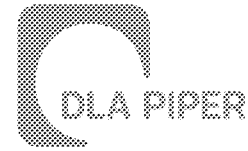


## LEGALLY PRIVILEGED AND SUBJECT TO FOISA EXEMPTION



### Initial Opinion on Contractual Issues associated with the Multi-Utilities Diversion Framework Agreement ("MUDFA")

Prepared by DLA Piper

8 January 2009

#### A. GENERAL PRINCIPLES

##### Recovery of Liquidated Damages by tie

Does the amount of liquidated damages provided for in the MUDFA act as a cap on the losses which can be recovered as a consequence of delay on the part of the MUDFA Contractor?

- The right to recover liquidated damages is triggered upon the MUDFA Contractor failing to achieve substantial completion of any Work Sector by the Longstop Date.
- The amount of liquidated damages (under *Clause 45.1*) is £50,000 per week (or pro-rated for each day) which shall elapse between the date on which the prescribed time expired and the date on which the final Work Sector is substantially completed in accordance with the MUDFA Agreement (capped at £1,300,000 under *Clause 45.3*).
- The original definition of "Work Sector" included Work Sector 6 - Gogar (including Depot Area) to Airport.
- Additional works at the Depot and the Airport have been instructed by tie as a tie Change. A contractual variation is being prepared to deal primarily with the inclusion of works at the Airport and the inclusion of works in respect of additional utilities.
- The Longstop Date has been adjusted to reflect these tie Changes but the level of liquidated damages and the trigger for levying liquidated damages has remained as originally drafted.
- As a matter of general law, in circumstances where a requirement to pay liquidated damages has been triggered, a court will not generally investigate what loss has actually been suffered. The general approach of the courts is to favour finding that pre-determined payments are enforceable. A distinction is, however, drawn between unenforceable 'penalty' clauses, and enforceable provisions for the payment of liquidated damages. A court will not enforce a provision which would make the party in default liable for a sum which bears no relation to the loss which the other party is likely to suffer in the event of a breach. The party in default in the circumstances here would be the MUDFA Contractor. As the clause is generally viewed from the perspective of the party who is to pay the damages (rather than the party who is to receive damages), it is therefore unlikely that a court could be persuaded that the liquidated and ascertained damages provision should be struck down and therefore unenforceable where the amount is not sufficient to compensate the innocent party (being tie in the circumstances here).
- In our opinion, the effect of the foregoing is that losses suffered by tie as a consequence of delay by the MUDFA Contractor would, in effect, be capped by the amount of the liquidated damages provided for in the MUDFA. It is also our opinion that this would be construed as

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an exclusive remedy for loss as a consequence of delay (*Temloc Ltd v Errill Properties Ltd (1987) 39 BLR 30, CA*). The effect would then be that **tie** would be unable (under the MUDFA or otherwise at common law) to recover unliquidated damages greater than the amount of liquidated damages provided for under the MUDFA.

### Recovery of Unliquidated Damages by tie

In the event that **tie** sought to recover unliquidated damages, the hurdle **tie** would have to overcome is that the amount of unliquidated damages would have to be proved according to the usual legal rules (including causation, mitigation and remoteness).

John Casserly has identified several types of loss, which are said to flow from the failures by the MUDFA Contractor, including:

- additional costs "*incurred by tie due to the imposition of charges on BT from any third party*" (*Clause 13.8*);
- consequential **tie** MUDFA costs for staff operational costs/overheads;
- consequential **tie** costs;
- consequential **tie** costs as a result of delay/adverse impacts on the Infracore programme; and
- consequential loss of revenue in relation to into service date of the tram.

The question is then whether, or to what extent, any or all of the foregoing types of loss would be said to fall within the contractual liquidated damages (and therefore could not be recovered in addition to the amount of liquidated damages) or whether the types of loss can be distinguished and recovered in addition to the amount of the liquidated damages.

### Extensions of time and concurrent delay

If there are two concurrent causes of delay, one of which was an event which entitled the MUDFA Contractor to an extension of time and the other not, is the MUDFA Contractor entitled to an extension of time for the period of delay caused by the event giving rise to an entitlement to an extension of time, notwithstanding the concurrent effects of the other event?

Entitlement to an Extension of Time for Completion is provided for under *Clause 38* of the MUDFA Agreement. A **tie** Change ordered under *Clause 46* of the MUDFA is an event which gives rise to an entitlement on the part of the MUDFA Contractor to an extension of time for the substantial completion of the MUDFA Works, provided that the MUDFA Contractor has within 10 business days of becoming aware of the event notified **tie** in writing.

It is, however, the case that under *Clause 38.4* of the MUDFA (1) any event or cause of delay consequent upon any omission or default on the part of the MUDFA Contractor; and (2) any delay which is concurrent with another delay for which the MUDFA Contractor is responsible are not to be taken into account in assessing any extension of time. It would then be arguable that, say, any delay as a consequence of a **tie** Change which was concurrent with delay as a consequence of default on the part of the MUDFA Contractor would, in effect, be ignored in assessing any entitlement to an extension of time. The issue then turns upon whether or not particular events are concurrent, which is of itself a technical matter, which would likely require planning/programming expertise to ascertain.

## B. RESPONSE TO JOHN CASSERLY'S EMAIL DATED 7 JANUARY 2008

1. *BT Remedial Works – Carillion (CUS) have installed BT utility diversions throughout all the work sites, it became apparent that very few of the actual installed diversions are installed correctly/in accordance with the Agreement and such CUS have been undertaking remedial*

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*works to the installed diversions since circa August 2008. Please can you give us your view on the following:*

- 1.1 *Recovery of any additional costs 'incurred by tie due to the imposition of charges on BT from any third party' Cl 3.18*

**DLAP comment:** Our opinion is that these costs should be recoverable by **tie**, in addition to the amount of liquidated damages on the basis that it is expressly stated to be without prejudice to any other remedy; is not directly associated with delay, but is instead associated with additional costs due to defective work carried out by the MUDFA Contractor; and is stated to be subject only to the limitations provided for under Clause 84. Recovery will be subject to there being the requisite proof of the costs/losses.

- 1.2 *Recovery of any consequential tie MUDFA costs for staff operational costs/overheads etc resultant from CUS delay related to remedials*

**DLAP comment:** **tie** costs associated with delay to the Longstop Date will be deemed to have been included in the calculation of liquidated damages, as such calculation should have represented the genuine pre-estimate of **tie**'s losses associated with such delay. Therefore, given that there is a liquidated damage, **tie** would not be able to recover unliquidated damages for losses arising out of a delay to the Longstop Date. **tie** costs associated with dealing with the remedial works should be recoverable as these costs have been incurred as a consequence of a breach of contract/negligence by the MUDFA Contractor (see e.g. Clause 56.1 and the general principles of set off expressed in the MUDFA).

- 1.3 *Recovery of any consequential tie costs as a result of any delay/adverse impacts on the Infraco programme both in relation to MUDFA LD's and any other avenues open to tie both within the Agreement or at Common law*

**DLAP comment:** **tie** costs associated with delay caused to the Infraco will be deemed to have been included in the calculation of liquidated damages, as such calculation should have represented the genuine pre-estimate of **tie**'s losses associated with the delay. Therefore, given that there is a liquidated damage, **tie** would not be able to recover unliquidated damages for losses arising out of a delay to the Longstop Date.

- 1.4 *EOT in relation to Clause 38 for CUS in relation to works other than the BT remedials which may in themselves entitle CUS to EOT but taken in conjunction with the BT remedial works or any remedial works may or may not entitle CUS to EOT. On the basis that CUS will be paid for the physical works undertaken which are not related to any remedial works but entitlement to EOT is the issue.*

**DLAP comment:** there will be no entitlement to EOT if it can be established that the events concerned are concurrent. As stated above, this is a technical matter, which would likely require planning/programming expertise to ascertain.

2. *BO Remedial/Replacement Works – Carillion (CUS) have backfilled a number of utility diversions, throughout all the work sites, with an acceptable alternative material which has subsequently been found to be inadequate and requires to be removed and replaced as remedial works. Please can you give us your view on the following:*

- 2.1 *Recovery of any consequential tie MUDFA costs for staff operational costs/overheads etc resultant from CUS delay related to remedial works*

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**DLAP comment:** tie costs associated with dealing with the remedial works should be recoverable as these costs have been incurred as a consequence of a breach of contract/negligence by the MUDFA Contractor (see e.g. Clause 56.1 and the general principles of set off expressed in the MUDFA). Recovery will be subject to there being the requisite proof of the costs/losses.

- 2.2 *Recovery of any consequential tie costs incurred by CEC / SUC's etc as a result of the remedials*

**DLAP comment:** tie costs should be recoverable as these costs have been incurred as a consequence of a breach of contract/negligence by the MUDFA Contractor (see e.g. Clause 56.1 and the general principles of set off expressed in the MUDFA). Recovery will be subject to there being the requisite proof of the costs/losses.

- 2.3 *Recovery of any consequential tie costs as a result of any delay/adverse impacts on the Infraco programme both in relation to MUDFA LD's and any other avenues open to tie both within the Agreement or at Common law.*

**DLAP comment:** see 1.3

- 2.4 *EOT in relation to Clause 38 for CUS in relation to works other the remedial which may in themselves entitle CUS to EOT but taken in conjunction with the B0 remedial works or any remedial works may or may not entitle CUS to EOT. On the basis that CUS will be paid for the physical works undertaken which are not related to any remedial works but entitlement to EOT is the issue.*

**DLAP comment:** see 1.4

3. *Gogar Depot 800mm water main gaskets – CUS were issued a change in accordance with Clause 46 to install an 800mm water main diversion at the Gogar Depot. The Gogar Depot is on the critical path for the Tram Project to enable the tram vehicles to be housed and driver training etc to be carried out prior to the tram entering into service and as such is the critical construction area within the works. The works are all undertaken in accordance with the Scottish Water specs etc. The required diversion were installed but failed a pressure test it has since been established and agreed by CUS that CUS have installed the wrong gaskets to the pipe joints which require the majority of the installed pipe line to be removed to allow the gaskets at the joints to be replaced with the correct gaskets. The resultant remedial works to rectify the gaskets have delayed the commencement of the Infraco works, impacted on the actual progress/method/efficiency etc of the Infraco Contractor for the limited amount of works actually available and has potentially delayed the construction of the Gogar Depot Tram base and the resultant operational commencement of the tram and the delay in revenue – all of which may amount to a significant additional cost to tie. Please can you give us your view on the following (based on two scenarios the first being the Infraco dates and critical completion date for the main to be complete being fully advised and identified by tie and incorporated into the MUDFA programme and the second being incorporation of the water main by CUS into the MUDFA programme for the completion of the water main by a given time but without/limited reference to any Infraco critical dates).*

- 3.1 *Recovery of any consequential tie MUDFA costs for staff operational costs/overheads etc resultant from CUS delay related to remedials*

**DLAP comment:** should be recoverable under both scenarios - see previous comments in 1.2

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- 3.2 *Recovery of any consequential tie costs incurred by CEC / SUC's etc as a result of the remedial*

**DLAP comment: should be recoverable under both scenarios - - see previous comments in 1.3**

- 3.3 *Recovery of any consequential tie costs as a result of any delay/adverse impacts on the Infraco programme both in relation to MUDFA LD's and any other avenues open to tie both within the Agreement or at Common law*

**DLAP comment: see 1.3. There is no difference under either scenario.**

- 3.4 *Recovery of any consequential loss of revenue as a result of the remedial related delay on the into service date of the tram both in relation to MUDFA LD's and any other avenues open to tie both within the Agreement or at Common Law. (Note: As discussed we and our independent loss adjusters are of the opinion that the loss of revenue and all the above associated with the gasket issue cannot be recovered through the OCIP insurance policy and this therefore should not be considered as an option)*

**DLAP comment: see 1.3. There is no difference under either scenario.**

- 3.5 *EOT in relation to Clause 38 for CUS in relation to works other the remedial which may in themselves entitle CUS to EOT but taken in conjunction with the B0 remedial works or any remedial works may or may not entitle CUS to EOT. On the basis that CUS will be paid for the physical works undertaken which are not related to any remedial works but entitlement to EOT is the issue.*

**DLAP comment: see 1.4**

4. *Long Stop Date – as discussed please confirm your view on who 'owns' the long stop period of time from completion of the works as originally envisaged within the Agreement which is approximately 12 weeks and how this may apply to delay/EOT for the following:*

- 4.1 *Original scope of measured works (circa £11.5m) identified within the Schedule 4 BofQ*

**DLAP comment:** Our opinion is that this period which could be described as "terminal float" is owned by the Project/tie because LDs are only triggered on failure to complete by the Longstop Date.

- 4.2 *Original Provisional and Prime cost works (circa £17.5m) identified and included in the Agreement which we believe were anticipated by CUS and as such incorporated/allowed for within the original Schedule 8 Programme incorporated within the Agreement.*

**DLAP comment:** The programme needs to be checked in order to see whether the MUDFA Contractor included these works within programme.

- 4.3 *Changes to the original scope through Clause 46 instructions*

**DLAP comment:** any change to the Longstop Date is a matter for negotiation in agreeing any tie Change. There could be circumstances where it was not appropriate/required for the Longstop Date to be adjusted. Also, it may be more appropriate to have sectional completion with an alternative longstop date dependant on the nature of the change to the scope.

- 4.4 *Potential additional scope of works such as the D&B at the Airport.*

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**DLAP comment:** as above, any change to the Longstop Date is a matter for negotiation in agreeing any **tie** Change. In this circumstance, it may be more appropriate to have sectional completion with an alternative longstop date given the inclusion of design within this works package and **tie's** unlimited liability to EAL.

### 5. Costs of DRP

The undernoted estimates below are subject to the following caveats:

- The costs do not include any allowance for any third parties (e.g. experts or counsel) which may be appointed;
- The costs assume that a discrete issue (as opposed to multiple issues which may be in dispute) is referred for dispute resolution; and
- All figures are given net of any applicable VAT.

#### Internal Dispute Resolution Procedure

Range - £10,000 to £15,000

#### Mediation

Range - £15,000 to £30,000

#### Adjudication

Range - £60,000 to £80,000

#### Court Proceedings

MUDFA provides that Court of Session has exclusive jurisdiction

Range (preparation of summons and service of same only - excluding any subsequent court procedure, hearings etc.) - £20,000 to £30,000

Subsequent procedure in court - legal costs in excess of £100,000 (it is not possible at this time to provide any more detailed an estimate)

### 6. Issues for Discussion/Solutions

- can we argue that Infracore related losses/costs can be differentiated from the other losses/costs included within the calculation of the LDs?
- availability of insurances (OCIP and PII)
- call on the performance bond?
- accelerative measures to be carried out at CUS' cost
- re-negotiation of the depot variation (e.g. reset trigger for LDs ? make it sectional completion but would lose concurrent delay argument)
- negotiation of EAL variation
- commercial leverage?
- argue that LDs relate to original work sectors not new variations?
- operation of the cap on liability
- re-negotiation of the LDs
- quantification of **tie's** losses?
- EOT awards to date and status of the programme?