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**From:** Fitchie, Andrew  
**Sent:** 10 January 2010 13:28  
**To:** 'rush\_aj@[REDACTED]'  
**Cc:** 'richard.jeffrey@tie.ltd.uk'; Bentley, Bruce; 'steven.bell@tie.ltd.uk';  
'dennis.murray@tie.ltd.uk'  
**Subject:** Re: Monday

Legally Privileged and FOISA exempt

Tony

All noted. Response follows this pm.

OSSA

The idea of a simple "let's get on with it" supplemental agt. which allows infraco some cash flow but not the flood they appear to demand under Notified Departures seems attractive.

In the past I know that Steven and Dennis have tried this and been frustrated by BSC changing its mind.

I have some points on the draft text but will discuss these (some are minor) with Bruce tomorrow am early before coming to tie.

I do not consider there is a significant procurement issue with the OSSA but will complete thinking on this to advice tomorrow. tie's authority to conclude the OSSA is more connected to project governance arrangements (with City of Edinburgh under internal operating protocols and delegated authorities) than public law governing local authorities.

Kind regards

Andrew Fitchie  
Partner  
DLA Piper Scotland LLP  
T: [REDACTED]  
M: [REDACTED]  
F: [REDACTED]

---

**From:** Anthony Rush <rush\_aj@cqm.co.uk>  
**To:** Fitchie, Andrew  
**Cc:** 'Richard Jeffrey' <Richard.Jeffrey@tie.ltd.uk>; torquilmurray@[REDACTED] <torquilmurray@[REDACTED]>; Bentley, Bruce; 'Steven Bell' <Steven.Bell@tie.ltd.uk>; 'Dennis Murray' <Dennis.Murray@tie.ltd.uk>  
**Sent:** Sun Jan 10 11:12:07 2010  
**Subject:** RE: Monday

Thanks Andrew,

I assume that there was some sort of "gateway" process which had to be satisfied before the Agreement was finalised – the trouble with missing voices is whether they are hostile or not.

My direction of thinking as moved on since you were holidaying in the Alps. I understand that the question of "absurdity" has been mooted as a defence against any change arising from design development being a mandatory change. I am inclined to think that unless we have a "knock-out" argument based on inconsistency there must be doubt about us winning that direction of argument (as it so often is).

However, I am more inclined towards believing that the way Infraco has delayed progress whilst and Estimate is agreed is a stronger argument. It would be absurd to interpret the terms of contract putting time for completion de facto at large.

Moreover, pursuant to Clause 64.2: "To obtain such extension of time or relief from performance, the Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Relief Event had caused or is likely to cause delay.

I am minded that "as soon as practicable" (but not later than 20 days from becoming aware) doesn't mean at such time as SDS delivered a final design or when tie agreed to the Estimate. In most cases it should have taken place as soon as the designer (Infracore by novation) had realised the design would change if at any time Infracore seek an extension. This of course makes sense as it would permit tie to consider how they could mitigate the effect of a change.

I have asked Dennis to give me a note on how Clause 80 and 64 works and I shall be interested to hear that on Monday.

Tony

Telephone [REDACTED] Mobile [REDACTED]

Replies will also be received on my blackberry

Legally privileged and exempt under FOISA

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**From:** Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]  
**Sent:** 09 January 2010 19:20  
**To:** rush\_aj@[REDACTED]  
**Subject:** RE: Monday


**Legally privileged and FOISA Exempt**

Noted. I am looking at:

1. The draft OSSA and the procurement regs issue you have raised - note will follow tomorrow.
2. Specific implement, Clause 60 and the EOT. Am discussing again with Bruce on Monday
3. Schedule Part 4 and Clause 19.19: there may be important voices missing here from the tie commercial team (Matthew Crosse and Geoff Gilbert) who were in the trenches during August, September and October 07
4. E-mail train January 5 between Steven and yourself.
5. Question posed on Clause 10.4 in Schedule Part 14

kind regards

**Andrew Fitchie**  
**Partner, Finance & Projects**  
DLA Piper Scotland LLP  
T: + [REDACTED]  
M: + [REDACTED]  
F: + [REDACTED]

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**From:** Anthony Rush [mailto:rush\_aj@██████████]  
**Sent:** 09 January 2010 18:32  
**To:** Fitchie, Andrew  
**Subject:** Re: Monday

Andrew a verbal view is OK - I am at this stage as interested in what tie thought S4 meant in May 2008 and how it came about.

Tony

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Glasgow Tel: ██████████  
BoW Tel ██████████  
Mobile ██████████  
email rush\_aj@██████████

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**From:** "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>  
**Date:** Sat, 9 Jan 2010 16:33:32 -0000  
**To:** <rush\_aj@██████████>  
**Cc:** Bentley, Bruce<Bruce.Bentley@dlapiper.com>  
**Subject:** RE: Monday


Tony

That's fine. See you at City Point at 11am. Happy to look at any points today/tomorrow in preparation and will be letting you have my thoughts/DLA positions on your various points in recent traffic.

kind regards

**Andrew Fitchie**  
**Partner, Finance & Projects**  
DLA Piper Scotland LLP

T: ██████████  
M: ██████████  
F: ██████████

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**From:** Anthony Rush [mailto:rush\_aj@██████████]  
**Sent:** 09 January 2010 16:23  
**To:** Fitchie, Andrew  
**Subject:** Re: Monday

Welcome back Andrew

I had hoped you would be there.

Tony

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Glasgow Tel: [REDACTED]  
BoW Tel [REDACTED]  
Mobile [REDACTED]  
email rush\_aj@[REDACTED]

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**From:** "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>  
**Date:** Sat, 9 Jan 2010 15:01:36 -0000  
**To:** <rush\_aj@[REDACTED]>; <steven.bell@tie.ltd.uk>  
**Subject:** Re: Monday

Tony  
Steven

Back last night. Radio silence since Thursday because needed to give family the time. Catching up now on traffic.

Do you want me at meeting on Monday?

Kind regards

Andrew Fitchie  
Partner  
DLA Piper Scotland LLP  
T: +[REDACTED]  
M: +[REDACTED]  
F: +[REDACTED]

---

**From:** Anthony Rush <rush\_aj@[REDACTED]>  
**To:** 'Steven Bell' <Steven.Bell@tie.ltd.uk>  
**Cc:** 'Richard Jeffrey' <Richard.Jeffrey@tie.ltd.uk>; 'Dennis Murray' <Dennis.Murray@tie.ltd.uk>;  
torquilmurray@[REDACTED] <torquilmurray@[REDACTED]>; Bentley, Bruce; Fitchie, Andrew  
**Sent:** Fri Jan 08 20:05:20 2010  
**Subject:** RE: Monday

To assist our conversation on Monday I set out some thoughts:

The provisions of Clause 60.4 give me some concern – the term “accept” has several meanings – we don’t want it to mean “approve”.

I think back on arguments arising from the old ICE Forms of Contract. The 6<sup>th</sup> Edition addressed the perennial refusal of most Engineers to “approve” a revised programme by requiring the Contractor to submit a programme to ensure completion by the time for completion or extended time for completion. IChemE addressed the problem by giving the Project Manager the right to refuse to approve a revised programme on the basis of “good reason”.

There are three key issues:

- has the time for completion been extended;

- what measures is the Contractor proposing to mitigate the delay; and
- is the delay the Contractor's responsibility.

In our case the Contractor is well behind the extended time for completion and I understand that he has not submitted any detailed substantial claim (s) for extension as required by Clause 64. Moreover in accordance with Clause 80.4.3 the Estimate given by Infraco must include: "any impact on the Programme and any requirement for an extension of time" and pursuant to Clause 80.4.8: "proposals to mitigate the impact of the proposed **tie** Change".

However, Clause 64 contains the proviso:

*"where a Relief Event has a continuing effect or the Infraco is unable to determine whether the effect of the Relief Event will actually cause it not to be able to comply with its obligations under this Agreement, such that it is not practicable for the Infraco to submit full details in accordance with this Clause 64.2 then the Infraco shall instead submit to **tie**:*

*(a) a statement to that effect with reasons, together with interim written particulars (including details of the likely consequences of the Relief Event on the Infraco's ability to comply with its obligations under this Agreement and an estimate of the likelihood and likely extent of the delay or non-performance); and*

*(b) thereafter, further interim written particulars until the actual delay caused or non-performance (if any) is ascertainable, whereupon the Infraco shall as soon as reasonably practicable, submit to **tie** the items referred to in Clause 64.2.2."*

When Infraco are not entitled to an extension of time Clause 64.9 prevails:

*"If the Infraco Works are delayed in circumstances other than those entitling the Infraco to an extension of time as set out in this Clause 64 (Relief Events), the Infraco shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. In such circumstances, the Infraco at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme."*

Under these circumstances, where Infraco have not fully addressed the three key issues (except for a small extension) I would take no quarrel with the attitude that we cannot accept a programme going forward which extends the durations of individual activities beyond any free or interfering float - although we may allow the extension being considered by Richard/David Darcy.

I am minded that we should ask Infraco to submit its revised programme along with details of the extent of delay or estimate of the likelihood and likely extent of the delay (as required inter alia Clause 64) of the extension to activities he asserts are caused by Relieve Events, together with details of the measures they have taken or propose in mitigation of the delay.

I am further minded that tie should not seek to agree or take any steps which could be construed as agreeing to the revised Programme. Rather I am minded that if tie accepts a revised Programme it should either be satisfied that the extension of time reflected therein and measures in mitigation are acceptable, or it should accept the revised Programme noting that tie does not agree that the extension of time reflected therein and measures in mitigation are acceptable - noting that in this context "accept" means to receive the revised Programme officially under the terms of Clause 64. Any extended time not due to a Relieve Event would be Infraco's culpable delay. Such delay would include SDS delay – explained by the Design Audit.

Telephone [REDACTED] Mobile [REDACTED]

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**From:** Steven Bell [mailto:Steven.Bell@tie.ltd.uk]  
**Sent:** 08 January 2010 17:08  
**To:** Anthony Rush  
**Cc:** Richard Jeffrey; Dennis Murray  
**Subject:** RE: Monday

Tony

We previously rejected their proposed Rev 2 programme but have agreed to engage in working with Infraco to revise the programme. We can think about this on Monday.

Please find attached Schedule 15

Steven

Steven Bell  
Edinburgh Tram Project Director

tie Limited  
Citypoint  
65 Haymarket Terrace  
Edinburgh EH12 5HD

Tel: [REDACTED]  
Fax: [REDACTED]

Email: [steven.bell@tie.ltd.uk](mailto:steven.bell@tie.ltd.uk)

For more information on the Edinburgh Tram Project, visit [www.edinburghtrams.com](http://www.edinburghtrams.com)

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**From:** Anthony Rush [mailto:rush\_aj@[REDACTED]]  
**Sent:** 08 January 2010 15:51  
**To:** Steven Bell  
**Cc:** Richard Jeffrey; Dennis Murray  
**Subject:** RE: Monday

Thanks Steven,

I am pondering Programme – I haven't got a copy of Schedule 15 can somebody email it to me this afternoon please?

I am puzzled as to why we may be getting involved with Infraco in revising the Programme rather than just sticking to Clause 60.4 and Schedule 12.

Clause 60.4.3 gives us scope to ask for reasons including why the change has happened. Thereafter I am inclined to reject any revised Programme – but we need to think about this.

Tony

Telephone [REDACTED] Mobile [REDACTED]

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**From:** Steven Bell [mailto:Steven.Bell@tie.ltd.uk]  
**Sent:** 08 January 2010 15:42  
**To:** Anthony Rush  
**Cc:** Richard Jeffrey; 'Bentley, Bruce'; 'Audrey Alexander'; TorquilMurray@[REDACTED] Dennis Murray  
**Subject:** RE: Monday

Tony

Happy for 11 start and your proposed agenda. I have progressed the audit scope and timing issues. I'll drop you a note over the weekend and we can ratify on Monday.

Regards

Steven

Steven Bell  
Edinburgh Tram Project Director

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Fax: [REDACTED]

Email: [steven.bell@tie.ltd.uk](mailto:steven.bell@tie.ltd.uk)

For more information on the Edinburgh Tram Project, visit [www.edinburghtrams.com](http://www.edinburghtrams.com)

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**From:** Anthony Rush [mailto:rush\_aj@[REDACTED]]  
**Sent:** 08 January 2010 14:02  
**To:** Steven Bell  
**Cc:** Richard Jeffrey; 'Bentley, Bruce'; 'Audrey Alexander'; TorquilMurray@[REDACTED]; Dennis Murray  
**Subject:** Monday

Steven,

I realise that you are busy with Martin today and may not get time to set the agenda for Monday's meeting – can I suggest a 11 am start to recognise the weather (Torquil and I will come by train – if that proves impossible we will drive over).

Richard would like to clear the proposed letter for David Darcy – so I suggest we do that first.

I think the items listed in my email of Wednesday cover the points we can constructively talk about.

Yesterday I agreed with Dennis that he would look at Clause 80 and 64. I will look at ground conditions and programme.

Thanks

Tony

Telephone [REDACTED] Mobile [REDACTED]

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