



## EDINBURGH TRAM NETWORK

### SUMMARY PAPER ON DRP ISSUES

This summary paper sets out the central issues, current stage, and contractual position under the Infraco Contract in relation to the matters which have, or are being considered for, referral to the DRP process. This paper is legal advice to CEC on matters which are in dispute.

#### DRP 1 - Preliminaries

##### Brief Description

The dispute is based upon establishing the correct method of calculating Head Office Overheads and Profit, Consortium Preliminaries and other Preliminaries elements in respect of **tie** Change Order Number 21 in connection with the provision of a contingency west bound bus lane at Princes Street, Edinburgh. Establishment of the correct principle ought to enable Infraco and **tie** to agree Estimates in this respect and as a principle on such matters going forward.

##### Contractual Basis

Head Office Overheads and Profit, Consortium Preliminaries and other Preliminaries elements are all defined in the Infraco Contract. The dispute is based upon the method of calculation applied in Schedule Part 4.

**tie** consider that this Estimate should be valued in accordance with *Clause(s) 80.6.3 or 80.6.4* of the Infraco Contract. Therefore, the Head Office Overheads and Profit, Consortium Preliminaries and any other Preliminaries elements are to be valued in accordance with valuation rules 1.1 to 1.5 inclusive as set out in *Appendix G (Process for agreement of value of tie Changes) to Schedule Part 4 (Pricing)*.

**tie** contends that the method of calculation to be applied in the valuation of any other Preliminaries elements to which the Infraco may be entitled as a consequence of the works comprised in the proposed **tie** Change (in addition to the Head Office Overheads and Profit and Consortium Preliminaries) is not the application of a proportion of method related charges (fixed or time related) to the value of works comprised in the Estimate. Instead, there should be an assessment of the effect of the works described in **tie** Change Order 21 upon the Infraco's intended method of executing the scope of work in the absence of that **tie** Change. That effect should be demonstrated and proved by the Infraco and thereafter valued having regard to the method related charges (fixed or time related) contained in *Appendix F of Schedule Part 4 (Pricing)* of the Infraco Contract

##### Next Steps

The internal part of the Dispute Resolution Procedure has been exhausted without a compromise having been reached. The parties now need to agree the forum for the next stage. **tie** have suggested that adjudication should be chosen, whilst BSC only wish to use mediation. Mediation is the default option in the event of a disagreement, so the parties now need to move to agree a mediator. This is underway.

## DRP 2 - Princes Street

### Brief Description

Its disclosure would seriously prejudice the commercial interests of **tie** and CEC and would also be a breach of confidentiality provisions in the Infraco Contract. Whether Infraco is obliged pursuant to the Infraco Contract and without further instruction, to proceed with carrying out of Works on Princes Street, Edinburgh from 21 February 2009 at the latest. Establishment of the applicable obligations could be used as a defence to claims by Infraco for delay. Clarification of the limits of instruction will assist in avoiding a similar delay to that experienced on Princes Street.

### Contractual Basis

Following the exchange of correspondence in respect of the **tie** Change(s) needed to finalise the plan for work to be carried out on Princes Street, **tie** affirmed the agreement and approval of implementation of the **tie** Change and instructed Infraco to implement the Change pursuant to *Clause 80.13*, and similarly directed Infraco to proceed during the resolution of a dispute pursuant to *Clause 80.15*. The letter was sent to the Infraco by **tie**'s Representative as an instruction.

The Infraco stated that they did not consider that they were obliged to accept the instruction, and maintain that they were not obliged to commence works on Princes Street under the Infraco Contract.

The Infraco put forward various technical and contractual reasons for not commencing work. One of these was that the Infraco did not have an exclusive licence to occupy Princes Street. In response, we highlight that under *Clause 18.1.2*, **tie** grants Infraco exclusive licence to occupy Designated Working Areas (defined as “any land, worksite or areas of the public road which Infraco occupies for purposes of executing the Infraco Works for the relevant programmed construction period”).

Another contractual Infraco argument was that they could not proceed as the Estimate had not been agreed. Where a dispute has arisen, *Clause 80.15* applies to require work to be undertaken pending the resolution of valuation *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.*

Given the attempt by **tie** to instruct based upon both *Clauses 80.13* and *80.15*, this DRP should establish the parameters of where/when such instructions can be overridden by technical or other concerns.

### Next Steps

The Dispute Resolution Procedure is currently on hold. **tie**'s decision to hold the process is generally attributable to the fact that work has since commenced on Princes Street. Nevertheless, the issues of principle about the obligation on BSC to work, the validity of reasons for delaying start of work, and the process of instruction, remain unresolved. These same issues may arise elsewhere before the completion of the Project. Under the terms of the DRP, a second dispute cannot be raised on similar facts, meaning that failing to conclude DRP2 in a satisfactory way would prevent **tie** from disputing a similar delay arising elsewhere on the Project.

### DRP 3 - Design Change from Base Date to Issued for Construction

#### Brief Description

The issue here is the proper treatment, determination and evaluation where it is alleged by the Infraco that the design of the Infraco Works has changed from the design at the stage of BDDI to IFC (to be joined with DRP 6). A number of project claims with a high value flow from the Infraco's interpretation of the Infraco contract - which interpretation differs from that of **tie**. As at 30 January 2009, the Infraco had notified to **tie** approximately 50 occasions where it was of the opinion that the design contained in the IFC drawings differed from design contained in the BDDI drawings (which was the design of the Infraco Works as at 25 November 2007) and, as a consequence, a Notified Departure had occurred, which gave rise to a Mandatory **tie** Change.

#### Contractual Basis

The crux of the matter is the interpretation of what constitutes a Notified Departure in *Schedule Part 4 Clause 3.1*. The Infraco consider that only "*under very limited circumstances*" can a change in design during evolution from BDDI to IFC not be a Notified Departure. **tie** agrees the degree and effect of any change to design will be a matter of technical opinion, but **tie** reasonably requires a proper examination and explanation of the changes to design which the Infraco asserts have been made to BDDI in order to determine whether a breach has arisen, or other circumstances apply, which would prevent a Notified Departure being properly claimed.

One such contractual requirement is that each design change permitted by the Infraco needs to have satisfied *Clause 10* and in particular *Clause 10.2* of the Infraco Contract, which provides "*The Infraco shall submit any Deliverables associated with any Permitted Variations to tie representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan)*" as well as *Clause 3.8* of *Schedule Part 14* which provides "*The Infraco shall ensure that each Submitted Item shall contain sufficient detail and shall be accompanied by sufficient information to enable tie's Representative to assess the Submitted Item in accordance with this Schedule Part 14 (Review Procedure and Design Management Plan)*".

Another central contractual issue is that the Infraco has taken on the SDS Provider as its subcontractor. Infraco should manage the SDS Provider and control mitigate any required changes in accordance with the Infraco Contract and not simply require **tie** to pay for its managerial indifference.

Furthermore, in order to be placed in a position to agree that there has been and to evaluate the effect of a Notified Departure, **tie** is entitled to receive, following explanation for the changes, a competent Estimate from the Infraco pursuant to *Clause 80 (tie Change)*. The Infraco has stated that it cannot provide such Estimates within the stipulated 18 Business Days and in many cases has not given any indication as to when it would be able to provide Estimates. **tie** considers each occasion is a material breach of contract, as is the Infraco's refusal to provide its analysis of how a Notified Departure has occurred.

#### Next Steps

**tie** have responded to the DLA Piper draft Position Paper and have prepared their own paper setting out their analysis of the position. We have reviewed that new **tie** paper, and are now in the process of testing its conclusions.

## DRP 4 - Hilton Hotel Car Park

### Brief Description

Concerns whether the Infraco is obliged, pursuant to the Infraco Contract and without further instruction, to proceed with carrying out of works at the Hilton Hotel car park. **tie** considers that the works in question form part of the core Infraco Works as at contract signature on 14 May 2008. **tie** understands that the Infraco considers that those works are accommodation works instructed as a result of a third party's new requirements. There is a therefore a difference in both treatment of the works and the value of those works between the Infraco Estimate, and the valuation by **tie**

### Contractual Basis

The works at the Hilton car park (defined in the Infraco Contract as "*the New Car Park Works*") are fully described in *Section 12 of Schedule Part 13* of the Infraco Contract ("*the Stakis Agreement*"). The scope of the New Car Park Works is shown on the plan annexed at *Appendix 9 to Schedule Part 13*. The Infraco is responsible for obtaining planning permission for these works.

The Infraco were put on notice of the relevant Stakis Agreement and had conducted due diligence on it (legal and technical), several months prior to close of the Infraco Contract. The Infraco have a full copy of the Stakis Agreement which forms part of *Schedule Part 13A*.

The Infraco Contract's approach on this issue is unambiguous. Under *Clause 18.17B*, the Infraco undertakes to carry out all of its obligations under *Schedule Part 13, Section A*. *Section 12 of Schedule Part 13 A* contains the express stepped-down obligations (at 12.9, 12.10 and 12.11) agreed to by the Infraco and pursuant to which the Infraco is responsible for carrying out the New Car Park Works.

The New Car Park Works are a defined category of works - "*Third Party Obligations*" - under the Infraco Contract. These are core works and constraints and obligations to be performed, to which the Infraco agreed to on 14 May 2008. The price for the New Car Park Works is contractually included as part of the Construction Works Price set out in *Schedule Part 4*. *Schedule Part 4* (and its pricing assumptions) cannot operate to exclude the New Car Park Works from the main scope of the Infraco Works.

The Infraco appears to confuse Accommodation Works and Third Party Obligations ("*TPOs*"). The former are any works which **tie** may need to instruct and which eventuate post contract award in connection with third party interface generally. On this basis, the Infraco are refusing to carry out the works without an Accommodation Works Change Order, and associated extra money.

### Next Steps

Our draft Position Paper is with **tie** for review, comment, and a decision about whether to proceed.

## DRP 5 - Programme Change

### Brief Description

**tie** seek a decision about the true and proper valuation of **tie** Change Order 1 in connection with the change from version 26 of the SDS Programme to version 31 of the SDS Programme. There is a substantial difference in value between the Infraco Estimate and the valuation of works by **tie** (circa £3 million). A decision in favour of **tie** would save a large amount of money for the Project, whilst establishment of the correct principle ought to improve the Estimate process going forward.

### Contractual Basis

There is no dispute that **tie** Change Order 1 is to be valued in accordance with *Clause 80.6* of the Infraco Contract, which provides

*"80.6 The valuation of any **tie** Changes made in compliance with this Clause 80 (**tie** Changes) shall be carried out as follows:*

*80.6.1 by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (Pricing) or Schedule Part 7 (Maintenance Contract Price Analysis) as the case may be in so far as such rates and prices apply;*

*80.6.2 if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;*

*80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (Pricing) and Appendix F Schedule Part 7 (Maintenance Contract Price Analysis);*

*80.6.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with Appendix G to Schedule Part 4 (Pricing) and Appendix F to Schedule Part 7 (Maintenance Contract Price Analysis);*

*provided that where any **tie** Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices."*

*Clause 80.6* of the Infraco Contract sets out the mandatory rules which are to apply in respect of the valuation a **tie** Change. The Infraco is of the view that neither *80.6.1* nor *80.6.2* are satisfied, and has thus valued **tie** Change Order 1 under one of the other methods, producing a much higher Estimate than under a valuation in accordance with *80.6.2*.

**tie** does not dispute or disagree with the Infraco's amendment to the Planned Sectional Completion Date(s) as part of it's Estimate of the effects of **tie** Change Order 1. In respect of the valuation of **tie** Change Order 1, **tie** acknowledge that the rates and prices contained in *Appendix F to Schedule Part 4 (Pricing)* do not apply. The valuation of **tie** Change Order 1 can be ascertained by measurement and it is practicable to deduce rates and prices from the rates and prices contained in *Appendix F to Schedule Part 4 (Pricing)*. Accordingly, valuation of **tie** Change Order 1 is to be on the basis of measurement and valuation at rates and prices deduced from the rates and prices contained in *Appendix F to Schedule Part 4 (Pricing)*, in accordance with *80.6.2*.

There are a number of other deficiencies in relation to valuation of certain heads of claim and lack of information which tie also challenge on this Estimate, including in relation to overheads and preliminaries as being tested in DRP 1 and DRP 7.

#### Next Steps

Our draft Position Paper, which sets out the relevant calculations and meanings of the terms used in 80.6 in detail, is with tie for review, comment, and a decision about whether to proceed.

### **DRP 6 - Definition of Base Date Design Information**

#### Brief Description

The main questions for determination are: (i) what comprises Base Date Design Information for the purposes of the Infraco Contract (to be joined with DRP 3); and (ii) as a consequence, the scope of the road reconstruction and surfacing works in Phase 1a which the Infraco has contracted to carry out. Anticipated by tie team that Infraco are of the opinion that a number of claims with high value flows from Infraco's interpretation of the Infraco contract - which interpretation differs from that of tie.

#### Contractual Basis

The purpose of the Base Date Design Information was, through a design freeze date, to establish an information and design baseline from which the Infraco could calculate and fix its final price for an identified scope of work.

*"Base Date Design Information"* is defined in Schedule Part 4 (*Pricing*) of the Infraco Contract as *"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4"*. Appendix H to Schedule Part 4 specifically includes *"All of the Drawings available to Infraco up to and including 25th November 2007"*.

Contrary to the Infraco's position, Base Date Design Information is not and cannot be the list of documents contained at Appendix A to Schedule Part 30 (*Infraco Proposals*). This is because Appendix A to Schedule Part 30 (*Infraco Proposals*) provides a list of documents appended to the Infraco Proposals. This list is not, and is not anywhere stated to be, exhaustive of all the design data, information and drawings available to or issued to the Infraco up to and including the 25th November 2007. There is therefore no basis (contractual or otherwise) for saying that Appendix A contains all of the drawings available to or issued to the Infraco at 25th November 2007. Whatever Appendix A is, it is not the set of information which is the Base Date Design Information.

It cannot be the case that, in the absence of an itemised list of Base Date Design Information to accompany Schedule Part 4 (*Pricing*), the Parties agreed without saying so that the drawings listed at Appendix A to Schedule Part 30 (*Infraco Proposals*) should be used exclusively to represent the Base Date Design Information.

Further design drawings information was available to the Infraco via the Project Data Room, and as part of all other information provided to the Infraco as part of its due diligence exercise up to and including the 25th November 2007.

#### Next Steps

Our draft Position Paper is with tie for review, comment, and a decision about whether to proceed.

## **DRP 7 - Overheads and Prelims**

### Brief Description

The correct method of calculating Head Office Overheads and Profit, Consortium Preliminaries and other Preliminaries elements in respect of other Estimates submitted by Infraco. Establishment of correct principle ought to encourage Infraco to produce Estimates and allow Infraco and **tie** to agree Estimates. Substantial difference in value between Infraco Estimate and valuation of works by **tie**.

### Contractual Basis

See DRP 1. The provisions which will be most heavily relied upon to argue DRP 7 will be significantly influenced by the weight given to the same by the mediator/adjudicator during the resolution of DRP 1.

### Next Steps

**tie** are preparing a paper setting out Infraco's position. The Dispute Resolution Procedure is not to be launched yet on this front due to awaiting the outcome of the specific application of these points to a specific site (Princes Street) in DRP 1, and any amendment or change of approach required as a result of the conclusions to that process.

## **DRP 8 - Edinburgh Park**

### Brief Description

Another dispute about the valuation of an Infraco Estimate, in this case concerning works at Edinburgh Park Exchange. There is a substantial difference in value between the Infraco Estimate and valuation of works by **tie** (circa £400K). Application of the principles covered in the other DRPs ought to assist, and the additional aspects covered in relation to this particular area of the works should further encourage Infraco to produce better Estimates and enable swifter agreement of Estimates.

### Contractual Basis

Further commercial arguments about the application of the methods of calculation set out in *Schedule Part 4* to these particular facts. The approach to this DRP and the drafting most relied upon will be significantly influenced by the progress made on the other DRPs which deal with valuation of Estimates.

### Next Steps

**tie** are preparing a paper setting out the history of problems at Edinburgh Park and the reasons for disputing the response and action of the Infraco to date on this part of the works.

### **Further DRP Options**

Infraco have served on **tie** a number of notifications of Compensation Events, which are associated with alleged failures on the part of the SDS Provider to perform services. On the basis of that evidence, **tie** anticipate that it is more likely than not that Infraco will in the future seek to submit claims seeking additional time and money as a consequence of alleged failures of SDS. **tie** are giving consideration to the rights and remedies available to **tie** in connection with such failures by the SDS Provider and it may be that those issues are referred to the Dispute Resolution Procedure for determination.

**DLA Piper**  
20 April 2009