the SDS Provider acted?

2.1.2.4 Did the SDS Provider act in accordance with a practice accepted as proper by a responsible body of system design services providers - even if another body of system design services providers opinion would have thought such practice to be incorrect?

2.1.3 Associated with the issue of time for performance, the SDS Agreement places obligations upon the SDS Provider in regard to liaising with other parties to allow progress of the Services:

2.1.3.1 *Clause 3.12* of the SDS Agreement as amended by the novation agreement dated 14 May 2008 (hereinafter referred to as the "**Novation Agreement**") among **tie**, Infraco and the SDS Provider then provides, amongst other things

*The SDS Provider shall liaise with the Client, any Client Party, **tie**, any **tie** Party, the Tram Supplier, and any other parties as may be required by the Client or tie to facilitate the production, by such persons, of any information required from them, in order that the Services and its other obligations under this Agreement can be progressed according to the Master Project Programme and the Programme." (emphasis added)*

and

2.1.3.2 *Clause 3.14* of the SDS Agreement as amended by the Novation Agreement provides, amongst other things

"Where the Client, or other bodies or persons involved in related works or services appoint other consultants or use their own staff for purposes related to the Services or the SDS Provider's other obligations under this Agreement, the SDS Provider shall use all reasonable endeavours (including the use of liaison with such other bodies or persons) to ensure that the Services, the SDS Provider's other obligations under this Agreement and these related works are carried out together with the greatest economy and in accordance with the Master Project Programme and the Programme." (emphasis added)

and

2.1.3.3 *Clause 3.15* of the SDS Agreement as amended by the Novation Agreement provides, amongst other things

"In performing the Services and its other obligations under this Agreement, the SDS Provider will have regard to the constraints imposed by the Master Project Programme and the Programme and to the objective of keeping the overall costs of the Services and its other obligations under this Agreement within any budgetary constraints agreed with the Client. If the SDS Provider considers that there may be a conflict between its obligations under this Clause 3.15 and the performance of the Services and/or the performance of any of the SDS Provider's obligations under this Agreement, it will within 3 Business Days give written notice of the same to the Client." (emphasis added)

2.1.4 More particularly in regard to time for performance, *Clause 7.1* of the SDS Agreement as amended by the Novation Agreement provides, amongst other things

"7.1.1 The SDS Provider shall progress the Services with due expedition and in a timely and efficient manner without delay, to achieve timeous completion of the Services (or any part thereof) and its other obligations under this Agreement in accordance with the Programme [being the Consents Programme (the document comprising Appendix Part 2 to the Novation Agreement as amended or updated in accordance with the Novation Agreement) and/or the Design Delivery Programme (the document comprising Appendix Part 2 to the Novation Agreement as amended or updated in accordance with the Novation Agreement)] and unless otherwise agreed with the Client, the SDS Provider shall adhere to that Programme with due diligence." (emphasis added)

2.1.5 *Clause 7.2* of the SDS Agreement provides, amongst other things



"7.2 The SDS Provider shall carry out the Services required in respect of the Requirements Definition Phase, the System-Wide Preliminary Design Requirements, the Preliminary Design Phase, and the Detailed Design Phase in the order of "criticality" (with "A" being the most critical), sequence and dates shown in the Programme Phasing Structure PROVIDED ALWAYS that the Client may at any time require the SDS Provider to stop, amend and/or accelerate such order of performance in respect of the whole or any part of the Requirements Definition Phase, the System-Wide Preliminary Design Requirements, the Preliminary Design Phase and/or the Detailed Design Phase." (emphasis added)

2.1.6 It is also noted that *Clause 3.28* of the SDS Agreement as amended by the Novation Agreement provides, amongst other things

"The SDS Provider is aware and has knowledge of all the terms and conditions of the Infraco Contract and the SDS Provider shall not cause the Infraco to be in breach of the provisions of the Infraco Contract to be observed and performed and complied with by the Infraco in so far as they relate and apply to the Services, and is further aware and has taken and shall continue to take full account of the obligations to be undertaken and the liabilities which may be incurred by the Infraco therein in relation to the Services." (emphasis added)

2.1.7 As the time for performance of Services is allied to and measured by the Consents Programme and the Design Delivery Programme the SDS Provider is to give notice of it becoming aware of a likelihood of delay to the performance of the Services (*Clause 7.4* of the SDS Agreement) and on the occurrence of certain specified events is entitled to an extension of time and amendment to the Consents Programme and/or the Design Delivery Programme (*Clause 7.5* of the SDS Agreement). DLA do not know what reliefs have been applied for or given under the SDS Agreement post-novation.

2.1.8 From the foregoing it can then be said that the positive obligation undertaken by the SDS Provider in regard to time for performance of Services is:

to progress the Services

- (a) with due expedition; and
- (b) in a timely and efficient manner without delay

in order to achieve completion of the Services in accordance with the Consents Programme and the Design Delivery Programme as those programmes may be adjusted to reflect the award of any extension of time granted in terms of the SDS Agreement.

2.2 What are the obligations of the Infraco under the Infraco Contract in regard to procuring that the SDS Provider performs its obligations timeously in accordance with the terms of the SDS Agreement?

2.2.1 By way of introduction Infraco have the responsibility for design, notwithstanding that the SDS Provider is the party delivering the design. The



Novation Agreement has the effect that the SDS Provider is the sub-contractor of Infraco and the Infraco adopts all the rights and liabilities of **tie** as if the Infraco had been the contracting party under the SDS Agreement from the outset. However, in terms of the Infraco Contract the Infraco have responsibility for the delivery of detailed design in a question with **tie**.

- 2.2.2 As with the SDS Agreement, the Infraco Contract places an obligation upon the Infraco in regard to liaising with other parties to allow progress. *Clause 7.11* of the Infraco Contract provides

*"The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator and any other parties as may reasonably be required by **tie** to facilitate the production, by such persons, of any information required from them, in order that the carrying out of the Infraco Works and its other obligations under this Agreement can be progressed according to the Programme. The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator, and any other parties as may be reasonably required by **tie** as often as is necessary in order to ensure that the Infraco Works are carried out properly and in accordance with the terms of this Agreement."* (emphasis added)

- 2.2.3 More particularly in regard to the Infraco's obligations to procure performance by the SDS Provider:

- 2.2.3.1 *Clause 11.3* of the Infraco Contract provides

"The Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to have complied with its obligations under this Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." (emphasis added)

- 2.2.3.2 *Clause 11.4* of the Infraco Contract provides

"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." (emphasis added)

- 2.2.3.3 *Clause 11.7* of the Infraco Contract provides

*"Subject to the provisions of the SDS Agreement, the Infraco shall use reasonable endeavours to procure that the SDS Provider shall perform any additional services which may be required and specifically instructed by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional services shall be a **tie** Change in accordance with Clause 80 (**tie** Changes)."* (emphasis added)



2.2.4 It follows from the foregoing that whether or not the obligation undertaken by the Infraco in terms of the Infraco Contract has been performed by the Infraco would require consideration of the terms of the SDS Agreement noted at *section 2.1* above of this note.

2.3 What is the entitlement of the Infraco under the Infraco Contract to relief and/or additional time and/or additional money by way of (a) a Notified Departure; or (b) a Compensation Event; or (c) other compensatory mechanism in the event of a failure by the SDS Provider to perform its obligations under the SDS Agreement timeously?

(A) NOTIFIED DEPARTURE

2.3.1 *Schedule Part 4* to the Infraco Contract comprises, amongst other things, a list of Pricing Assumptions at *Section 3.4*, which Pricing Assumptions could result in the notification of a Notified Departure. In the context of the time for performance of Services by the SDS Provider, the following Pricing Assumptions could be relevant:

"2 *Design delivery by the SDS Provider has been aligned with the Infraco construction delivery programme as set out in Schedule Part 15 (Programme).*

4 *That the Design Delivery Programme as defined in the SDS Agreement is the same as the programme set out in Schedule Part 15 (Programme).*

5 *That the Infraco shall not suffer any loss and expense of whatever nature as a consequence of any matter identified in the "Assumptions and Constraints Report" in Appendix 2 of the SDS Novation Agreement, including without prejudice to the foregoing generality the following:*

5.1 *the modifications to the SDS Provider's design process and approvals and consents periods;*

5.2 *any assumptions or dependencies;*

5.3 *any matter identified as being at the risk of tie or subject to instruction from tie;*

5.4 *any instruction issued by tie;*

5.5 *subject to Clause 10.18, any acceleration (save where Infraco itself decides to accelerate); or*

5.6 *any strategy.*

22 *That in circumstances where, to maintain the Programme, the Infraco carries out works or procures materials or works prior to the issue of Issue for Construction drawings, no amendment to the works carried out, or works or materials procured shall be required as a consequence of the subsequent issue of the relevant Issue for Construction drawings.*

32 *That the programming assumptions set out in Schedule Part 15 (Programme) remain true in all respects."* (emphasis added)

- 2.3.2 It is conceivable that if the Infraco were able to demonstrate that the facts or circumstances differed from the foregoing Pricing Assumptions and that difference was as a consequence of delay in the performance of Services on the part of the SDS Provider then the Infraco could be entitled to a Mandatory tie Change. The particular facts and circumstances relied upon by Infraco would however need to be investigated as a mere allegation of delay on the part of the SDS Provider by the Infraco would not, of itself, be sufficient.
- 2.3.3 It should also be noted that Infraco's entitlement to relief is not the same with a Notified Departure as with Compensation or Relief Events when impacted by SDS (therefore Infraco) failure - this difference arises as a consequence of *Clause 80.24* of the Infraco Contract Conditions which in the case of a Notified Departure excludes the restrictions on relief listed in *Clause 80.19* of the Infraco Contract Conditions.

(B) COMPENSATION EVENT

- 2.3.4 *Schedule Part 1* to the Infraco Contract provides, amongst other things, that Compensation Event (t) 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." (emphasis added)
- 2.3.5 The aforementioned reference to Programme includes the Programme set out in *Schedule Part 15* to the Infraco Contract and the Consents Programme and Design Delivery Programme annexed to the Novation Agreement all as may be extended.
- 2.3.6 Delay in the performance of Services by the SDS Provider could therefore give rise to a Compensation Event and the delay would be measured against the various programmes.

(C) OTHER COMPENSATORY MECHANISM

- 2.3.7 Certain limitations are placed upon the Infraco's right to claim for additional time and/or payment. In regard to Compensation Event(s) (t) and (u) *Clause 65.1* of the Infraco Contract provides, amongst other things

"The Infraco's sole right to an extension of time and/or relief from the performance of its obligations and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (Compensation Events)." (emphasis added)

- 2.3.8 Similarly, *Clause 121* of the Infraco Contract provides:

"121.1 Neither Party to this Agreement shall:

121.1.1 be entitled to recover any amount from the other under this Agreement to the extent that it has previously recovered for the same loss or damage under the terms of this Agreement or otherwise; or

121.1.2 claim or purport to claim for the same loss or damage under more than one provision of this Agreement." (emphasis added)

2.4 What are the circumstances in which the Infraco under the Infraco Contract would be disentitled to relief and/or additional time and/or additional money in the event of a failure by the SDS Provider to perform its obligations under the SDS Agreement timeously?

2.4.1 In regard to the Notified Departure mechanism, *paragraph 2.8 of Schedule Part 4* to the Infraco Contract excludes a difference from the Base Case Assumptions which is caused by a breach of contract by Infraco. It can therefore be said that to the event that Infraco are in breach of their obligations under the Infraco Contract, that could be an Infraco Default or breach of contract by Infraco. A failure by the Infraco to comply with its obligations discussed at *section 2.2* above of this note could therefore disentitle the Infraco from claiming that a Notified Departure has occurred - in each case the particular facts and circumstances would need to be investigated.

2.4.2 In terms of *Clause 19.19* of the Infraco Contract, the Infraco would not be entitled to a Compensation Event on the grounds of failure of the SDS Provider to achieve the release of Issued for Construction Drawings by the date identified in the Programme in the circumstances where the Infraco Design is *"not submitted to the SDS Provider in accordance with the Consents Programme and Schedule Part 14 (Review Procedure and Design Management Plan."*

2.4.3 Furthermore, in considering Compensation Event (t) *Clause 68.5* of the Infraco Contract provides

"tie shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (Compensation Events)

65.8.1 not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties; and;

65.8.2 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." (emphasis added)

2.4.4 The amount which may be recovered by Infraco in the event of the occurrence of Compensation Event (t) is also subject to reduction in that *Clause 65.12.2* of the Infraco Contract provides that

"if the SDS Compensation Event is Compensation Event (t) there shall be deducted from any additional costs which Infraco is entitled

to recover pursuant to Clause 65.2 the amount of liquidated damages recoverable from the SDS Provider pursuant to Clause 27.7 of the SDS Agreement (as amended by the SDS Novation Agreement)"
(emphasis added)

The amount of liquidated damages being £8,928.57 in respect of each failure by the SDS Provider to achieve the provision of Issued for Construction Drawings identified in the Design Delivery Programme by the date set out in the Design Delivery Programme for the release of the Issued for Construction Drawings up to a total aggregate liquidated damages of £1,000,000.

2.4.5 In terms of the SDS Agreement the SDS Provider is then subject to liquidated damages for failure to perform Services timeously in the amount of £8,928.57 in respect of each failure.

2.5 What are the differences in the Infraco's entitlement to relief as a result of poor SDS performance as distinct from late performance (Compensation Event (u))?

2.5.1 *Schedule Part 1* to the Infraco Contract provides, amongst other things, that Compensation Event (u) 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".
(emphasis added)

2.5.2 In the first instance it is to be noted that Compensation Event (u) is qualified in that the breach must be "*material*". It is not therefore every instance of alleged failure by the SDS Provider where the quality of Deliverables can be called into question which will give rise to a Compensation Event. The courts have described the concept of "*material breach*" in various ways – a failure to perform the obligations under the contract "*in any material respect*"; a violation of stipulations which are "*material or essential*" as opposed to "*minor and incidental*"; "*substantial failure*"; a breach of stipulations going "*to the root of the contract*"; a breach which is "*of the essence of the contract*"; or which affects "*the root and substance of the contract*". Whether a breach is material is a question of fact and degree. In this context "*material*" then means serious as opposed to trivial. It will therefore be for Infraco to demonstrate that any such breach on the part of the SDS Provider is "*material*".

2.5.3 In terms of *Clause 19.19* of the Infraco Contract, the Infraco would not be entitled to a Compensation Event on the grounds of failure of the SDS Provider to achieve the release of Issued for Construction Drawings by the date identified in the Programme in the circumstances where the Infraco Design is "rejected by the Approvals Body on grounds of content or quality but not, for the 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." (emphasis added)

2.5.4 The amount which may be recovered by Infraco in the event of the occurrence of Compensation Event (u) is also subject to reduction in that *Clause 65.13* of the Infraco Contract provides that

"If the SDS Compensation Event is Compensation Event (u), there shall be deducted from any additional costs which Infraco is entitled

to recover pursuant to Clause 65.2, the full amount recoverable by Infraco (that is to say up to ten million pounds (£10,000,000) for each and every event) pursuant to the SDS Agreement and specifically Clause 27 (as amended by the SDS Novation Agreement) as a result of the occurrence of such Compensation Event." (emphasis added)

The SDS Provider's total liability is not to exceed £10,000,000 in respect of each and every claim other than in respect of claims arising from pollution or contamination where the limit of indemnity of £10,000,000 applies to any one claim in the aggregate but excludes any business interruption, loss of profits, loss of business, loss of business opportunity, loss of or damage to or corruption of data or loss of management time or time of other employees.

3. CONCLUSIONS

3.1 DLA are of the opinion that:

- 3.1.1 in regard to time for performance of Services the SDS Provider is to progress the Services with due expedition and in a timely and efficient manner without delay in order to achieve completion of the Services in accordance with the Consents Programme and the Design Delivery Programme as those programmes may be adjusted to reflect the award of any extension of time to which the SDS Provider is entitled in terms of the SDS Agreement;
- 3.1.2 the Infraco is obliged to procure that the SDS Provider carries out and completes the SDS Services in accordance with the SDS Agreement and is obliged to carry out all required management activities in order to manage the performance of the SDS Services;
- 3.1.3 delay in the performance of Services by the SDS Provider could, depending upon the particular facts and circumstances, give rise to a Notified Departure; and
- 3.1.4 delay in the performance of Services or supplying an inadequate quality of Services by the SDS Provider could, depending upon the particular facts and circumstances, give rise to a Compensation Event, although any additional monies which the Infraco may be entitled to as a consequence of the occurrence of the Compensation Event are to be subject to certain deductions to reflect the sums recovered by the Infraco from the SDS Provider under the SDS Agreement.

DLA Piper Scotland LLP

25 June 2009