PARSONS BRINCKERHOFF LIMITED

SDS CONTRACT

NOVATION PLANNING

Date 14 January 2008

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Executive Summary

The purpose of this document is to review the provisions for novation of the SDS Contract in the light of the current status of the Contract. The document reviews many of the clauses pertaining to novation and considers how these clauses may be applied in the current circumstances

- PB notes that the intent of the Edinburgh Tram Network Business Case was that the deliverables from the SDS contract would be complete and approved prior to award of the Infraco Contract.
    - The detailed design scope is not yet complete.
    - The MUDFA scope is not complete.
- PB notes that ***tie*** has yet to advise on the status of the Employer's Requirements; any reductions in SDS Contract scope to be made prior to novation; and any changes to SDS Contract scope to be made prior to novation
- PB notes that the Draft Novation Agreement included as Schedule 8 to the SDS contract provides for the release by ***tie*** of SDS, and for the release by SDS of ***tie*** from the performance of the duties under the SDS Agreement.
- PB notes the provisions of the Draft Novation Agreement for indemnification by SDS of the Infraco against damage, loss, and expense arising from breaches of the Infraco Contract by the Infraco which are judged to be due to breach by SDS of the novated Agreement.
- PB notes the provisions for payment by ***tie*** of all payments due under the Agreement prior to novation.

The conclusion from the review of the provisions for novation in the current circumstances is that risks would arise for both ***tie*** and PB if the novation were to be invoked under the stated provisions at the same time as the award of the Infraco contract, assuming the Infraco Contract is awarded on or about 28 January 2008.

Accordingly, PB wishes to discuss with ***tie*** the options for:-

- Delaying the date of novation of the SDS Contract
- Changes to the provisions of the Draft Novation Agreement.

1 Principles of Novation of the SDS Contract

1.1 Requirements of the SDS Contract

With reference to Clause 29 of the SDS Contract:-

- The SDS Contract is to be novated to the Infraco at the option of ***tie***
- The scope of the SDS Contract may be reduced by ***tie*** prior to novation
- Changes to scope may be instructed by ***tie*** prior to novation as a result of changes proposed by the Bidders.
- On novation SDS is to provide a collateral warranty in favour of ***tie***
- On novation SDS may be required to sign a Funder's Direct Agreement

With reference to the Draft Novation Agreement included as Schedule 8 to the Contract, this Agreement sets out:-

- The release by ***tie*** of SDS from the further performance of the SDS Provider's duties and obligations under the SDS Agreement
- The release by SDS of ***tie*** from any and all duties, obligations and liabilities owed to the SDS Provider under the SDS Agreement.
- The vesting of remedies against the SDS Provider and against ***tie***.
- Acceptance of liability by the SDS Provider to the Infraco.
- Acceptance of liability by the Infraco.
- Acknowledgement by the SDS Provider that all fees and expenses properly due to the SDS Provider under the SDS Agreement up to the date of the Agreement have been paid by ***tie.***
- Provision for the amendment of the SDS Agreement as defined by Appendix 1 to the Draft Novation Agreement.

1.2 SDS Contract Status at Novation – Planned vs Actual

The current status of the SDS Contract is different now from what was envisaged at novation both when the Edinburgh Tram Network Business Case was drawn up and when the SDS Contract was awarded.

For the ETN Scope key variances can be summarised as follows:-

- With reference to the original master programme, the scope of work to deliver detailed design packages should have been complete and approved prior to award of the Infraco Contract. This scope of work is not complete.

- Completion of the detailed design has been delayed in the past due to delays in the resolution of "Critical Issues". Three issues remain outstanding:-

    - The delay to resolution of the third party agreement between CEC and the SRU. The absence of this agreement will impact the programme to completion of the SDS ETN Scope.

    - The question over approval of the Picardy Place detailed design where PB has been instructed to develop a design which may not be approved by CEC.

    - The delay to agreement on the height of the bridge at Balgreen Road.

For the MUDFA Scope key variances can be summarised as follows:-

- With reference to the original master programme the scope of work to deliver MUDFA Issue-for-construction, (IFC), drawings should have been complete prior award of the Infraco Contract. This scope of work is not complete.

1.3 *tie* Actions Prior to Novation

Partly as a result of the detailed negotiations with the Bidders ***tie*** has introduced changes to the Employer's Requirements. These changes are in addition to earlier changes which modified the Requirements from the version produced by SDS and which has formed the reference for the completion of the preliminary and detailed designs.

Figure 1 shows how the Detailed Design and the Employer's Requirements have evolved. Figure 1 also shows the relationship between the Employer's Requirements and the BBS Offer. Currently the Employer's Requirements, the Detailed Design, and the BBS Offer are not aligned. It is assumed that ***tie*** will have completed the review of the Employer's Requirements prior to novation and will be in a position to advise SDS of any changes which may be required to the detailed design at that point.

It is a pre-requisite for novation that the Design (including any change instructions) conforms with the Requirements. Reference Clause 4.8 of the SDS Contract:-

4.8 If it should be found that the Deliverables do not fulfil the requirements of this Agreement or the needs of any Approval Bodies, the SDS Provider shall at its own expense amend the Deliverable. Such amendment shall be made in accordance with Schedule 9 (Review

Procedure) and such amendment and rectification shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.

In the context of this Clause it is clear that in addition to ensuring that Changes are instructed in order to achieve alignment between the Requirements and the Design ***tie*** must also ensure that the needs of the Approval Bodies will not be adversely affected by any changes instructed.

Currently the SDS Detailed Design conforms to Version 1.x of the Employer's Requirements.

1.4 Outstanding Payments Against SDS Claims

PB notes that the Legal Agreement drafted to formalise the resolution of the claims for additional services submitted on 09 April 2007 and 22 June 2007 has yet to be signed. This agreement defines a payment profile which should be considered in tandem with the arrangements for novation of the SDS Contract.

1.5 *tie* Novation Plan dated 06 December 2007

PB notes the content of the "Novation Plan" provided in draft format by ***tie***. Appendix 1 contains a set of comments on the content of the document.

1.6 SDS Agreement Cross Reference

Table 1 provides a cross reference matrix showing the provisions for novation contained in the SDS Agreement and the links to sections in this document.

2 Provision for Novation

2.1 Contract Reference

At Clause 29.1 the SDS Contract defines the requirement for novation:-

29.1 ***tie*** intends to enter into an infrastructure supply contract with the Infraco. It is a material condition of this Agreement that the SDS Provider shall, if and at the time requested by ***tie***, enter into and execute a Novation Agreement with ***tie*** and the Infraco in the form set out in Schedule 8 (Novation Agreement).

2.2 Impact of Differences between Planned and Actual Contract Status

2.2.1 Incomplete ETN Detailed Design Scope

It is possible that Clause 29 can be applied irrespective of the incomplete status of the detailed design scope. However, it is clear that at the commencement of the SDS Contract all parties were of the view that the deliverables from the contract would have been completed prior to novation. In these circumstances Clause 29 could have been applied at some indeterminate time, but only after completion of the deliverables.

PB understands that ***tie*** is minded to invoke novation of the SDS Contract at the point of award of the Infraco Contract. However, in PB's opinion the alternative of deferring novation to the time when the deliverables have been completed should also be considered. It is clear from the Edinburgh Tram Business Case that the potential difficulty of securing approvals and consents for the detailed design under the constraints imposed by the Heritage City environment was fully appreciated. The procurement strategy was designed to address these difficulties and novation of the SDS Contract was but one aspect of the complete strategy. PB considers that since much of the design has not yet been submitted for approval there is merit in delaying novation until more confidence has been gained that the Stakeholders will be content to sanction progress to construction. Experience through the course of the SDS Contract – especially experience from the Charrette exercise – would suggest that postponement of novation could be the best approach for ***tie*** from a risk management perspective. If novation does proceed as currently envisaged, then in PB's view there is a significant risk of further disruption to the contract programme.

2.2.2 Incomplete MUDFA IFC Scope

Since the MUDFA scope is not novated and in light of the provisions contained in the Draft Novation Agreement for release by ***tie*** of SDS from the further performance of the SDS Provider's duties and obligations under the SDS Agreement, (ref section 5), ***tie*** would have to contract the completion of the MUDFA IFC scope separately if novation were to be exercised prior to completion of the MUDFA deliverables. Given the detailed knowledge of the

SDS team of the MUDFA requirements the option of delaying novation to allow SDS to complete this scope should be considered.

2.3 Action

tie to confirm if the option to novate the SDS Contract is to be taken up and, if so, the intended timing.

3 Provision for Reduction in Scope

3.1 Contract Reference

At Clause 29.2 the SDS Contract provides for the scope to be reduced by ***tie*** prior to novation:-

> 29.2 Notwithstanding the provisions of Clause 15 (Changes), ***tie*** may in its absolute discretion require the reduction of the scope of the Services prior to the execution of the Novation Agreement by the SDS Provider.

Clause 29.2 continues to define the process for valuation of WIP associated with any reduction in scope.

Clause 29.3 defines the process for invoicing payment for the WIP associated with any reduction in scope:-

> 29.3 If the scope of the Services is reduced by ***tie***, then within 30 Business Days of the date of execution of the Novation Agreement by the SDS Provider, the SDS Provider shall submit a valid VAT invoice to ***tie*** for the work in progress certified by ***tie*** in respect of the services which have been removed from the Services to be performed by the SDS Provider.[1]

Clause 29.4 defines the process for payment against any invoice raised under the provisions of Clause 29.3:-

> 29.4 Payment will become due to the SDS Provider on the date of receipt of the valid VAT invoice by ***tie*** and the final date for payment by ***tie*** of such valid VAT invoice shall be 30 days from the date of receipt of such valid VAT invoice.

3.2 Impact of Differences between Planned and Actual Contract Status

3.2.1 Incomplete ETN Detailed Design Scope

There is no impact on the provision for reduction in scope.

3.2.2 Incomplete MUDFA IFC Scope

Since the MUDFA scope is not to be novated, if ***tie*** chooses to exercise the option for novation before the MUDFA scope is complete the SDS Contract scope will have to be reduced by the outstanding MUDFA scope.

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[1] Note that this is the only instance requiring a valuation of WIP prior to novation. The intent of the contract is that all other applications for payment continue as previously with the change of client being the sole difference post-novation

3.3 Action

tie to confirm if any reductions in scope are to be instructed.

4 Provision for Changes to Scope

4.1 Contract Reference

At Clause 29.5 the SDS Contract provides for the scope to be changed as a result of notification by ***tie*** of any changes which arise due to BBS:-

29.5 Within 10 days of any request from ***tie***, the SDS Provider shall provide an Estimate of any changes proposed by the bidders for the Infraco Contract to the scope of the Services or the Deliverables, which have been notified by ***tie*** to the SDS Provider.

4.2 Impact of Differences between Planned and Actual Contract Status

4.2.1 Incomplete ETN Detailed Design Scope

There is no impact on the provision for changes to scope.

4.2.2 Incomplete MUDFA IFC Scope

Since the MUDFA scope is not to be novated there is no impact on the provision for changes to scope.

4.3 Action

tie to instruct any changes to scope.

Note that, with reference to the Draft Final Business Case, PB understands that any changes introduced as a result of changes proposed by the Bidders are to be instructed at the Bidder's risk. The relevant clause is Clause 7.51 of the Draft Final Business case dated November 2006:-

7.51 "...Infraco bidders will prepare their bids on the basis of the emerging SDS designs and the successful bidder will be required to adopt the SDS Provider's design as at the date of Infraco contract signature. Variations to this design could be introduced with the agreement of ***tie*** but at the risk of the Infraco."

5 Collateral Warranty in Favour of *tie*

5.1 Contract Reference

With reference to Clause 29.6 of the SDS Contract:-

On the date of execution of the Novation Agreement, the SDS Provider shall execute a collateral warranty agreement in favour of ***tie*** in the form contained in Schedule 7 (Collateral Warranty Agreement) and provide the same as executed to ***tie*** on that date.

5.2 Action

PB to review the provision of the required Collateral Warranty in favour of ***tie.***

6 Agreements

6.1 Funder's Direct Agreement

With reference to Clause 29.7 of the SDS Contract:-

On the date of execution of the Novation Agreement, the SDS Provider shall, if required by ***tie***, execute a Funder's Direct Agreement and provide the same as executed to the Infraco on that date.

No such requirement has been confirmed by ***tie***.

6.2 Action

None.

7 Release and Vesting of Remedies

7.1 Contract Reference

At Clause 2.1 the Draft Novation Agreement provides for the release by SDS of ***tie***:-

> 2.1 The SDS Provider releases and discharges ***tie*** from any and all duties, obligations and liabilities owed to the SDS Provider under the SDS Agreement and accepts the liability of the Infraco under the SDS Agreement in lieu of ***tie***.

At Clause 3.1 the Draft Novation Agreement provides for the release by ***tie*** of SDS:-

> 3.1 ***tie*** releases and discharges the SDS Provider from the further performance of the SDS Provider's duties and obligations under the SDS Agreement.

At Clause 5 the Draft Novation Agreement provides for the vesting of remedies against the SDS Provider:-

> All rights of action and remedies against the SDS Provider under and pursuant to the SDS Agreement vested in ***tie*** shall from the date of this Agreement vest in the Infraco.

At Clause 7 the Draft Novation Agreement provides for the vesting of remedies against ***tie***:-

> All rights of action and remedies under or pursuant to the SDS Agreement vested in the SDS Provider shall from the date of this Agreement lie against the Infraco and not ***tie***.

7.2 Impact of Differences between Planned and Actual Contract Status

7.2.1 Incomplete ETN Detailed Design Scope

The only change due to these Clauses from the SDS perspective is a change of client. Hence, strictly there is no impact from the incomplete ETN detailed design scope. However, consideration should be given to the impact of the early release of ***tie*** given the need for outstanding approvals and consents to be secured and given that the three critical issues highlighted in section 1.2 remaining to be resolved. It could be argued that ***tie*** is better placed than the Infraco to deal with these items, and that programme slippage could arise as a consequence of any early release of ***tie***.

7.2.2 Incomplete MUDFA IFC Scope

Since the MUDFA scope is not novated the impact of the release by ***tie*** of SDS is that alternative arrangements have to be put in place by ***tie*** for the completion of the remaining MUDFA scope. This introduces risk to ***tie***.

7.3 Outstanding Payments Against SDS Claims

If the Legal Agreement referred to at 1.4 above is not to be signed prior to novation then under the terms of the release by SDS of ***tie*** referred to above the balance of the claims dated 09 April 2007 and 22 June 2007 should be paid in full prior to signing the (Draft) Novation Agreement.

7.4 Action

tie to confirm if the option to novate the SDS Contract is to be taken up and, if so, the intended timing.

tie to confirm the proposals for payment of the SDS Claims.

8 Acceptance of Liability

8.1 Contract Reference

At Clause 4 the Draft Novation Agreement provides for the acceptance of liability of the SDS Provider to the Infraco:-

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***.

4.2 The SDS Provider warrants to the Infraco that, in respect of the duties and obligations which it has already performed under the SDS Agreement, it has performed those duties and obligations in accordance with the standards of skill and care set out in the SDS Agreement. The SDS Provider warrants to the Infraco that it shall be liable for any loss or damage suffered or incurred by the Infraco arising out of any negligent act, default or breach by the SDS Provider in the performance of its obligations under the SDS Agreement prior to the date of this Agreement. The SDS Provider shall be liable for such loss or damage notwithstanding that such loss or damage would not have been suffered or incurred by ***tie*** (or suffered or incurred to the same extent by ***tie***).

4.3 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.

4.4 The SDS Provider acknowledges that the Infraco has and shall continue to rely upon all Services carried out by the SDS Provider.

At Clause 6 the Draft Novation Agreement provides for the acceptance of liability by the Infraco:-

> 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.

8.2 Commentary

The following passage is an extract from a presentation to the Society of Construction Law in March 2005. It contains some relevant observations in the context of Clause 4 of the Draft Novation Agreement:-

Some novation agreements contain this sort of clause:

> *'The liability of the Consultant under the Appointment whether accruing before or after the date of this Novation shall be to the Contractor and the Consultant agrees to perform the Appointment and to be bound by the terms of the Appointment in all respects as if the Contractor had always been named as a party to the Appointment in place of the Employer.'*

There may be room for debate over what this clause means, or what is the effect of an agreement containing such a clause. It may simply refer to the performance of the consultant's services following novation. If so, that ought to be made clear.

However, if it means that the performance of the consultant prior to novation and his potential liability for work done prior to novation will be judged on the fictitious basis that during that time the consultant had in fact been engaged by the contractor, it would involve a retrospective variation in the scope of the consultant's duty. That would be unacceptable to the consultant and its professional indemnity insurers, and it would not be commercial sense from the consultant's point of view. It would also be departing from the principles of a novation.

The clause above was taken from the contract in the Scottish case of Blyth & Blyth v Carillion Construction Ltd. The contract there continued as follows:

> *'... the Consultant agrees that any services performed under the Appointment by the Consultant or payments made pursuant to the Appointment by the Employer to the Consultant before the date of this Novation will be treated as services performed for or payments made by the Contractor and Consultant agrees to be liable to the Contractor in respect of all such services and in respect of any breach of the Appointment occurring before the date of this Novation as if the Contractor had always been named as a party to the Appointment in place of the Employer.'*

Now this really does look as though the intention was to alter the scope of the consultant's liability retrospectively, but the judge was not convinced. He pointed out that it would produce nonsensical results and a conflict of interest, and said:

> *"It would in any event be inherently unlikely that the parties should intend the effect of the Novation Agreement to be that of re-casting a duty owed and performed to the employer as being a duty owed to the contractor retrospectively.'*

Counsel acting for the contractors conceded that that must be so. However, this effectively doomed the contractor's claim. The claim was based on alleged deficiencies in the Employer's Requirements, which had been prepared by the consultants. These deficiencies, said the contractors, led to their tender being too low, and as they had now accepted responsibility for the design, they had to bear this loss.

However, this was clearly not the kind of loss which the consultants were under any duty to the employer to use reasonable skill and care to avoid, so no claim could be made against them, without recasting their duty retrospectively.

Some English commentators have been a bit sniffy about the Blyth & Blyth judgment. It is worth just bearing in mind that, as I mentioned earlier, novation is a concept borrowed from Roman law, and Scottish law, unlike English law, is based on Roman law. One would, therefore, expect a judge in Scotland to understand how novation is meant to work.

Notwithstanding what the judge said and what the contractor's counsel conceded in Blyth & Blyth, those sort of clauses, saying that the consultant should be treated as having been engaged by the contractor from the outset, should be avoided. At best, they are meaningless. At worst, they could in fact be interpreted as varying the scope of the consultant's duty retrospectively.

8.3 Action

The wording of Clause 4 of the Draft Novation Agreement should be reviewed in light of the above.

9 Acknowledgement of Payment

9.1 Contract Reference

At Clause 8 the Draft Novation Agreement provides for acknowledgement of payment by ***tie***:-

> The SDS Provider acknowledges that all fees and expenses properly due to the SDS Provider under the SDS Agreement up to the date of this Agreement have been paid by ***tie*** except sums which have been agreed to be due to the SDS Provider in accordance with Clause 12.7.3 and/or Clause 29.4 of the SDS Agreement and which have not been paid by ***tie***.

Sums due in accordance with Clause 12.7.3 are those due for payment of retentions. Clause 12.7.3 should be read in conjunction with Clause 12.7.1 and Clause 12.7.2:-

12.7.1 Prior to the date of execution of the Novation Agreement by the SDS Provider and the date of execution of the Funder's Direct Agreement by the SDS Provider, the SDS Provider shall submit a VAT invoice to ***tie*** for ninety seven per cent (97%) of the sum certified in each relevant Interim Certificate. ***tie*** shall retain three per cent (3%) of such sums certified in each relevant Interim Certificate (the "Retention"). Payment will become due to the SDS Provider on the date of issue of such Interim Certificate by ***tie*** and subject to Clauses 12.5 and 12.6, the final date for payment of such valid VAT invoice shall be 30 days from the date of issue of the Interim Certificate.

12.7.2 Within 30 Business Days of the date of execution of the Novation Agreement by the SDS Provider and the date of execution of the Funder's Direct Agreement by the SDS Provider or the SDS Provider being notified in writing by ***tie*** that the Novation Agreement is not to be executed by the SDS Provider and/or that that the Funder's Direct Agreement is not to be executed by the SDS Provider, the SDS Provider shall issue a valid VAT invoice to ***tie*** for one hundred per cent (100%) of the total of all Retentions retained in accordance with Clause 12.7.1.

12.7.3 Payment will become due to the SDS Provider on the date of receipt of the valid VAT invoice by ***tie*** and the final date for payment of such valid VAT invoice by ***tie*** shall be 30 days from the date of receipt of such valid VAT invoice.

Sums due in accordance with Clause 29.4 are those due for WIP associated with any reduction in scope as described in section 1.2 above.

9.2 Impact of Differences between Planned and Actual Contract Status

9.2.1 Incomplete ETN Detailed Design Scope

There should be no impact on the provisions for payment from the incomplete status of the ETN Design Scope. The diagram demonstrates that the only difference from the PB perspective is that Applications for Payment post-novation will be routed to the Infraco Contractor rather than to ***tie***. Continuity of payment is assured under the provisions of the SDS Contract.

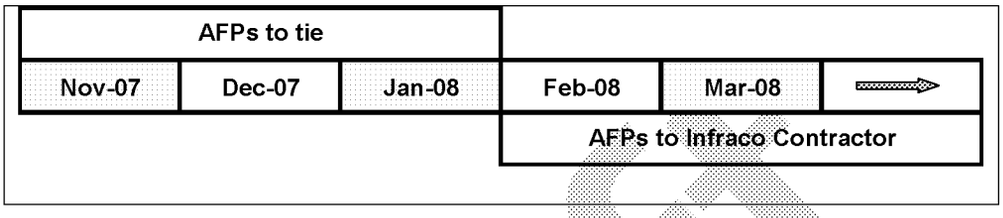

Chart 1 Application for Payment Process

9.2.2 Incomplete MUDFA IFC Scope

There should be no impact on the provisions for payment from the incomplete status of the MUDFA Scope. All payments associated with the MUDFA scope should be completed prior to novation.

9.3 Action

tie to complete the processing of all payments due under the SDS Agreement.

10 Amendment of the SDS Agreement

10.1 Contract Reference

10.1.1 Draft Novation Agreement

At Clause 9 the Draft Novation Agreement provides for amendment to the SDS Agreement as defined at Appendix 1 to the Draft Novation Agreement:-

> ***tie***, the SDS Provider and the Infraco agree that the terms of the SDS Agreement shall be and are varied in the manner set out in Appendix 1 to this Agreement.

The principal provisions of Appendix 1 are reviewed in the following sections.

10.1.2 Appendix 1. Clause 3 - Duty of Care, Standards and the Services to be Provided

The following Clauses are to be inserted-

3.28 The SDS Provider is aware and has knowledge of all the terms and conditions of the Infraco Contract (in so far as the same has been supplied to the SDS Provider) so that in so far as is consistent with its terms the SDS Provider shall not cause the Infraco to be in breach of the provisions of the Infraco Contract to be observed and performed and complied with by the Infraco in so far as they relate and apply to the Services, and is further aware and has taken and shall continue to take full account of the obligations to be undertaken and the liabilities which may be incurred by the Infraco therein in relation to the Services.

3.29 The SDS Provider acknowledges that any breach by it of this Agreement may result in the Infraco committing breaches of and becoming liable for damages under the Infraco Contract and other contracts made by it in connection with the Infraco Contract and may occasion further loss or expense to the Infraco in connection with the Infraco Contract and all such damage, loss and expense is hereby agreed to be within the contemplation of the Parties as being the probable results of any such breach by the SDS Provider. The SDS Provider shall indemnify the Infraco against all such damage, loss and expense.

3.30 The SDS Provider shall observe, perform and comply with all the provisions of the Infraco Contract (in so far as the same has been supplied to the SDS Provider) on the Infraco's part to be observed, performed and complied within so far as they relate and apply to the performance of the Services and the SDS Provider shall be liable to the Infraco for:

3.30.1 any breach, non-observance or non-performance for which the SDS Provider is responsible of any of the provisions of the Infraco Contract in so far as they relate and apply to the performance of Services; and

3.30.2 any act or omission for which the SDS Provider is responsible which involves the Infraco in any liability to ***tie*** under the provisions of the Infraco Contract in so far as they relate and apply to the performance of Services; and

3.30.3 any claim, damage, loss or expense due to or resulting from any negligence or breach of duty for which the SDS Provider is responsible.

10.1.3 Appendix 1. Clause 4 - Development, Review, Finalisation and Delivery of the Deliverables

The following new Clause is to be added:--

4.14 In addition to the other requirements of this Clause 4, the SDS Provider shall support the Client as required in relation to the maintenance and provision of any records, drawings, registers, manuals and/or reports as may be required under the Infraco Contract.

10.1.4 Appendix 1. Clause 7.5 - Extensions of Time

A set of new Clauses 7.5.1 to 7.5.6 is proposed in place of Clause 7.5.

10.1.5 Appendix 1. Clause 15 - Changes

An additional Clause 15.15 is proposed.

10.2 Impact of Differences between Planned and Actual Contract Status

10.2.1 Incomplete ETN Detailed Design Scope

Given the incomplete nature of the ETN detailed design scope the proposed Clauses 3.28, 3.29, and 3.30 become much more onerous than they would have been under the circumstances envisaged at contract award when the SDS Design would have been complete and approved at novation. Experience to date of dealing with the Stakeholders suggests that further delays to programme can be expected and in these circumstances Clauses 3.28, 3.29, and 3.30 introduce unacceptable risk for PB.

The provisions of Clause 4.14 are also potentially more onerous than would have been the case if the SDS Design were complete and approved.

10.2.2 Incomplete MUDFA IFC Scope

Since the MUDFA scope is not to be novated there is no impact on the provisions for the SDS Contract to be amended.

10.3 Other Observations

The periods of time proposed in Clause 7.5.5 - Extension of Time - are regarded as to short given the experience of dealing with time barring provisions under the current SDS Agreement.

10.4 Action

tie and PB to consider the potential alternatives of a delay to novation or a change to the wording of the proposed amendments to the SDS Agreement.

FIGURE 1

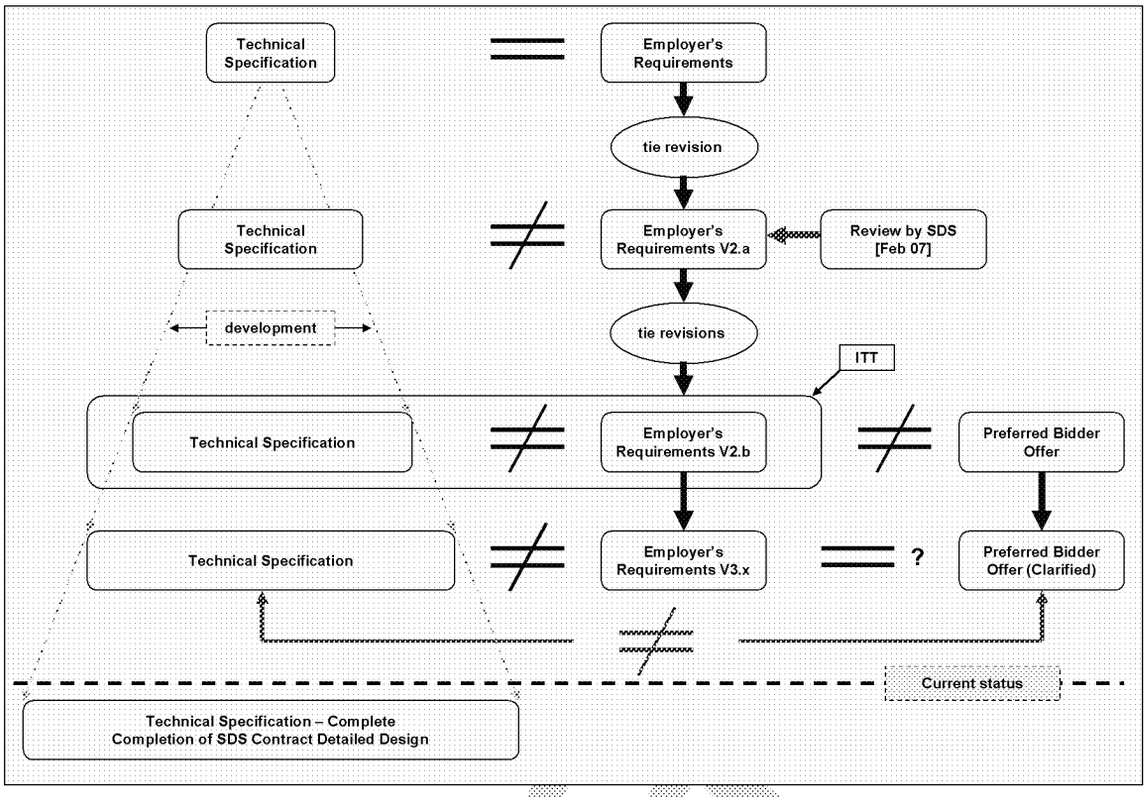

Figure 1 **Evolution of the Misalignment of the SDS Detailed Design; the *tie* Employer's Requirements; and the BBS Offer**

TABLE 1

Cross Reference Matrix between

The SDS Agreement and This Document

			This Document Section References									
			1	2	3	4	5	6	7	8	9	10
SDS Contract Clauses	**Novation, Collateral Warranty in favour of tie, Funder's Direct Agreement and Agreement between the JRC and the SDS Provider**											
	29.1	SDS to enter into Novation Agreement	♦	♦								
	29.2	Reduction in Scope & Calculation of WIP	♦		♦							
	29.3	Invoicing of Reduced Scope WIP	♦		♦							
	29.4	Payment of Reduced Scope WIP	♦		♦							
	29.5	Changes to Scope	♦			♦						
	29.6	Collateral Warranty in favour of ***tie***	♦				♦					
	29.7	Funder's Direct Agreement	♦					♦				
	29.8	Entry into the JRC Agreement										
	29.9	Deployment of the SDS-JRC Modelling suite										
Draft Novation Agreement		Background										
	1	Definitions & Interpretation										
	2	Release by the SDS Provider of ***tie***	♦						♦			
	3	Release by ***tie*** of the SDS Provider	♦						♦			
	4	Acceptance of Liability by the SDS Provider to the Infraco	♦							♦		
	5	Vesting of Remedies against SDS Provider	♦						♦			
	6	Acceptance of Liability by the Infraco	♦							♦		
	7	Vesting of Remedies against ***tie***	♦						♦			
	8	Acknowledgement of Payment	♦								♦	
	9	Amendment of SDS Agreement	♦									♦
	10	Affirmation of SDS Agreement										
	11	Rights of Third Parties										
	12	Law & Jurisdiction										
Appendix 1	Cl 3	Duty of Care, Standards and the Services to be Provided										♦
	Cl 4	Development, Review, Finalisation & Delivery of the Deliverables										♦
	Cl 7.5	Extensions of Time										♦
	Cl 15	Changes										♦
	Cl 19	Termination for SDS Provider Default										
	Cl 20	Termination, Abandonment or Suspension of the Services by Client										
	Cl 22	Termination for Corrupt Gifts and Payments										
	Cl 30	Assignation, Changes In Legal Status And In Control										

APPENDIX 1

Commentary on the "Novation Plan" Proposed by *tie*

Tie Proposed Novation Plan		PB Comments
1.0 Purpose		
1.1 The purpose of this plan is to set out the principles, steps and programme necessary to effect the novation of SDS to Infraco as agreed between SDS, BBS and **tie**.		
1.2 The Project Procurement Strategy requires the novation of SDS to Infraco to maintain the single point responsibility for design, construction, commissioning, maintenance, affordability and risk allocation objectives of the strategy.		
1.3 The plan addresses the following aspects:-		
• Contractual requirements		
• Scope of novation		
• Technical – the issues that need to be addressed to enable novation to proceed without creating disconnects in designs and specifications of the respective parties		
• Programme for novation – the steps to conclude a novation at Financial Close		
2.0 Contractual		
2.1 The novation will be effected via the draft novation agreement contained in schedule eight of the SDS contract. The novation agreement will contain the following:-		
• Changes to the SDS contract terms via Appendix 1		
• Scope to be provided direct to **tie**		This is not contemplated by the SDS Contract
• SDS Disclosure Statement		This is not provided for in the SDS Contract
• Status Of Design		

• Status Of Consents		
• Statement of Commercial Position		
• Collateral Warranty from Halcrow		
• Agreed Detailed Design Standard (See para 7 below)		
The content of these sections is defined below.		
2.2 A collateral warranty is required from Halcrow in the form attached. This is to be provided at the same time as the signature of the novation agreement and novation is conditional upon its provision. No collateral warranties are required from Courderoys or Ian White Associates (*BBS to confirm*). The Form of Warranty is enclosed as Appendix A.		The requirement for a collateral warranty from Halcrow is stated at Clause 9.5 in connection with the appointment of SDS Provider Parties and not in the Clauses specifically related to novation. Nevertheless, Halcrow has committed to provide a collateral warranty assuming a suitable form of words can be agreed
2.3 Changes to the SDS contract terms are as follows (drafting to be agreed where appropriate:-		
• In Schedule 1 reference to "tie" to be substituted with "Client"		Accepted
• In Schedule 1 the services referred to in Section 3 below will be deleted.		Under the provisions of Clause 29.2?
• Schedule 11 clause 1.4 shall be amended as follows:-		
Delete current clause 1.4 and substitiute:-		
"1.4 Edinburgh Tram Network operations shall support the following journey times:		Review
1. Phase 1a – Airport to Ocean Terminal (Newhaven ?) shall have an end to end journey time including layover of ???? all runtime assumptions shall be agreed by **tie.**		Review
2. Phase 1b – Ocean Terminal to Granton Square shall have an end to end journey time including layover of ???? All runtime assumptions shall be agreed by **tie.**		Review
3. Common corridor – The section between Haymarket and Ocean Terminal shall have an end to end journey time including layover of ???? All runtime		Review

assumptions shall be agreed by **tie.”**		
• The above changes will be added to those currently in the Draft Novation Agreement included in the SDS contract.		Why should these specific items be included within the Draft Novation Agreement when they form part of the contract to which the Draft Novation Agreement refers?
3.0 Scope to Be Provided Direct To tie		
3.1 A direct contract will be established between tie and SDS at the same time as the novation agreement is signed. The scope of this contract (“the Services”) will be for:-		This is not contemplated by the SDS Contract. The Draft Novation Agreement specifically provides for release by ***tie*** of SDS from the further performance of the SDS Provider's duties and obligations under the SDS Agreement.
• Provide technical support and advice, including but not limited to feasibility, preliminary, detailed design and obtaining all ancilliary consents, necessary to enable tie and CEC to		
○ obtain core traffic regulation orders (TROs)		
○ obtain TROs for wider area traffic measures		
• Provide technical support and advice, including but not limited to feasibility, preliminary, detailed design for wider area traffic measures including those outside the LOD and LLAU which are necessary to enable the traffic system in Edinburgh to operate at optimal level following completion of the Edinburgh Tram Network.		
• Provision of utilities designs in accordance with Schedule 1 including general technical support and on-site support for these works and in accordance with any Changes in respect of utilities designs		
• Provision of design and technical support in respect of future extensions to the scheme as **tie** may from time to time instruct. The extent of such services remains at **tie’s** discretion and **tie** reserves the right to tender such services. The option included in		

the direct contract does not represent prequalification of SDS for any such tender shortlist for such services.		
• Provision of such other design and technical support in respect of the Edinburgh Tram Network as **tie** may from time to time instruct		
3.2 The terms of the contract between tie and SDS will be as those contained in the SDS Contract dated 19th September 2005 with the following changes:-		If any separate contract were to be established the terms and conditions of the existing SDS Contract would not be appropriate for the scope of work contemplated. If a separate contract were agreed it should be awarded on a time and expenses basis
• Schedule 1 – shall be as Appendix B to this Plan		
• Schedule 2 – Key Personnel shall be Alan Dolan, David Pluse, Brian McCreer, Chris Reed, Warren Murphy + Tom Kelly's replacement. These personnel shall not provide services to BBS until such time as their work supporting tie under this direct contract are completed, unless otherwise agreed in writing by **tie**. Confidentiality Agreements will be required from these individuals to ensure that no breaches of confidentiality in respect of the services provided direct, particularly in respect of BBS, and that conflicts of interest with BBS are avoided.		
• Schedule 3 - Pricing Schedule shall be as Appendix C to this Plan		
• Schedule 4 – Programme shall be as Appendix D to this Plan		
• Schedule 5 – Deleted		
• Schedule 6 – Insurances shall be as included in the current contract		
• Schedule 7 – Deleted (the collateral warranty will be incorporated into this contract)		
• Schedule 8 – Novation Agreement – Deleted		
• Schedule 9 – Review Procedure shall be as included in the current contract		

• Schedule 10 – Panels For The Dispute Resolution Procedure shall be as included in the current contract		
• Schedule 11 – Requirements Specification for Overall System Operational and Performance Requirements shall be as included in the current contract in so far as it relates to the scope of this contract		
• Schedule 12 - Requirements Specification for Civil Engineering shall be as included in the current contract in so far as it relates to the scope of this contract		
• Schedule 13 - Requirements Specification for Supervision, Command And Control Suite Of Systems shall be as included in the current contract in so far as it relates to the scope of this contract		
• Schedule 14 – Requirements Specification for Electrification & Power shall be as included in the current contract in so far as it relates to the scope of this contract		
• Schedule 15 – Requirements Specification for Tram Vehicle shall be as included in the current contract in so far as it relates to the scope of this contract		
• Schedule 16 – System – Wide Non – functional Requirements		
• Schedule 17 – Agreement Between the SDS Provider and the Joint Revenue Committee		
• Retention Bond to be provided for the retained scope.		
• Provide a parent company guarantee for the retained scope, in the form contained in the SDS Contract.		
3.3 Requirements Definitions, Preliminary Designs and Detailed Designs as approved by **tie** and as may be delivered and approved by **tie** under the novated contract to Infraco shall be incorporated into this contract to the extent that they are required in order to deliver the Services.		Note that ***tie*** has yet to confirm the definition of the Employer's Requirements for the scheme

4.0 SDS Disclosure Statement		
4.1 In order that the status of the SDS contract pre and post novation is clear details of the status of progress and commercial position must be clearly stated within the novation agreement. To this end SDS warrant the following to Infraco as at the point of Novation (practically the position at 5th January 2008:-		PB will provide a status report on the SDS Contract. The provision of any warrants should be of the form set out in the SDS Contract and the Schedules attached thereto. No other warrants should be required. The comments here are made as clarifications to the items raised.
• that **tie's** liabilities are discharged in terms of payments, save as expressly carved out.		This is a pre-requisite for Novation
• that the design fits within the LoDs advising where this is not the case and the implications for the design delivery.		The status of the design should be clear from ***tie***'s management perspective. No further warrant is required
• SDS have complied with their obligations under Clause 3 of the SDS Contract specifically and that no extensions of time or other claims are sought or anticipated to be sought from **tie** in respect of events, actions or inactions prior to the date of novation or events, actions or inactions foreseeable at the date of novation.		
• the full scope of design deliverables produced for **tie** and the status of each along with relevant consents. See appendix E.		Status report to be provided
• the status of the identified design deliverables as being capable of deployment by the Infraco without further design refinement. See Appendix E.		Status report to be provided
• that there are no claims or disputes regarding its design deliverables.		
• that the design meets the Employer's Requirements as at the date of Novation, including compliance with the Noise and Vibration Policy, code of Construction Practice and Environmental Statement and the like.		PB awaits ***tie***'s advice on the status of the Employer's Requirements
• that the design complies with Consents (including Land Consents)		The status of the design should be clear from ***tie***'s management perspective. No further

	and Special Requirements.	warrant is required
	• That the designs take account of and incorporate the requirements of Third Party Agreements and Parliamentary Undertakings.	The status of the design should be clear from ***tie***'s management perspective. No further warrant is required. However, in this particular case it should be noted that the Third Party Agreement with SRU is still not in force.
	• That there are no Changes in Law which affect the designs as currently completed or to be completed (Preliminary Design or Detailed Design)	
4.2	In addition SDS are to	
	• identify any outstanding design deliverables, the programme. See Appendix E.	Status report to be provided
	• costs for the production and finalisation of outstanding design deliverable post novation in accordance with the SDS Contract and Changes instructed as at the date of Novation. See Appendix F	The costs for any changes instructed by ***tie*** will be provided by SDS
	• confirm in the novation agreement that they are responsible for obtaining the listed Consents and will be obliged to obtain those Consents (including Building Fixing consents/agreements) in accordance with the BBS programme. The listed consents are as set out in Appendix E.	SDS's responsibility for obtaining consents is defined by the SDS Contract. SDS cannot agree that it is obliged to obtain any such consents in accordance with the BBS programme. Under the original provisions of the Contract all such consents would have been secured prior to novation – and this could still apply dependent upon the timing of novation.
	• confirm the status of all consents which it has sought in connection with its design and project support services. The status of consents currently is as set out in Appendix E.	Status report to be provided
	• confirm provision of collateral warranty for **tie** and CEC as provided for in the SDS Contract.	The SDS Contract provides for a collateral warranty to ***tie***, but not to CEC
	• provide collateral warranties in favour of Network Rail and BAA (EAL)	The SDS Contract does not provide for collateral warranties in favour of Network Rail or BAA.

• confirm any retained scope and Infraco acknowledges this arrangement as set out in Section 3 above.		Not contemplated by the SDS Contract
4.3 **tie** warrant to Infraco **that tie's** payments to SDS are fully up to date and identifies any outstanding payments as carved out of Infraco's obligations as novated client.		
4.4 **tie** is to identify and confirm any retained scope and Infraco acknowledges this arrangement as set out in Section 3 above.		
4.5 **tie**/SDS/Infraco acknowledge full scope of novated SDS services.		
4.6 For the purposes of this Disclosure Statement the status will be as of 5th January 2008.		
5.0 Status Of Design and Consents		
5.1 The status of the design and consents is to be as exists at 5th January 2008. The status summary is to set out in detail:-		
• The design deliverables provided to **tie** (title, description and document reference), their status ie Design Completion notified to **tie**, submitted awaiting comment/approval or acceptance for Prior Approval, submitted with Design Assurance Statement awaiting comment/approval or acceptance for Technical Acceptance, Prior Approval Granted, Technical Approval Granted.		Status report to be provided
• The extent to which each Change has been incorporated into the design deliverables.		Status report to be provided
• For each deliverable the status of any applicable consents i.e. details of the consents required and for each consent for each deliverable consent obtained, consent application submitted and date on which consent expected, date consent application to be		Status report to be provided

submitted and date consent expected.		
• For each deliverable submitted under a Design Assurance Statements whether the design deliverable is capable of deployment by the Infraco without further refinement.		This can only be assessed by BBS
• A copy of the SDS programme progressed for work completed up to 5th January 2008.		Status report to be provided
5.2 The pro formas/current position in respect of the above are to be included in Appendix D so that all parties are clear and agreed on the format and content.		
6.0 Statement Of Commercial Position		
6.1 The commercial position is to be as at 5th January 2008. The format and status is to be as set out in Appendix E. This will set out:-		
• A summary of the financial position for the novated contract		Assistance to be provided to ***tie*** for the production of a status report
○ current contract costs, including accepted changes and changes submitted but not yet agreed,		Assistance to be provided to ***tie*** for the production of a status report
○ payments certified to that date,		Assistance to be provided to ***tie*** for the production of a status report
• A list of the Changes accepted by **tie**		Assistance to be provided to ***tie*** for the production of a status report
6.2 **tie** will pay direct to SDS all payments certified up to 5th January 2008.		***tie*** will pay direct to SDS all payments certified prior to novation.
7.0 Detailed Design Deliverables		
7.1 SDS confirm that their Services include for:-		The services provided are as set out in the SDS Contract. Any attempt to summarise the

		complexities of the SDS Contract as proposed here is certain to result in an incomplete and inconsistent assessment which would potentially introduce unnecessary risks to the novation process
• construction drawings and as built drawings will be provided		
• that in the "System Design Spec" a RAMS analysis/concept is provided with a break down to each function, including vehicles		
• in "Planning Approvals" all approvals to tie, CEC, Network Rail and any other authority is included		
• test & commissioning procedures are included in the "Requirements Test Spec" or the "System Design Test Spec"		
• all changes resulting from BBS amendments in the Employer Requirements and the Tram design as a result of the bidding phase will be covered in this agreement		
8.0 Scope Not Required by BBS		
8.1 BBS do not require the following services and scope to be provided by BBS:-		
• *BBS to advise*		Advice still awaited
8.2 A change order will be issued to reflect this and the SDS Contract Sum adjusted accordingly, to the extent that such services and scope have not already been delivered.		
9.0 Technical		

9.1 The Infraco Employer's Requirements, Infraco Proposals, Tram Vehicle Employer's Requirements, Tramco Proposals and SDS Design (SDS Design is all of the deliverables under the SDS Contract) must align each with the other at novation. This does not mean that each must contain the same statements but that the documents must not conflict with each other.		This whole section should be simplified. ***tie*** is to determine the up-to-date content of the Employer's Requirements, incorporating any changes agreed from the negotiations with BBS. (It is for ***tie*** to ensure that the Stakeholders are in agreement with any revisions which may be deemed necessary). ***tie*** is then to determine whether any changes should be instructed to the SDS design in accordance with Clause 29 of the SDS Contract
9.2 Alignment of the SDS design and Employer's Requirements means:-		
• The SDS design should not conflict with the Employer's Requirements		
• That the SDS designs completed to date will deliver the requirements of the Employer's Requirements		
• That the SDS designs to be completed will deliver the requirements of the Employer's Requirements		
• Where conflicts are identified SDS advise **tie** and **tie** decide the action required to bring about alignment (either a change to the Employer's Requirements or a change to the SDS design)		
The SDS design and Infraco Proposals also need to align. This means that:-		
• There should be no conflicts between the Infraco Proposals and SDS Design.		
• Where conflicts are identified SDS and BBS advise **tie** and **tie** decide the action required to bring about alignment (either a change to the Infraco Proposals or a change to the SDS design)		
9.3 The steps to achieve this are:-		

	• BBS to advise the elements of system for which SDS design is not required. We believe that this applies principally to the systems. BBS have put forward technical proposals for various systems. SDS have produced specifications of varying levels of detail and system architecture drawings which are different and conflict with the BBS proposals. There seems little mileage in SDS revisiting their designs in these areas. BBS need to consider the extent and scope of ongoing SDS support they require to integrate their designs into the design for the whole Network, designs required to obtain planning (prior) approvals to the extent they relate to systems, ongoing performance modelling support required and the like.		
	• The revised scope of designs to be agreed with SDS (This then to be added into the novation plan)		
	• BBS to concurrently agree the alignment of their proposals with the Employer's Requirements (we await your fully marked up ERs and compliance matrix)		
	• Once item 2 is settled SDS are to review and confirm alignment of their remaining design with the Employer's Requirements		
	• BBS to identify any aspects of the remaining SDS design which do not align with their technical proposals. **tie** to then decide on the course of action and instruct accordingly.		
9.4	The possible outcomes of the alignment exercise are:-		
	• Changes to the ERs are instructed by **tie** to ensure alignment with certain elements of the SDS design		
	• Changes to the ERs are instructed by **tie** to ensure alignment with certain elements of the Infraco Proposals		
	• Changes are instructed to the SDS Design to align with Employer's Requirements		
	• Changes are required to the Infraco Proposals to align with the		

SDS design		
• Certain elements of the SDS design completed to date are agreed as redundant (they having been superceded by the Infraco Proposals as accepted by **tie**		
• Changes are required to the Tramco Proposals to align with the Employer's Requirements		
• Changes are required to the Employer's Requirements to align with the Tramco Proposals		
• Changes are required to the SDS Designs to align with the Tramco Proposals		
9.4 It is not necessary for the SDS Design to be amended to align by novation but that:-		
• there is clear agreement on how the SDS Design needs to change (as listed in a schedule)		
• there is clear agreement on where the SDS Design completed to date is redundant (as listed in a schedule)		
• the programme for changing the design is agreed		
• any necessary Changes under the SDS contract are agreed to effect amendments to the design to deliver alignment.		
9.5 It is not expected that these changes will be extensive.		
10.0 Programme for Novation		
10.1 The programme for concluding the novation on the 28th January 2008 is:-		
• Halcrow confirm agreement to provide collateral warranty by novation – 10th December 2007		
• Agreement of terms of direct contract between tie and SDS by – 17th December 2007		
• SDS provide draft documents to support the Disclosure Statement		

	by – 20th December 2007		
	• SDS provide final documents to support Disclosure Statement by – 5th January 2008.		
	• SDS/tie/BBS sign novation agreement – 28th January 2008		
	• SDS/tie sign direct contract – 28th January 2008		
11.0	**Agreement**		
11.1	**tie**, SDS and BBS confirm their agreement to this Plan.		