

# DRAFT - Not for distribution

## FOISA Exempt

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### Your reference

25.1.201/RWa/5226

### Our reference

AF/SC/310299/1

UKM/29378215.2

Dear Sirs



We act for **tie** Limited and have been instructed to write to you with regard to your letter sent to Tom Aitchison, Chief Executive of City of Edinburgh Council ("CEC") dated the 1 April 2010 (Ref: 25.1.201/RWA/5226). Our client was passed a copy of this letter on the 6 April 2010, the day that it was received by CEC. We understand you will receive separate response from CEC.

Our client is extremely disappointed by the content and tenor of this open letter to the most senior officer of its ultimate owner and the Authorised Undertaker pursuant to the Edinburgh Tram Acts 2006. The intentionally derogatory and tendentious approach taken in this letter puts the BSC Consortium in direct breach of its obligations under Clause 7.3.16 of the Infraco Contract.

We have also advised our client that your publication of these views to CEC is defamatory and we are instructed to advise on our client's rights and legal recourse in this regard. Your observations in the letter are tantamount to an accusation of deliberate dereliction of duty and unprofessional and negligent obduracy by our client. Our client cannot accept this ill-considered commentary (which is part of a pattern of negative and denigrating public communications by you about **tie** Limited) remaining on the public record which seeks, if unanswered, to tarnish the reputation of **tie** and damages the image and Project Vision of the Edinburgh Tram Project.. Our client has reminded you in writing on 18th February 2010 and on various other occasions verbally of your contractual responsibility not to put **tie** Limited or the Edinburgh Tram Project in such a situation. This conduct by the BSC Consortium diverts **tie** management time from the progress of the works and incurs additional unnecessary costs, thereby putting BSC in further breach of its contractual obligations.

We invite you to reconsider the purpose and effect of your unsolicited communication to CEC and provide us with a written and unqualified withdrawal of all of the following untrue and defamatory comments made in your letter:

- "a tactic of bureaucratic time-wasting";
- "the strategy now adopted by **tie** has been described as "ensuring adherence to the contract" but it amounts to little more than deliberate frustration";

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- "...behaviour by **tie** is simply not consistent with that of an organisation wishing to progress the project in an efficient manner or act in the best interest of the City of Edinburgh. In fact, it would appear that such behaviours are more consistent with an organisation wishing to substantially frustrate the process".

In the absence of such unqualified retraction within seven days of the date of this letter, our client reserves its right to take legal action without further notice against the BSC Consortium members and their authorised representatives for defamation and to prevent a repeat by you of any further such defamatory comment or writing.

We turn now to the facts behind matters mentioned in each of the headings in your letter to CEC:

### **COMPENSATION FOR DELAYED UTILITY DIVERSIONS**

Your assertions are contradictory and misrepresent the facts and our client's position. It is a matter of record that our client accepts that you are entitled to compensation arising from delays to utility diversions. Your letter ignores that our client has not abandoned, as you put it, attempts to deal with compensation. They have proposed a process, using provisions of the Infraco Contract, to assess and calculate your entitlement to compensation, whereas you have not complied with your responsibility to present a reasoned and substantiated claim. Moreover, you have been awarded an interim extension of time and loss and expense, without proper contractual justification from you.

You know that work to examine possible On-Street arrangements was not undertaken on the basis of any commitment by our client to outcome or continuance. Our client rejected your various offers [*date*] because acceptance *inter alia* would have placed them in breach of Public law and their obligations to their stakeholders. It is not accurate to call this "unilateral abandonment".

### **INSTRUCTIONS**

You either misread or misrepresent our client's instructions under Clause 80.13 and pursuant to Clause 34.1. Our client has not instructed you to "immediately" progress work on all disputed changes. They have instructed you to carry out those works with "due expedition" as the Infraco Contract provides. Our client rejects your assertions that the instructions are not valid. We are instructed to request a proper explanation from you as to why the instructions are not valid and to remind you that failure to comply with the instructions is a breach of your central obligations to progress the Infraco Works.

### **PERMIT TO COMMENCE WORK AT HAYMARKET**

Our client denies that they have unreasonably refused to issue a Permit to Commence Works in the Haymarket area. The facts are that they have written to you on [*dates: March , April*] giving detailed explanations of their reasons. Whilst you may not agree with our client, you have no grounds to describe their actions within a contractual relationship (to which you say you are committed) in derogatory terms to

a third party. We are instructed to ask you to specify which reasons you define as being "spurious".

### **PROGRAMME**

Our client has explained to you on various occasions in writing their reasons for rejecting your proposed revised programmes. You chose to ignore Clause 60 of the Infraco Contract when you refer to our client's "unilateral abandonment"; this is untrue, since our client is acting in the manner allowed and envisaged by that provision.

### **AUDITS**

Our client is contractually entitled to carry out audits.

### **ADJUDICATION OUTCOMES**

It is factually not correct to claim that Adjudicators determined that our client had failed to administer the terms of the contract timeously. Please refer us to the relevant passages in the awards that support this statement.

We look forward to receiving your prompt responses on each of the matters we have put to you.

Our client requires that you remedy your breach of Clause 7.3.16 and the defamation by the withdrawals as we have asked and that, in addition, you propose in writing how you will make amends and expunge any damage caused to our client. This should include a written statement from any of your authorised representatives who have made contact with third parties to criticise our client, its management or the Edinburgh Tram Project, explaining: what those contacts were and when and how any denigrating or prejudicial statements have been withdrawn in order to expunge damage to our client.

May we please hear from you within the time frame stated for the retractions.

Yours faithfully

**DLA PIPER SCOTLAND LLP**