

Infraco Design Responsibility under the Infraco Contract Suite

A Infraco Contract

The assumption of design responsibility by the Infraco for the Infraco Works is achieved by the following provisions in the Infraco Contract. The commercial and contractual objective of these provisions is that use by Infraco of any design prepared by SDS provider (no matter when completed) is also the Infraco's legal responsibility, as if Infraco had prepared it itself.

It should be understood that BSC resisted this assumption of responsibility strongly during negotiations and in relation to the Consenting process in particular. Consequently, SDS Provider failings in certain defined circumstances permit contractual relief and cost entitlements for BSC.

Part C of this paper deals with this dilution of the basic strategic risk transfer sought to be achieved by tie through the early engagement of the SDS Provider and their novation at the date of the tram network construction contract award to Infraco.

The fundamental position on Infraco's design liability is achieved by the following principal core Infraco Contract provisions:

Clause 7.1 tie hereby appoints the Infraco in accordance with the terms of this Agreement and the Infraco hereby accepts full responsibility and agrees to carry out and complete the Infraco Works fully and faithfully in accordance with this Agreement.

"Infraco Works" being:

Definition As the context requires, the EAL Works 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, all in accordance with this Agreement and the Employer's Requirements.

"Edinburgh Tram Network" being:

Definition The tramway which is to be designed, constructed and maintained in Edinburgh pursuant to this Agreement in Phase 1a (forming part of Line One and Line Two as described in the Tram Legislation) and, if the Phase 1b option set out in Clause 85 is exercised, Phase 1b, together with all associated works and facilities required pursuant to this Agreement including all civil engineering and track works, Trams, infrastructure, plant, machinery and equipment installed or used for the operation of such tramway.

The key design obligations are:

Clause 7.3 The Infraco shall (each as distinct and separate obligations), and shall procure that the Infraco Parties¹, carry out and complete the Infraco Works:

7.3.2 so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained;.....

7.3.14 so as to ensure that the design of the Edinburgh Tram Network is buildable and maintainable;

tie's ability to have oversight and influence over design development is protected by clause 10 and Schedule Part 14 (Design Review and Design Management Plan.)

Clause 10 DEVELOPMENT, REVIEW AND FINALISATION OF THE DELIVERABLES

Clause 10.1 The Infraco shall develop and finalise the Deliverables in accordance with the Programme and this Agreement, and tie shall review the Deliverables and procure that CEC reviews the Deliverables (which shall include any amendment to any Submitted Item) in accordance with Schedule Part 14 (Review Procedure and Design Management Plan).

Clause 10.2 The Infraco Shall submit any Deliverables associated with Permitted Variations to tie's Representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan).

Clause 10.10 The Infraco shall provide tie with all Deliverables in accordance with the terms of this Agreement and where no timescale for provision of such Deliverables is specified in the Programme, such Deliverables shall be provided to tie as soon as reasonably practicable. The Infraco shall provide to tie, at no cost to tie, five copies of the agreed Deliverables in hard copy form and one copy in an agreed soft copy form (as appropriate to the format of the Deliverables).

Clause 10.12 Subject to Infraco's express rights under this Agreement, the Infraco accepts all risks arising from any conflicts, ambiguities, discrepancies, errors or omissions that subsequently appear within or between any of the Deliverables, and the Infraco shall not be entitled to make any claim against tie for an extension of time, payment or otherwise in respect of any such conflicts, ambiguities, discrepancies, errors or omissions.

"Deliverables" being:

Definition all documents, information, reports, diagrams, pricing schedules, records, method statements, risk assessments, manuals, schedules, databases, reinforcement details, photographs, formulae, plans, designs, specifications, drawings (including as-built drawings), details, calculations, analysis, operation and maintenance manuals, software, data, data configuration designs, tools and details, software protocols, source and object codes, transport and other models and simulations, the outputs and

¹ SDS is an Infraco Party. Infraco Works includes the design function.

reports based on any models, programmes and all other material created and/or provided by Infraco (and/or any Infraco Party or any other third party) in relation to the Infraco Works required to deliver the Infraco Works

Infraco assumes responsibility for the management of SDS Provider:

Clause 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.

Clause 11.4 The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services² 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.

Any design prepared by the Infraco in its own proposals is warranted to deliver the Employer's Requirements.

Clause 7.4 The Infraco undertakes and warrants that the Infraco's Proposals shall meet the Employer's Requirements.

Among further provisions within the Infraco Contract that are consistent with assumption of design responsibility by Infraco are:

Clause 10.2 under which the Infraco grants licences over project design produced by it and Infraco Parties.

Clause 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.

Clause 16.21 The Infraco shall design, procure and carry out each element of the APA Works in accordance with all Standards as at the date that such element of the APA Works passes Stage Gate Four and any change of Standards for

² SDS Services are defined under the SDS Agreement scope as, in essence, being the full design of the ETN summarised by:

"2.1.1 The SDS Provider shall undertake all design and produce the Deliverables necessary to enable the Edinburgh Tram Network to be procured, constructed, tested and commissioned (taking account of the need to fully co-ordinate these activities, including with other physically-related projects, so as to minimise overall disruption) to meet the requirements of the Master Project Programme, and then operated and maintained.

2.1.2 The SDS Provider shall produce a design which shall deliver overall system functionality, capability and achieve the performance requirements of the Edinburgh Tram Network."

safety reasons thereafter or such derogations from the Standards as Network Rail and/or the relevant Approval Bodies may approve or consent to in writing. The Infraco shall design, procure and carry out the APA Works in accordance with the requirements which Network Rail are entitled to stipulate to tie under the Asset Protection Agreement.

Clause 17.8 In accordance with Schedule Part 14 (Review Procedure), the Infraco shall, from the Effective Date of this Agreement, take account of any comments from tie in relation to operational issues when refining its Design, Maintenance Plans, standards, procedures and safety documentation in accordance with Schedule Part 2 (Employer's Requirements) and when ensuring system integration in accordance with Clause 8 (System Integration). The Infraco shall as part of the Mobilisation Services comment on maintainability issues and provide review and support during the design and construction process, seeking to optimise the whole life asset cost. These comments shall be deliverable to the Operator in addition to tie.

Clause 17.25 Following the Service Commencement Date subject to Clause 17.20, the day-to-day operation of the Edinburgh Tram Network shall be the responsibility of the Operator. To enable the efficient operation of the Edinburgh Tram Network, the Infraco shall provide technical advice where practicable to tie and to the Operator during normal working hours regarding the operational deployment and integration of the various components of the Edinburgh Tram Network which relate to the scope of work under this Agreement and any other non-confidential and non-financial information regarding their design, construction, standards, integration, operation and maintenance which the Operator and tie may reasonably request provided such request does not adversely impact on the delivery of the Infraco Works.

Clause 18.2 Subject to any rights to enter upon any Temporary Sites pursuant to Clauses 18.4 to 18.10 (inclusive) and any requirement to carry out Accommodation Works outwith the Permanent Land, the Infraco shall not design or construct any part of the Edinburgh Tram Network upon or otherwise encroach upon any land outwith the Permanent Land for the purposes of carrying out the Infraco Works without the prior written consent of tie.

Clause 46.6 Infraco's liability for Patent Defects related to design, construction, installation and maintenance of the Infraco Works...

B Novation of SDS Provider

Under the terms of the SDS Novation Agreement, the Infraco becomes the client for the SDS Provider with responsibility for the performance of this key consultant for design development and delivery. Key provisions are:

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 4.4 The liability of the SDS Provider to the Infraco pursuant to the SDS Agreement shall not be affected by the Infraco's assumption of liability for design to tie pursuant to the Infraco Contract.

Clause 6.1 The Infraco undertakes to perform all the duties and to discharge all the obligations of tie 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 and as if all acts and omissions of tie under or pursuant to the SDS Agreement prior to the date of this Agreement were the acts and omissions of the Infraco.

C Qualifications

The qualifications in relation to Infraco's contractual responsibility for the SDS Provider's Deliverables were acceded to by tie for three main reasons: (i) the unfinished scope of SDS's design work at 14th May 2008, (ii) BSC's reservations (whether well founded or not) about the quality of the design produced up to the date of BSC's bid price fix (25th November 2007) (iii) BSC's insistence that the SDS Provider should take Consent risk on design. The key areas where the Infraco Contract contains provisions which dilute, in part, Infraco's primary responsibility for design are:

Consents (Infraco Contract - Clause 19)

1. Responsibility for obtaining Consents is divided contractually:

tie is responsible for obtaining TROs and TTROs

BSC is responsible for obtaining and maintaining Design and Construction and Maintenance Stage Consents ("DCSCs") and any TTROs required during operational phase, with SDS Provider specifically responsible for handling the approval process. The manner in which the three parties should approach Consenting Design is set out in Schedule Part 14 (Design Review and Design Management Plan). The policing of this process and the activities feeding into it is therefore crucial.

2. Even though SDS Provider is Infraco's design consultant, to the extent that the SDS Provider fails to obtain a DCSC on time, BSC can obtain time and money from tie through a claim for Compensation Event provided that, in summary, (i) BSC has kept tie fully informed as to likely delay/difficulty in obtaining the DCSC and has attempted to mitigate the consequences of not obtaining it (ii) BSC is not at fault for the failure of SDS Provider or the inability to secure the DCSC (iii) the failure to get the DCSC is neither a result of poor quality SDS Provider or Infraco design nor the result of Infraco instructing SDS Provider to re prioritise design submissions to the approval body (CEC) under the design review procedure.

The Pricing Assumptions in Schedule Part 4, notably 3.4.1 through 3.4.1.5

Infraco can seek a Notified Departure (essentially a variation triggering entitlement to apply for a tie Change order granting BSC time and money) if:

- (i) Any SDS Provider produced design is amended from Base Date Design Information ('BDDI'), except where this as a result of (i) an Infraco breach (ii) an Infraco change or (iii) a Change of Law or (iv) the normal development and completion of designs from preliminary to construction stage.

It will be a matter of technical opinion and fact as to whether any BDDI design does change as to (1) principal, shape, form or specification or (2) scope, because of Third Party requirements or Approved Body requirements.

- (ii) SDS design is not aligned in terms of its delivery timing with the construction programme.
- (iii) SDS design produced pre-contract award date does not comply with Infraco Proposals or the Employers Requirements. In practice, this occurrence will have been removed/identified in the design workshops post contract award.
- (iv) Design delivery programme for SDS provider differs from Schedule Part 15.
- (v) Infraco suffers loss and expense as a result of any outcomes from the Assumptions and Constraints report in the Novation Agreement.

But Notified Departure does not relieve Infraco of its obligations under (i) Clause 10 to comply with design review requirements and (ii) Clause 80 evaluation process. Importantly, Clause 10.2 obliges Infraco to submit any Deliverable (ie design) associated with Permitted Variation (which includes Notified Departure) to **tie** for review. This is the protection **tie** has that design revisions are not being introduced simply for Infraco 's convenience. The occurrence of a Notified Departure will, in most instances, be a verifiable occurrence of fact or technical necessity.

Early release of IFC Drawings in terms of any change related costs following IFC re-release which exceed a threshold of £1.5 million and Pricing Assumption 22

This entitlement to claim for time and cost under Clause 80 (tie Change) is set out at Clause 10.18 and is conditional upon (i) an initial threshold of £1.5 million in costs being exhausted and (ii) none of the changes required to IFC drawings being needed as a result of SDS Provider or the Infraco being in breach of their obligations on design quality or content of the IFC Drawings.

Additionally, Pricing Assumption 22 permits application by Infraco (as a Notified Departure) for time and costs if, in order to protect programme, Infraco has to proceed before issue of IFC drawings and any of that work or supply is abortive or requires revision following IFC drawings being available.

Failure by SDS Provider to release IFC drawings by Programme date

This is a defined Compensation Event, except if it is a result of Infraco design being late or inadequate (that is: an Infraco Breach).

Material breach by SDS Provider of its obligations regarding quality of Deliverables;

This defined Compensation Event has potential consequences if Infraco can establish that the SDS Design was not in accordance with the SDS Agreement or was prepared negligently since it permits a claim by Infraco for time and cost if the quality of SDS design or services is contractually deficient. Such a claim would be subject to deduction from any cost recovery against **tie** by Infraco of any Infraco recovery against SDS Provider (£10 million each and every claim).

This qualification's origin lies in BSC's extreme position regarding Parsons Brinckerhoff design production performance up to Contract signature date. Its consequence is that Infraco are certain to join SDS Provider into any dispute with **tie** over design quality. In the event that

Infraco successfully claimed against **tie**, **tie** would require to proceed against SDS Provider under the Novation Agreement and the Collateral Warranty.

Relief in the event of an SDS provider design being the cause of a latent defect in the installed works;

This is an adjunct to the Compensation Event above.

The outcome of the design development workshops as stipulated by Clause 4.8 in the novation agreement i.e. any change (coming from these workshops) to SDS produced design will be a tie Mandatory Change

This covers the consequence of any design change required following the development workshops.

Qualification on Infraco's obligation to correct errors and omissions in the Infraco Works (Clause 40)

Where Infraco can establish that the reason for an error or omission from the Infraco Works has been caused by a Notified Departure (ie a change as a result of a Schedule Part 4 Pricing Assumption not being true), the cost of rectifying the error/omission would be borne by **tie**, not Infraco.

DLA Piper
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