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**From:** Anthony Rush [rush\_aj@██████████]  
**Sent:** 28 September 2010 21:05  
**To:** Fitchie, Andrew; Glover, Joanne  
**Subject:** RE: Instructions

My comments are embedded in my suggested revision. Please ring if you require any explanation.

I am not keen on making our client aware of RK's initial (unconsidered) comments.

I think we have to give him the full picture as well.

Tony

Dear Richard,

Further to our telephone call earlier this evening, noted below is a brief synopsis of the current position (relative to our instructions) and the questions which we would be grateful if you would consider and provide us with any comments. Thank you for agreeing to assist us with these queries at short notice and while you have many other commitments.

[We have not shared this email with our clients in advance of sending to you (in the interests of time) and will therefore advise as soon as possible tomorrow morning if there are any amendments to these instructions.]

Attached to this email is a copy of the Performance Bond. I have also attached a copy of the Bilfinger Berger AG Parent Company Guarantee (the Siemens PCG is in substantially similar terms).

### **Synopsis**

**tie** issued a Remediable Termination Notice ("**RTN**") in respect of the defective works on Princes Street on 9 August 2010. Further RTNs have also been issued, as per the list included in the course of conduct RTN subject of our earlier instructions.

The Infraco has disputed that the RTN is valid, but nonetheless submitted a rectification plan on 17 September 2010.

**tie** has reviewed the rectification plan and considers it not to be acceptable for a number of reasons:

- Your proposals are not approved by the relevant Approval Bodies (in particular the Roads Authority and Planning Authority).
- Your proposals are based on advice from unnamed and therefore purported experts and not on adequate factual data obtained by recognised testing methods.
- Your proposals do not address all of the defects present in materials and workmanship.
- The proposal to remove and replace a 300 mm strip of "wearing course" either side of the rail is unacceptable to us.
- The proposal to introduce another form of wearing course in random lengths and locations is not acceptable to us.
- You make no proposal for the transition from the track's rigid construction to the adjacent flexible construction.

The intention is to communicate this rejection of the rectification plan to the Infraco on or before 1 October, as per the contract provisions.

Our clients also issued contemporaneously with the above RTN one which required the Infraco to rectify their lack of suitable supervision of the On-street works. The Infraco have failed to respond to this RTN.

On the 8 September 2010 our Clients issued an RTN requiring the Infraco to rectify their failure to develop an integrated assured design for the On-street trackway. We note that the rectification plan referred to above inter alia admits that the Princes Street Works comprised in part works which were deficient in design.

In addition to the above our client has on six occasions since given the Infraco instructions to rectify defective work to Princes Street.

Our clients are considering the potential actions which may now be taken, against the backdrop of a huge number of considerations and pressures. Bringing about the ongoing negotiations in relation to a commercial arrangement is an essential consideration. Deciding on these options has to react to current set of circumstances and our client is continuously reviewing the best next steps.

The options can be summarised as the following (which are relevant for the questions below):

- do nothing;
- exercise the right to terminate (on 5 Business Days' notice);
- instruct a suspension of the on-street works pursuant to clause 87.1;
- instruct the removal of the work by a third party pursuant to clause 37.2 (the costs of which are recoverable against the Infraco) (other than the RTN, there has been correspondence between the Parties and instructions from **tie** in respect of the carrying out of the rectification works on Princes Street. The Infraco did not comply with these instructions, which led to the issue of the RTN);
- make a call on the Performance Guarantee (an on-demand bond in the sum of £23m);
- make a call on the Parent Company Guarantees (there are separate PCGs for Bilfinger Berger and Siemens, both in identical terms).

Our client is concerned that taking no action at this stage could be perceived to be weak (the current thinking is not to terminate on this RTN). Moreover in the absence of an integrated assured design our client is mindful that to instigate Clause 37.2 it would be necessary to have another designer to produce such a design – the timing of such action would exceed the possible timing to procure termination by the route previously discussed with you.

Our clients are mindful of the potential for the Infraco deeming a tie Default if the suspension period exceed 45 business days – but note that the expiry could be timed to coincide with the timing of the Conduct RTN we will be serving in the next 48 hours.

Questions:

We would be obliged if you could give us your thoughts on the following questions:

1. Would not suspending the works could send a stronger message, as it leaves the possibility of termination open and suspending the works could be seen to take the pressure off the Infraco for those works?
2. What dangers to tie are there in suspending the On-street works?
3. Do you have any further views on the use of suspension?

Do you think there is any gain in our client making it clear that they are taking steps to procure a third party to carry out the rectification works. Would this also fall within the thinking that this could be seen to take the pressure off the Infraco.

1. Is there anything else of which you are aware which could provide a useful legal or tactical option?

2. Must our clients issue a clause 37.2 notice prior to making a call on the Performance Bond? (our view is that there are no 'conditions precedent' to our clients making a call on the Performance Bond other than the issue of a Default Notice to the Infraco at least 14 days prior to presenting the call on the Performance Bond to the Surety).
3. Neither the Performance Bond nor the PCGs contain a prioritisation provision. Is there anything at law, of which you are aware, which would impact upon the order on which either of these instruments should be called, or could these instruments be called simultaneously (for different elements/matters)?
4. Would it be a legally sound option (or would you have any particular concerns) to our clients making a call on the Performance Bond for the money already paid for the (defective) works carried out on Princes Street (approximately £9m), together with a call on the PCG (under clause 2.1) for the parent to perform the rectification works?

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**From:** Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]  
**Sent:** 28 September 2010 20:56  
**To:** Glover, Joanne; rush\_aj@[REDACTED]  
**Subject:** Re: Instructions

Jo

Well done.

In brief:

Add: "the grounds for the Cl87 suspension would not only be the unsatisfactory rect. plan but also the failure to produce a Programme (answering an RTN), no proper superintendence on P Street and no clear plan on design production and an RTN running on these matters.

The question also arises as to whether tie should permitting BSC to proceed against this background, given that tie owes duties to its shareholder which it cannot comply with (regarding the provision of collateral warranties from BSC's subcontractors unavailable because of Infraco breach) and CEC's duties (delegated to tie) as Authorised Undertaker under the Tram Acts."

Tie requires to increase the contractual pressure on BSC. Client suspension is an extreme measure, appropriate only where a serious performance deficiency exists. tie would have 45 BD to determine whether and on what terms to lift the suspension before Infraco could assert a tie Default."

Andrew Fitchie  
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DLA Piper Scotland LLP  
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**From:** Glover, Joanne  
**Sent:** Tuesday, September 28, 2010 08:13 PM  
**To:** Anthony Rush <rush\_aj@[REDACTED]>; Fitchie, Andrew  
**Subject:** Instructions

Draft email - I'm re-reading again simultaneous to circulating to you both. I will then re-send to you both and send to tie with the background, so it doesn't come out of the blue.

I'm at my desk if you have comments.

Jo

**Strictly confidential and legally privileged**

Dear Richard,

Further to our telephone call earlier this evening, noted below is a brief synopsis of the current position (relative to our instructions) and the questions which we would be grateful if you would consider and provide us with any comments. Thank you for agreeing to assist us with these queries at short notice and while you have many other commitments.

[We have not shared this email with our clients in advance of sending to you (in the interests of time) and will therefore advise as soon as possible tomorrow morning if there are any amendments to these instructions.]

Attached to this email is a copy of the Performance Bond. I have also attached a copy of the Bilfinger Berger AG Parent Company Guarantee (the Siemens PCG is in substantially similar terms).

**Synopsis**

**tie** issued a Remediable Termination Notice ("**RTN**") in respect of the defective works on Princes Street on 9 August 2010. Further RTNs have also been issued, as per the list included in the course of conduct RTN subject of our earlier instructions.

The Infraco has disputed that the RTN is valid, but nonetheless submitted a rectification plan on 17 September 2010.

**tie** has reviewed the rectification plan and considers it not to be acceptable for a number of reasons (including the absence of a contractually compliant design). The intention is to communicate this rejection of the rectification plan to the Infraco on or before 1 October, as per the contract provisions.

Our clients are considering the potential actions which may now be taken, against the backdrop of a huge number of considerations and pressures (including the ongoing negotiations in relation to a commercial arrangement). The detail of these options and their application to the current set of facts is currently being developed.

The options can be summarised as the following (which are relevant for the questions below):

- do nothing;
- exercise the right to terminate (on 5 Business Days' notice);
- instruct a suspension of the on-street works pursuant to clause 87.1;
- instruct the removal of the work by a third party pursuant to clause 37.2 (the costs of which are recoverable against the Infraco) (other than the RTN, there has been correspondence between the Parties and instructions from **tie** in respect of the carrying out of the rectification works on Princes Street. The Infraco did not comply with these instructions, which led to the issue of the RTN);
- make a call on the Performance Guarantee (an on-demand bond in the sum of £23m);
- make a call on the Parent Company Guarantees (there are separate PCGs for Bilfinger Berger and Siemens, both in identical terms).

**Questions**

1. We note your initial reaction that suspension could be a difficult and dangerous route, as it could trigger a series of entitlements for the Infraco (Compensation Event; potential **tie** Default for material breach continuing for 45 Business Days). We also note your initial view that not suspending the works could send a stronger message, as it leaves the possibility of termination open and suspending the works could be seen to take the pressure off the Infraco for those works.

A. There is a concern that taking no action at this stage could be perceived to be weak (the current thinking is not to terminate on this RTN). We are also aware that the duration of any suspension is critical (so as not to trigger a **tie** Default). With that in mind, do you have any further views on the use of suspension?

B. Thank you for your earlier suggestion of our clients making it clear that they are taking steps to procure a third party to carry out the rectification works. Would this also fall within the thinking that this could be seen to take the pressure off the Infraco.

C. Is there anything else of which you are aware which could provide a useful legal or tactical option?

2. Must our clients issue a clause 37.2 notice prior to making a call on the Performance Bond? (our view is that there are no 'conditions precedent' to our clients making a call on the Performance Bond other than the issue of a Default Notice to the Infraco at least 14 days prior to presenting the call on the Performance Bond to the Surety).

3. Neither the Performance Bond nor the PCGs contain a prioritisation provision. Is there anything at law, of which you are aware, which would impact upon the order on which either of these instruments should be called, or could these instruments be called simultaneously (for different elements/matters)?

4. Would it be a legally sound option (or would you have any particular concerns) to our clients making a call on the Performance Bond for the money already paid for the (defective) works carried out on Princes Street (approximately £9m), together with a call on the PCG (under clause 2.1) for the parent to perform the rectification works?

If you have any questions, or require any further information, please let me know.

Many thanks once again for your assistance.

Kind regards,  
Joanne

Joanne Glover  
Solicitor

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