

## ---TIE – EDINBURGH TRAMS - SDS NOVATION/SDS LIABILITY

### PRELIMINARY SHORTENED VERSION OF PROPOSED REPORT

#### 1.0 INTRODUCTION

1.1 It has been suggested that many of the contentious issues that have arisen on the project are as a consequence of the performance and professional skill of the SDS Provider. As a consequence the ability to hold the SDS Provider accountable in respect of any losses incurred requires to be ascertained.

1.2 As a consequence of the volume of material concerned with the SDS Provider time has not permitted a detailed liability analysis of every default. What this summary document covers is general issues as regards liability. In particular the following documents have been reviewed.

- SDS Design Agreement (Schedule 22)
- Novated SDS Design Agreement (Schedule 23)
- The Infraco Contract (clauses relevant to SDS Novated Agreement)

1.3 It is accepted that the initial brief was to assess the SDS liability. Notwithstanding this the liability for performance of the SDS Provider that TIE has taken on is also very relevant. Not only under the Infraco Contract but also under the Novation Agreement. The focus of this report has tended to concentrate on this issue.

#### 2.0 TIE/SDS RIGHTS OBLIGATIONS

2.1 The purpose of novating design is to transfer the rights, duties, and obligations and indeed risk to the design and build contractor, in this case the Infraco. The following items within the Novation agreement deal with this matter:-

*Item C. tie and Infraco have agreed, with the consent of the SDS Provider, that the Infraco shall take over the rights and liabilities of the "Client" under the SDS Agreement by novating*

*the SDS Agreement from **tie** to Infraco upon and subject to the terms of this Agreement.*

*Clause 3.1 **tie** releases and discharges the SDS Provider from the further performance of the SDS Provider's duties and obligations under the SDS Agreement.*

*Clause 4.1 The SDS Provider undertakes to continue to perform all the duties and to discharge all the obligations of the SDS Provider under the SDS Agreement and to be bound by its terms and conditions in every way as if the Infraco was and always had been a party to the SDS Agreement in place of **tie**.*

*Clause 5.1 All rights of action and remedies against the SDS Provider under and pursuant to the SDS Agreement vested in **tie** (as Client) shall from the date of this Agreement vest in the Infraco.*

- 2.2 As is common with novation the SDS Novation is intended to transfer the rights, obligations and duties from TIE to the Infraco. In particular clause 5.1 excludes the right of TIE to pursue the SDS Provider from the date of the Agreement. Whether this clause prevents all actions by TIE from the date of the agreement or that TIE only has a right to pursue actions for matters before the date of the agreement may require an opinion of Counsel. It is noted that clause 4.1 states that the agreement provides that Infraco was always party to the agreement in lieu of TIE. It is averred that contractually TIE will have lost its right to bring any separate action against the SDS Provider. Dependant on the facts there may be a possibility of a delictual claim. Whether or not a separate claim against the SDS Provider can be made TIE will have to prove a loss has been incurred. That loss will come through claims made by the Infraco under the Contract. Accordingly, the contractual arrangements and basis for potential Infraco claims is relevant to this issue.

### 3.0 SDS NOVATION AGREEMENT (SCHEDULE 23)

3.1 The Novated SDS Design Agreement is incorporated within the Infraco Contract as Schedule 23. The document identifies the conditions under which the parties have contracted. It is noted that the Novation was a tri-partite agreement and as such TIE will have accepted its conditions. In respect of the Agreement it is noted that TIE has accepted liability for certain items. In particular under clauses 4.7 and 4.8. These clauses are reproduced below:-

*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 and objective unless otherwise agreed:*

*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.*

- 3.2 In respect of clause 4.7 it is noted that it makes mention of the Parties entering into a series of meetings to deal with the issue of misalignments. In itself clause 4.7 is fairly innocuous and merely requires that meetings are conducted to resolve certain matters and in a specified order. However, clause 4.8 expands on clause 4.7 and it is noted that TIE agrees *'that any amendment to the deliverables completed prior to the date of this agreement will be a Mandatory tie Change'*. The SDS Design Agreement (Schedule 22) defines deliverables as follows:-

*"Deliverables" means the Functional Requirements Specifications, the Technical Specifications and the items listed in Appendix 3 to Schedule 1 (Scope of Services) of the SDS Agreement, and all other documents, information, reports, records, diagrams, bills of quantities, manuals, schedules, databases, reinforcement details, photographs, formulae, consultation materials, plans, designs, specifications, drawings (including as-built drawings), details, calculations, transport and other models and simulations, the outputs and reports based on any models, programmes and all other material created and/or provided by the SDS Provider (and/or any SDS Provider Party or any other third party) in the performance of the Services and the SDS Provider's other obligations under the SDS Agreement;*

- 3.3 The interpretation of clause 4.8 is that where there is a change to a high level documents such as the specifications and the scope of services then the Infraco is entitled to a Mandatory TIE Change. This is understood to be a reasonable condition. However, clause 4.8 becomes very onerous when taking into account that the definition of deliverables includes all other documents, information etc. It is understood that the state of the design at novation was poor and as such has required significant work and change. Accordingly, a strict interpretation of clause 4.8 would enable the Infraco to make a significant claim with the liability

falling to TIE. It is noted that a detailed examination of the specifics may say otherwise. However, the potential for a significant entitlement exists.

3.4 It is noted that clause 4.7 and 4.8 make specific reference to the deliverables as at novation. They do not refer to the competence of the deliverables at that date.

3.5 The original SDS Design Agreement (Schedule 22) has been amended by the Novation Agreement. It noted that in doing so the SDS Novation Agreement does not contain a unilateral acceptance of the SDS Design Agreement. There are a number of amendments that have been made. This has been accepted by TIE under clause 9.1 where the following is stated:-

*9.1 tie, the SDS Provider and the Infraco agree that the terms of the SDS Agreement shall be and are varied in the manner set out in Appendix Part 1 to this Agreement.*

3.6 Appendix part 1 contains a list of amendments to the original SDS Design Agreement. In general terms, if the amendments incorporated in the Novated Agreement place a different and less onerous requirement than that of the original SDS Design Agreement, then there is the potential to create a liability black hole. If the Infraco liability as regards the SDS Provider is less onerous than existed between TIE and the SDS Provider then TIE may be at risk. This may be possible under clause 63.13 of the Infraco Contract. Under this clause the Infraco is paid any losses subject to the amount it can recover under the Novated SDS Provider. If the SDS liability has been contracted out TIE will not be able to recover costs incurred. Clause 63.13 is explained in greater detail below.

3.7 Time has not permitted a review of every amendment to the SDS Design Agreement. Particularly as detailed examination of specific issues will be required to identify if a liability to TIE exists. It is also acknowledged that many of the changes are in respect of matters solely between the SDS Provider and the Infraco.

3.8 Some of the amendments result in conditions within the Novated SDS agreement being less onerous than existed in the TIE agreement with the SDS Provider. One

example of an amendment to the SDS Design Agreement is in respect of clause 5.7 which states the following:-

*5.7 Subject to Clause 5.8 below, failure to obtain a Design Stage Consent from the relevant Approval Body in respect of a design which the SDS Provider is responsible for preparing by the date on which it is shown as required in the Design Delivery or Consents Programme shall not be a breach of this Agreement and shall be a Compensation Event.*

3.9 Clause 5.7 identifies that where the SDS Provider is unable to obtain (or maintain) a Design Stage Consent it will be entitled to a compensation event. This clause raises a number of issues as regards liability. It is accepted that the clause was likely to have been inserted at the request of the SDS Provider to restrict its liability with the Infraco. It is also acknowledged that on the face of it the liability is one for which the Infraco, given its overall responsibility to produce the works on time, is liable. It is noted that the term Compensation Event does not appear to be a defined term in either the SDS Agreement or the Novated Agreement. It is, however, a defined term within the main Infraco Contract. It is also the case that as TIE was party to the Novated Agreement. The Infraco may claim it was a tacit acceptance by TIE of an entitlement to a Compensation Event.

#### **4.0 INFRACO CONTRACT**

4.1 Under the Contract by virtue of clause 7 and 10 the Infraco has a general responsibility to ensure that the project is delivered on time. This includes, as a consequence of the novation of design, the timely provision and completion of the design. The Contract does contain matters that are relevant to the SDS and the Novation of the design. In particular Clauses 4, 11 and 63 have a bearing on the liability of Infraco as regards the SDS Provider.

##### Clause 11

4.2 Clause 11.3 of the Infraco Contract states the following:-

*11.3 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.*

4.3 Clause 11.3 identifies that it is Infraco's responsibility to ensure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. Under this clause the Infraco will be liable for any failure by the SDS Provider.

4.4 Clause 11.3 also states that provided that the SDS services are and have carried out in accordance with the SDS Agreement the Infraco will be deemed to have complied with its obligation to comply with the requirements of the Agreement. In the premise that the SDS Services are not and were not carried out in accordance with the SDS Agreement then the Infraco has not complied with the terms of the agreement. Accordingly Clause 11.3 makes the Infraco Liable for the SDS Provider default.

4.5 At clause 11.4 the following is stated:-

*11.4 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.*

4.6 Clause 11.4 identifies that under the Infraco has undertaken to manage and be responsible for the performance of the SDS provider. However, it is noted that this is with the caveat 'subject to any express limitations ... within the Agreement'. The effect of the clause is that in certain circumstances the Infraco will not be responsible for the management or performance of the SDS Provider.

4.7 Clause 11.5 of the Agreement states the following:-

*11.5 The Infraco shall not amend the SDS Agreement (including the SDS Services) without the prior written approval of tie (such approval not to be unreasonably withheld or delayed) provided that tie's consent shall be deemed to have been given in relation to any amendment to the SDS Agreement (including the SDS Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.*

4.8 It is a matter of record that the SDS Agreement has been amended by the Infraco. The Novation Agreement contains a number of amendments. The Novation Agreement was a tri-partite agreement between TIE, the SDS Provider and the Infraco, all signed the document. Accordingly, it is deemed that the amendments made to the SDS Agreement have been accepted by TIE.

#### Clause 4

4.9 As noted above the Infraco is responsible for the management and performance of the SDS Provider. Indeed the purpose the Novation is to absolve the client, in this case TIE, of any responsibility as regards the design and SDS Provider. The actual wording of the documentation does not demonstrate that all liabilities for the SDS performance pre and post novation have become that of the Infraco.

4.10 In respect of clause 4.3 of the Contract the following is stated:-

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

4.11 It is understood that the relevance of clause 4.3 is subject to receiving an opinion from Counsel. However, in the premise (as Infraco has claimed) that clause 4.3 takes precedence over the entire Contract agreement the terms of Schedule 4 is considered.

4.12 Schedule 4 at clause 3.4 lists the Infraco Pricing Assumptions. Relevant to the SDS are the following:-



*1 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 Base Date Design Information (except in respect of Value Engineering identified in Appendices C or D to this Schedule Part 4);*

*1.3 be amended from the drawings forming the Base Date Design Information and Infraco Proposals as a consequence of the requirements of any Approval Body.*

*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.*

4.13 In respect of items 1.1 and 1.3 of the Pricing Assumptions it is stated that the Infraco has priced the works on the basis that the design prepared by the SDS Provider will not be amended from the BDDI (other than design development, or value engineering). A technical appraisal will be required to ascertain if the design as at BDDI was compliant with the SDS Agreement. If not then the Infraco may not be entitled to any relief. Theoretically, however, as far as this clause is concerned Infraco relief is possible for any change from BDDI that was not as a consequence of negligence by the SDS Provider. Recovery is particularly likely when considering the other Pricing Assumptions made in respect of the SDS Provider.

4.14 Schedule 4 clause 3.4 Item 2 of the Infraco Pricing Assumptions states the following:-

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

4.15 Item 2 identifies that the Infraco has priced based on the SDS Provider design delivery being aligned with the Infraco Schedule 15 Construction delivery programme. If the SDS Provider design delivery has not been aligned then it is assumed that the Infraco will be seeking relief under the Contract. It is understood that the design was not aligned and the information provided was subsequently found to be incorrect. In fact it appears that the SDS Provider was not programming its works but simply reporting on progress **(Still needs factual clarification)**. Item 2 may infer that if the SDS Design has not been aligned with the Infraco Schedule 15 there is an entitlement. However, there are other contract requirements to consider. The Infraco was responsible for undertaking a due diligence exercise on the status of the design prior to novation including the status of the design. Only the Infraco could undertake this alignment as the Programme in schedule 15 was their own. It is implied in doing so that it would have reviewed the SDS programme and as a consequence checked it for compliance and accuracy.

4.16 Schedule 4 clause 3.4 Item 3 of Infraco Pricing Assumptions states the following:-

*3 The Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco Proposals and the Employer's Requirements.*

4.17 As noted above only the Infraco could have checked this out and indeed has a duty to do so.

4.18 Schedule 4 clause 3.4 Item 4 of the Infraco Pricing Assumptions states the following:-

*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).*

4.19 As noted above only the Infraco could have checked this out and indeed has a duty to do so.

4.20 Schedule 4 clause 3.4 Item 5 of the Infraco Pricing Assumptions states the following:-

*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;*

4.21 Item 5 of the Pricing Assumptions states that the Infraco is entitled to relief in the event that the assumptions made in SDS Agreement change. The SDS in its programme made certain assumptions about the time required to obtain consents. Item 5.1 appears to provide the Infraco with relief if those assumptions made by the SDS change. If the assumptions were negligent, or potentially that no mitigation has been undertaken, it may be that the Infraco has no entitlement to relief. However, potentially the Infraco has a right to make a claim in the event that an assumption proves incorrect.

4.22 Included with in Appendix 2 of the SDS Agreement there are more specific assumptions and constraints relevant to individual items or areas of works. A review of these areas would be best undertaken on an individual basis as each specific issue arises.

4.23 In respect of the Infraco's entitlement under Schedule 4 will require detailed analysis as each individual issue emerges. However, it is noted that a condition of Schedule 4 is that if the Pricing Assumptions are incorrect the Infraco will be entitled to a Mandatory Tie Change.

#### Clause 65

4.24 Clause 65 deals with Infraco Compensation events. Under the Clause it is evident that the Infraco is entitled to a Compensation Event for matters concerning the

SDS Provider. In respect of SDS Compensation Events the Infraco Contract includes the following definition.

*"SDS Compensation Event" means Compensation Events (t) and (u);*

4.25 In respect of SDS Compensation Events the Infraco Contract includes the following definition for item (t):-

*(t) 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;*

4.26 The Infraco Contract therefore permits an entitlement where the SDS Provider fails to issue construction drawings by the date identified in the programme. This appears to be a very onerous condition on TIE. It is noted that clause 19.19 provides an exclusion. Clause 19.19 of the Infraco Contract states the following:-

*19.19 The Infraco shall not be entitled to any relief or compensation and the provisions of Clause 65 (Compensation Events) shall not apply in the event that 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.*

4.27 The exclusion under clause 19.19 is only relevant if the Infraco fails to issue its design to the SDS Provider in accordance with Schedule 14. However, as the SDS Provider is part of the Infraco proving such an event may be difficult.

4.28 Clause 65.12.2 also deals with SDS Compensation Events and states the following:-

*65.12 Where a claim is made under this Clause 65 as a result of the occurrence of a SDS Compensation Event:*

*65.12.1 Clause 65.2.3.1 shall not apply to steps which might reasonably be expected to have been taken by the SDS Provider;*

*65.12.2 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)*

4.29 The clauses referred to in 61.12.2 above are as follows:-

*65.2.3 demonstrate to the reasonable satisfaction of tie that:*

*65.2.3.1 subject to Clause 65.12, Infraco and the Infraco Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;*

4.30 Clause 65.2.3.1 states that the Infraco will not be liable if they can demonstrate to the reasonable satisfaction of TIE that they had taken or could have taken reasonable steps. Clause 65.12.1 states that clause 65.2.3.1 shall not apply to steps which might reasonably have been taken by the SDS provide. This appears to suggest that whether or not the SDS provider could have taken steps or not there will be an entitlement. That is to say that clause 65.2.3.1 is excluded where the issue lies with SDS. In other words no requirement to demonstrate steps they might reasonably have been expected to take.

4.31 In respect of clause 65.12.2 it is noted that while the Infraco is entitled to a compensation event it is to be adjusted by the amount it is entitled to recover from the SDS Provider. As noted previously the original SDS Agreement was amended in the SDS Novation Agreement. In some instances the conditions were less onerous. It is therefore entirely feasible that the SDS Provider has contracted out of any liability. However, a detailed examination of the facts of the claim would be required to ascertain if this was indeed the case. However, in theory it could be possible that the Infraco is entitled to recover from TIE with no adjustment for the SDS culpability.

4.32 Clause 65.13 of the Infraco Contract states the following:-

*65.13 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.*

4.33 In respect of SDS Compensation Events the Infraco Contract includes the following definition for item (u):-

*(u) 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;*

4.34 Clause 65.13 does identify a right for TIE to recover monies for a failure by the SDS provider as regards the quality of the deliverables. The Contract providing that the Infraco are entitled to a compensation event and a deduction made from the amount due for the SDS Culpability. As noted above the SDS Novated Agreement may contain slight differences as regards liability. A detailed examination of each event would be required to ascertain any entitlement.

4.35 It is acknowledged that Clause 65.13 may entitle TIE to relief for the performance of the SDS Provider. However, it should also be noted that the some of potential failures of the SDS Provider may be deemed to be mandatory changes under the Infraco Contract. Detailed examination of each item will be required.

## **5.0 CONCLUSION**

5.1 The liability of the SDS Provider under the Contract is somewhat complicated. The following is noted as being relevant to the ascertainment of any entitlement:-

- The Novated Agreement between SDS, TIE and the Infraco (Schedule 23) amends the Agreement between SDS and TIE. That is to say the obligations are potentially different.
- Schedule 4 Infraco Pricing Assumptions appear to restrict liability of Infraco under the Novation Agreement.
- Clause 11 of the Contract appears to restrict liability of Infraco under the Novation Agreement.

5.2 It is noted that under clause 65.13 TIE may have an entitlement to indirectly pursue the SDS Provider for the quality of the deliverables under the Contract. However, it may be that potentially some of the claims are be dealt with as a mandatory TIE change under clause 80 and not an SDS Compensation Event under clause 65, as such the Infraco may not be entitled to any recovery.