

## **BRIEFING PAPER ON RIGHTS AND REMEDIES AVAILABLE TO TIE IN CONNECTION WITH FAILURE ON THE PART OF SDS PROVIDER TO PERFORM SERVICES**

### **Contractual Framework**

One of the conditions precedent of the Infraco Contract is that the Infraco enters into a novation agreement with **tie** and the SDS Provider ("**Novation Agreement**") (*Clause 11.1* of the Infraco Contract). On the last date of execution of the Novation Agreement **tie** and the Infraco are to execute a collateral warranty from the SDS Provider in favour of **tie** ("**Collateral Warranty**") (*Clause 11.2* of the Infraco Contract).

### **Obligations of the Infraco in connection with securing performance of the SDS Provider**

The Infraco is obliged to:

- *"procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement"* (*Clause 11.3* of the Infraco Contract);
- *"carry out all required management activities in order to manage the performance of the SDS Services"* (*Clause 11.4* of the Infraco Contract);
- *"use reasonable endeavours to procure that the SDS Provider shall perform any additional services which may be required"* (*Clause 11.7* of the Infraco Contract);
- *"perform all the duties and discharge all the obligations of **tie** under the SDS Agreement"* (*Clause 6.1* of the Novation Agreement)

and subject to any express limitations or rights in relation to the performance of the SDS Provider, the Infraco is wholly liable for the performance of the SDS Provider (*Clause 11.4* of the Infraco Contract).

### **Relief available to the Infraco in the event of non-performance by the SDS Provider in terms of the Infraco Contract**

The Infraco can apply for an extension of time and/or relief from the performance of its obligations and/or claim for additional costs on the occurrence of:

- *"save as excluded by Clause 19.19, failure of the SDS Provider to achieve the release of Issued for Construction Drawings by the date identified in the Programme for the release of*

*such Issued for Construction Drawings" (Schedule Part 1 to the Infraco Contract - Compensation Event "t"); and*

- *"any material breach (as distinct from (t) above) by the SDS Provider of its obligations under the SDS Agreement or in delict in relation to the quality of the Deliverables under the SDS Agreement" (Schedule Part 1 to the Infraco Contract - Compensation Event "u").*

### **Relief available to tie in the event of non-performance by the SDS Provider in terms of the Infraco Contract**

In the event of a claim by the Infraco on the grounds of the occurrence of either of the foregoing events ("t") and/or ("u"):

- if the event is Compensation Event (t), there shall be deducted from any additional costs which Infraco is entitled to recover the amount of liquidated damages recoverable from the SDS Provider pursuant to *Clause 27.7* of the SDS Agreement (as amended by the SDS Novation Agreement) (*Clause 65.12* of the Infraco Contract);
  - the amount of liquidated damages (in terms of *Clause 27.7* of the Novation Agreement) is £8,928.57 in respect of each failure by the SDS Provider to achieve the provision of Issued for Construction Drawings identified in the Design Delivery Programme by the date set out in the Design Delivery Programme for the release of the Issued for Construction Drawings (or within such longer agreed period by the Infraco)
    - the SDS Provider has no liability to pay liquidated damages (1) to the extent that the failure to achieve the release date for Issued for Construction Drawings is the failure of tie or the CEC to approve the SDS submission of the Design Deliverables within the requisite periods set by the Design Management Plan and/or Design Delivery Programme; or (2) the total aggregate liquidated damages exceed £1,000,000.
- if the event is Compensation Event (u), there shall be deducted from any additional costs which Infraco is entitled to recover the full amount recoverable by Infraco (that is to say up to ten million pounds (£10,000,000) for each and every event) pursuant to the SDS Agreement and specifically *Clause 27* (as amended by the SDS Novation Agreement) as a result of the occurrence of such Compensation Event (*Clause 65.13* of the Infraco Contract)

- the SDS Provider's total liability under the SDS Agreement whether in contract, delict or howsoever arising shall not exceed the sum of £10,000,000 in respect of each and every claim other than in respect of claims arising from pollution or contamination where the limit of indemnity of £10,000,000 applies to any one claim and in aggregate during the policy period.

The Infraco is not entitled to any relief or compensation and the provisions of *Clause 65 (Compensation Events)* do not apply in the event that Infraco Design is:

- not submitted to the SDS Provider in accordance with the Consents Programme and Schedule *Part 14 (Review Procedure and Design Management Plan)*; or
- is rejected by the Approvals Body on grounds of content or quality but not, for the avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals (*Clause 19.19* of the Infraco Contract).

In addition, in assessing any delay or extension of time or costs or relief for the purpose of *Clause 65 (Compensation Events)*, **tie** shall:

- not take into account any event or cause of delay or costs which is caused by any negligence, default or breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties (*Clause 65.8.1* of the Infraco Contract); and
- take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs (*Clause 65.8.2* of the Infraco Contract).

The liability of the Infraco, in the case of any liability arising solely from the breach of contract or negligent acts or omissions of the SDS Provider, is, however, capped at an aggregate amount of ten million pounds (£10,000,000) for each and every event, save in relation to liability for pollution or contamination which is restricted to an aggregate cap of ten million pounds (£10,000,000).

### **Relief available to tie in the event of non-performance by the SDS Provider in terms of the Novation Agreement**

In terms of *Clause 8.8* of the Novation Agreement, **tie** is entitled to deduct the sum of £8,928.57 from the Incentivisation Payment (amounting to £1,000,000) on each occasion that the SDS Provider does not achieve the provision of Issued for Construction Drawings by the dates identified in the Design Delivery Programme, save where **tie** and the SDS Provider otherwise agree. No other reduction to the Incentivisation Payment is permitted.

For the purposes of *Clause 8.8* of the Novation Agreement, any extension of time granted to the SDS Provider is to be ignored except where the cause is a circumstance or occurrence entitling the Infracore to an extension of time and that such occurrence is a **tie** Change.

### **Relief available to tie in the event of non-performance by the SDS Provider in terms of the Collateral Warranty**

The SDS Provider warrants and undertakes to **tie** that:

- it has carried out and shall carry out its Services and other duties and obligations under the SDS Agreement and the Novation Agreement subject to and in accordance with the terms thereof (*Clause 2.1* of the Collateral Warranty);
- in the production of the Deliverables and in the performance of the Services and its other obligations under the SDS Agreement it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent system design services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity (*Clause 2.2.1* of the Collateral Warranty);
- it owes a duty of care to **tie** in carrying out its duties and obligations under the SDS Agreement and the Novation Agreement (*Clause 2.2.2* of the Collateral Warranty).

In the event of a claim by **tie** under the Collateral Warranty:

- the liability of the SDS Provider to **tie** is to be determined in all respects in accordance with the terms of the SDS Agreement and the Novation Agreement;

- the SDS Provider shall be entitled to rely upon any defence, right, limitation or exclusion under the SDS Agreement or the Novation Agreement as though **tie** were named as Client under it, except that:
  - **tie** shall not be affected by any subsequent variation of the SDS Agreement which would adversely affect the obligations owed by SDS Provider or the waiver, compromise or withdrawal of any claim made by the Infraco; and
  - the SDS Provider shall not be entitled to exercise any right of set-off, retention or withholding against **tie** to which the SDS Provider may be entitled as against the Infraco
- the liability of the SDS Provider under the Collateral Warranty shall be no greater in extent than the liability of the SDS Provider under the SDS Agreement.