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18 March 2008

Dear Ms Lindsay,

**EDINBURGH TRAM NETWORK ("ETN")  
DRAFT CONTRACT SUITE AS AT 13 MARCH 2008**

We write to update you on our report yesterday. In our letter, we commented on three areas where we identified the need for further evidence that **tie** has advanced its negotiation with the BBS Consortium to a stage consistent with level of stability and clarity we would expect the ETN contract documentation suite to have reached at notification of intent to award. As you are aware, there have been intensive discussions on all aspects of this matter during the last week.

**1. CORE INFRACO AND TRAMCO CONTRACT TERMS**

There has been measured progress in closing out the core provisions, despite extreme time pressure and interruption for detailed commercial discussion. **tie** has achieved a level of closure and agreement which will support the notification of intent to award letters being dispatched today.

**2. EMPLOYERS REQUIREMENTS**

We reported yesterday that work was outstanding in relation to this key contract schedule. We are instructed by **tie** that both SDS Provider and BBS Consortium are content that the document is now in acceptable form and detail to be used as a contractual scope. Our reservations as to risk emanating from the Employers' Requirements because of deficiency in precision, clarity and link with the core contract provisions have moved now to a level where we do not consider this an obstacle any longer to **tie** committing to a contract award by end of March.

**3. FURTHER TASKS**

**tie** has also indicated to us that receipt of the final Infraco Proposals, an agreed project master programme and the execution of the Network Rail APA are all confirmed.

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We are instructed that the agreed treatment of NR immunisation has been completed and base line scope, price and programme is agreed for Phase 1b and the mechanism for adjustment on exercise of this option will be included in the relevant Infraco Contract Schedule. We understand that **tie** will confirm settled pricing for all major fixed price elements of the Infraco Contract. If **tie** has achieved these objections and BBS has been able to confirm its commitment to abide by these positions, **tie** should have every confidence in closing the contract suite efficiently, commencing with the issue of notification of intention to award today. We would stress that full cooperation of the BBS Consortium on this objective is essential.

4.

Four days of difficult negotiations surrounding the nature of the contractual indemnities provided by BBS Consortium and their interrelationship with the OCIP insurance **tie** has purchased took place after the BBS Consortium unexpectedly raised an entirely new issue regarding their corporate policy not to accept any liability with regard to uninsured third party economic consequential loss.

We have briefed you regarding the detailed contractual provisions to which BBS had already committed and why this was a totally unexpected position, seemingly adopted by Siemens (Germany), obliging Bilfinger Berger to follow suit.

The outcome as regards the commercial position, risk allocation and insurance cover has, we believe, now been adequately analysed and explained to us and to yourself by **tie** and their insurance broker. These matters are ones of fact and risk projection, as opposed to fundamental legal or contractual issues.

The net effect with the draft Infraco Contract provisions is that:

- subject to bullet 2 below, a clause will require adding to state that BBS will not be liable for uninsured consequential economic loss arising from third party claims. This is of course an adjustment to BBS previous preferred bidder position.
- a clause will require adding to set out the final commercial arrangement settled by **tie** (we expect today) regarding BBS's provision of a risk reserve available to **tie** should any third party liability for economic loss eventuate which is not insured under OCIP. This is beneficial commercially to **tie**/CEC.
- a clause will require adding to clarify that BBS will not be liable for any claims which arise as an unavoidable consequence of the Infraco Works (where BBS are in full compliance with their obligations). Here, insurance will protect **tie**/CEC interests, as will the statutory powers under the Tram Acts. This is not a change to the previous contractual position.



## 5. PROCUREMENT RISK

We explained our views on procurement risk in section 10 of our earlier letter. The document provided to us by **tie** (referred to in section 10 of our letter) has been updated by the **tie** Project Director. We have examined this and its explanation on how specifically the BBS Consortium price has moved since preferred bidder appointment. **tie** has a detailed and cogent story and this is an important piece of **tie**'s armour against challenge. It will undoubtedly be tested by Tramlines in their requested debrief session. Presented carefully, **tie**'s explanation should reduce the risk of the losing Infracore bidder sensing any weakness to exploit. We understand from **tie** the losing tram supplier bidder was by some distance more expensive, so that CAF's selection and confirmation as winning party can be robustly justified on pricing grounds alone.

In the round, we do not consider that the issues referred to in 4 above materially alter analysis of procurement risk, though the adjustment is to accommodate BBS's position. The losing preferred bidder approached third party liability issues with similar caution and both stances are conditioned by contractor experience (real and anecdotal) on other operational UK tram schemes.

Yours faithfully

A handwritten signature in black ink that reads 'DLA Piper Scotland'.

**DLA PIPER SCOTLAND LLP**

cc Graeme Bissett, **tie** Limited Strategic Planning Director