
From: Trudi Craggs
Sent: 12 June 2007 07:23
To: Matthew Crosse
Cc: Geoff Gilbert; David Crawley; Lesley McCourt; Frances Hamilton
Subject: RE: LOD's

Matthew

Happy to discuss both.

Frances I will come up and see you this morning re my availability over the next couple of weeks.

Trudi

From: Matthew Crosse
Sent: Mon 11/06/2007 20:04
To: Trudi Craggs
Cc: Geoff Gilbert; David Crawley; Lesley McCourt
Subject: RE: LOD's

Trudi

Let's get something in the diary.
Can we talk about the SDS prolongation claim too?

Frances: pls arrange 2 hrs session to talk about SDS/ LoD

Thanks

Matthew

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From: Trudi Craggs
Sent: 04 June 2007 09:18
To: Matthew Crosse; Lesley McCourt
Cc: Geoff Gilbert; David Crawley
Subject: RE: LOD's

Geoff/Matthew

Has this meeting been set up/happened yet?

Lesley's summary is useful.

However the issue is wider than the Constitution Street issue and I think we need to break down the issues as follows:-

- road design
- utilities design
- tram design, construction and operation

as I think that there may be different positions for each situation given that the acts do allow for work outside the LOD.

Trudi

From: Matthew Crosse
Sent: Thu 17/05/2007 16:02
To: Lesley McCourt
Cc: Geoff Gilbert; Trudi Craggs; David Crawley
Subject: RE: LOD's

Thanks Lesley

I think we need a session with you, me, Geoff, Dave Crawley and Trudi to debate the issue and options open to us. I am sure there is range of opinions!

Geoff: please can you have Val set this up to suit your commercial calendar.

Thanks

Matthew

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From: Lesley McCourt
Sent: 16 May 2007 11:29
To: Matthew Crosse
Subject: FW: LOD's

Morning Matthew,

I've now had a chance to review the SDS contract and would comment as follows:

- i) The contract does indeed require that the services are carried out in accordance with 'the Tram Legislation'. Further, the contract provides (at 15.8.2) that SDS does not require to implement a client change that would be contrary to Law. This being the case, I think that SDS initial position is correct.

- ii) The contract requires that SDS obtains all necessary consents and approvals and in the event that the deliverables do not fulfil the requirements, amend them at its own cost. This would appear to be the position re: Constitution Street.
- iii) This obligation is supported by provisions relating to no warranty supplied by tie on information provided and tram legislation being defined as the tram bill, subsequent Act or other legislation enacted from time to time.
- iv) On checking the liability clause, this appears to be limited to £10m for each and every breach but the drafting is a bit woolly. The application of damages will be restricted to those that were reasonably foreseeable as a result of the breach.

In summary, I think that the SDS argument is correct but I don't think that it gets them anywhere.

I have tagged and red lined both documents if you would like to go through them if further detail.

I have now completed my review of the Infraco contract and hope to produce a summary table of my comments within the next couple of days.

Regards

Lesley

From: Lesley McCourt
Sent: 14 May 2007 17:14
To: Matthew Crosse
Subject: LOD's

Hi Matthew,

I've had a look at letter that PB has issued relating to LOD's and our response. I've managed to get a copy of the Bill but I haven't as yet seen the SDS contract so the following comments are based upon my knowledge of the EARL TSDS obligations, which I imagine are similar. I'll confirm when I get a hold of the SDS Tram contract if the same applies.

- i) I would agree with PB that its obligations in relation to the design works are governed by the primary obligation to comply with statutory provision, in this case the Tram Act. I do not accept that there can be any 'higher' contractual obligation to 'design a tram system for Edinburgh' as the logical, but absurd, conclusion to this argument would be that SDS could presumably design the entire system out with the provisions of the Act. I would not imagine that there is a contractual mechanism for dealing with derogations from the Act and this would be compelling in terms of contract construction.
- ii) This however does not get SDS of the hook as I would then ask what are they obliged to do? In relation to the Act it appears that powers certainly extend to 'deviate' and 'alter' the design in terms of both the system and the road layouts. This raises some questions:
 - a) Why do the services require to be moved from Constitution Street?
 - b) Can the services be located at a deeper level than is currently envisaged?
 - c) Can the *existing* road layout be altered to accommodate the additional services?

Again, the powers to place apparatus in the road and to 'maintain or change' the position of existing apparatus are clearly covered.

- iii) In relation to SDS specific obligations (going by the EARL TSDS contract) it is likely that SDS is required to design a tram system 'to approval' and that tie provided no warranty in relation to any information provided to SDS, in this case existing utilities. In addition, the EARL contract is drafted in terms of information that the consultant '*has or will have*'. This gets round SDS issues relating to signing the contract before royal assent.
- iv) If this is the case, SDS has signed up to provide a tram design, that complies with both legislation and technical requirements and it is certainly responsible for the costs associated with doing this, irrespective of rework. Has SDS / 3rd parties confirmed that there is no alternative to moving the cables to Constitution Street? If there is no alternative but to move the cables, SDS would be in breach of its

contract for the design works being that it had failed to deliver the design in accordance with the contract. The good news is that tie would be able to recover damages flowing from this breach (I imagine that these would relate to costs for the design in C Street and any works relating to TRO's / TTRO's) *but* I imagine that any increase in construction costs as result of the breach would be too remote to recover from SDS and would be considered to be a secondary financial loss.

When I get can get a copy of the contract I'll be able to let you have a better idea of what's achievable but I thought you'd like a 'heads up' in the mean time. Obviously the foregoing is based on a load of assumptions and I'm happy to be corrected.

Regards

Lesley