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Advice Note on Scope Reduction and Resequencing [REDACTED]

1. INTRODUCTION

This note considers the consequences of two courses of action in relation to the Edinburgh Tram Project ("ETN") which we are instructed **tie** wishes to consider within the range of options available in seeking to achieve better progress and an affordable and timely outcome for the ETN. This note draws upon the comments and conclusions set out in our April note for CEC on the subject of truncation and termination. This note cannot evaluate the economic outcome of these two scenarios but it sets out the normal foreseeable contractual consequences and related legal liabilities, entitlements and risks.

For current purposes, the same considerations as exist when considering a tie Change, including the likely application of Schedule Part 4 and Notified Departures, apply generally in relation to scope reductions or resequencing. [REDACTED]

2. SCOPE REDUCTION [REDACTED]

We understand from instruction that scope reduction would involve part omission(s) from the ETN as envisaged under the contracted Infraco scope of work, with the intention of either awarding such work to another contractor, or no longer having such work as part of the ETN at all.

This note does not consider adjustments to the system specification (i.e. change to ERs) or reduction to a smaller tram fleet (which would be a Notified Departure), however many of the same principles apply in terms of the contractual mechanisms involved.

Procurement risk

In the event that **tie** seek to award any part of the works which currently form part of the Infraco scope to another contractor, there will be a procurement risk. This risk arises on two fronts. First, in the absence of the consent of the Infraco to the idea, the Infraco may challenge the legality of reducing the scope from that which they won the contract to build in an open tender competition. Alongside the contractual claims, this could manifest itself in terms of Infraco seeking wasted bid and planning costs, raising arguments of illegality and disproportionate treatment. There would also be an adverse publicity risk in the event that Infraco views received the attention of the media.

The premise would be that **tie** have reneged on the results of the Infraco procurement process in respect of these packages of work. A fully compliant new procurement process in respect of these packages of work would not assist in rectifying the breach. It could be envisaged that **tie** would lose a degree of public support, and perhaps damage their position in the event of litigation or adjudication, if there were allegations that **tie** had not behaved in accordance with the procurement regulations. CEC would be implicated under the tie-CEC Operating Agreement.

Full BSC agreement to any reduction in scope and retendering of certain works would avoid these risks. It is difficult to predict the level of loss of predicted revenue,



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change of drafting on acceptance of interface risk, design change, and other items which BSC would demand in exchange for their consent.

The second front of procurement challenge could come whether alternate contractors are appointed. This challenge could come from consortia such as Tramlines. Their argument would be that the procurement of the Infraco was based upon a tender for a scope of work which is no longer as extensive. If a consortia believes that it could show that it could have been successful in winning the tender for the reduced-scope project, they might mount legal action. Though such actions are rare, there have been successful cases and under Scots law there is no immediate time bar by implementation being started. The adverse effect upon the reputation of **tie** could again be significant.

Contractual Basis

Reduction in scope (truncation) would need to be implemented using the Infraco Contract's **tie** change provisions. The time and cost implications of removing contracted work or supply from the existing scope would require stringent evaluation and agreement to establish the Infraco's entitlements. There is no restriction on when or by how much **tie** may reduce or truncate the ETN scope or recalibrate tram services, but were this to result in the Infraco incurring demobilisation expenditure or sub contract breakage costs, those would be recoverable by the Infraco.

Very significant scope reduction would almost certainly result in BSC seeking to be compensated for loss of profit, overheads and all indirect costs or, in an extreme case, alleging a **tie** Default and terminal breach. Before any part of the ETN scope was excised, a careful analysis of the level of legitimate claim from Infraco would be advisable. The decision to omit by variation is therefore a decision required to be supported by technical and financial analysis, rather than contractual justification. It should be remembered that Clause 80.12 contains grounds on which variation can be refused. Of these, risk of non compliance because of the change, technical infeasibility or financial infeasibility of maintenance services might be used by BSC to refuse truncation or negotiate its terms. In terms of any **tie** intention to award works to another contractor, Infraco might also claim that the **tie** Change is contrary to Law, in reference to a breach of procurement regulations.

A **tie** Change to reduce scope could be expected to involve a long period of seeking to agree the various elements of the relevant Estimate with all Infraco members and, given the complexity of this issue and the BSC attitude to date, the Infraco can be expected to take a significant amount of time to put an acceptable Estimate together. A reference to DRP may be required on both cost, heads of recovery and the time elements for anything other than a very simple and easily delineated reduction in scope. Even then, items such as: effect upon system integration of a truncated ETN; run-time impact and the necessary tram fleet; system integrity; and effects upon Maintenance price would all be difficult issues to resolve.

Other Relevant Provisions

Clause 7.18 sets out the process for assessing any Abortive Work which the Infraco has undertaken, and refers to the principles of **tie** Change in terms of payment to the **tie** for circumstances such as a reduction in scope where works have already been undertaken in the affected area. The Infraco and **tie** are to jointly investigate such instances, with the onus on **tie** to determine the actual extent of any Abortive



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Work. On this front therefore, **tie** would be able to close out Abortive Work issues and leave Infraco to look to the Dispute Resolution Procedure if not satisfied.

Please note that in relation to suspension discussed below, there is a possibility that long-term suspension of a part of the Works could be treated contractually as a deletion of that part of the scope by the Infraco.

3. **RESEQUENCING**

We understand that another option under consideration is the resequencing of the Infraco Works, for example to complete the ETN between the airport and St Andrew's Square as a priority before substantial further work is done between St Andrew's Square and Newhaven. This may avoid the scenario of awarding work to another contractor, and the procurement implications which such action would involve. We understand that **tie** also wish to explore the possibility of a full suspension as a prelude to the resequencing.

Contractual Basis

Clause 60 of the Infraco Contract includes the ability of the Infraco to submit any change to the programme to **tie**'s Representative for acceptance. Programme alterations are drafted to be Infraco-led, and **tie** does not have any equivalent right to propose programme changes under this clause. **tie**-led sequencing changes can be instructed under the acceleration provisions in Clause 61, which provide **tie** with the right at Clause 61.2 to instruct such a change in circumstances where a resequencing is required in order to achieve an original Planned Sectional Completion Date.

In such circumstances, **tie** may issue an initial instruction to resequence under Clause 61.3. In order to do this, **tie** must specify the 'exact nature of the requirements' in terms of the relevant Planned Service Commencement Date. The Infraco is entitled to make reasonable objections to the initial instruction, and **tie** is obliged to make amendments if such objections are received. The Infraco must provide **tie** with the cost and time implications of the instruction under Clause 61.5, as soon as is reasonably practicable. In complex cases where the Infraco is unable to quantify the change, the costs are referred to be dealt with under the **tie** Change provisions.

Where a proposed resequencing is not for the purpose of meeting the original Planned Sectional Completion Date of a Section, but is in fact something more significant, such proposals would also need to be implemented using the change provisions at Clause 80. It is conceivable therefore, that a large ETN-wide change of works sequence could fall within Clause 61 in relation to Sections A and B (depot and test track sequence changes), but not in relation to Sections C and D (full Phase 1a system completion and shadow running).

tie Change

In terms of the **tie** Change procedure, many of the points discussed above in relation to scope reduction would apply. The Infraco could seek to use risk of non compliance because of the change, technical infeasibility or financial infeasibility as reasons to wholly avoid the change. Given the difficulties in agreeing the milestones prior to contract signature, any rearrangement is likely to met with either a refusal in term of the grounds above, or at least a long period to settle the relevant Estimate and agree

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alternate proposals, subject of course to whether 'clean' and easily re-ordered sequencing could be identified.

The requirement upon the Infraco to mitigate the effects of Changes would be crucial in minimising impacts and costs of the adjustments to programme sequence.

Suspension

tie does have the power to order a suspension of the Infraco Works, or any part thereof, under Clause 87 of the Infraco Contract. The clause provides that **tie** has discretion over both the time and manner of the suspension. Compliance with **tie** instructions to suspend works pursuant to Clause 87 is an Infraco Compensation Event and will clearly have demobilisation and remobilisation implications. These may be difficult to quantify, particularly where **tie** is unable to specify the length of the suspension prior to it taking effect. Costs may fluctuate depending upon the duration for reasons of mobilisation, interfaces with other works or otherwise. The Infraco is obliged to secure the Infraco Works during any suspension.

Given that suspension under this clause is not a **tie** Change, the Infraco does not have extensive ability to object to the **tie** instruction. The Infraco would need to claim under the Compensation Event mechanism, which does not disrupt the suspension. The most disruptive BSC behaviour which might be expected could be in terms of Infraco failing to provide clear and agreeable cost estimates for the suspension period, thus complicating the **tie** decision-making process.

tie would need to be mindful of the various constraints applicable in the event of suspension, such as the timing of TROs, temporary occupation and third party obligations.

Clause 87 permits a suspension for up to six months, following which the Infraco becomes entitled to serve a notice to continue. In the absence of a **tie** confirmation to continue, the onus lies on Infraco to either treat the part of works suspended as removed from the Infraco scope, or to allege **tie** Default if it considers that an element of the suspension affects the whole of the Infraco Works and has been preventing the Infraco performing a material part of them for a continuous period of 45 days.

Thus a suspension could lead to a reduction in scope, although the leading party in this regard becomes the Infraco rather than **tie**, meaning that there would be a considerable amount of uncertainty as to how the Infraco might approach the issue at the time.

Note that in any period without a formal notice of suspension from **tie** being in effect, the 45 day head of **tie** Default will apply (Clause87).

4. **NEGOTIATED APPROACH**

If there were a desire to reduce the scope of the ETN, but not create the possibility of blockage by the Infraco or an Infraco claim under the contract, the approach not set out in the contract would of course be a negotiated variation. This would need to address many elements of the BSC costs and expenses requiring evaluation under a unilateral **tie** Change in relation to scope, but these ought to be capable of presentation and verification in a less adversarial environment. It may be unrealistic to suppose that BSC might be persuaded to engage in negotiation unless BSC



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perceived an appreciable financial advantage to them which might result in any contractual compensation being either increased, brought forward and/or to protected from the unpredictable risk of contest under DRP.

tie will continue to hold 'on demand' performance securities from sureties, which should not be forgotten in the context of key changes to the project, whether in terms of scope adjustment or suspension. The key significance of the performance securities (on demand instruments) and the parent company guarantees is their availability to **tie** were BSC to (i) refuse to comply with reasonable instructions regarding changes or suspension; and/or (ii) manifestly fail to mitigate the costs of any plan for changes or suspension; and/or (iii) break contractual commitments which have direct financial impact on **tie** in terms of cash flow.

5. **KEY SUBCONTRACTS**

Note that the costs involved in the reduction of scope or any suspension would also include those of subcontractors such as SDS or Tramco.

Systems Design Services Contract ("SDS")

In terms of the SDS Contract, Clause 20 provides the option for the Client to postpone or abandon any part of the Services, which would enable **tie** to instruct the Infracore look at such options in respect of the SDS Provider in the event that significant design costs are associated with the proposed action by **tie**.

Tram Supply Agreement ("TSA")

Under the TSA, any truncation of the ETN will have to be done through the Client Change mechanism at Clause 20 (*Changes*). The cost implications for this would have to be negotiated with the Tram Supplier.

The Client Representative has the ability to suspend the progress of the Tram Works under Clause 54 (*Suspension of Works*) of the TSA, provided it has the requisite permission from **tie**. This will be considered a Compensation Event under the Agreement with the relevant evaluation and payment applicable. It is important to note that this does not apply to the manufacture of trams by the Tram Supplier, for which we understand that CAF are operating on a strict fixed production line that should not be interrupted.

Subject to certain stipulations the Tram Supplier can, after 6 months, request to restart any suspended Tram Works. Further provision under this clause allows the Tram Supplier to treat suspension of the tram works as an omission or abandonment. However, the manufacture of the trams is again expressly excluded from this provision.

Any costs for the manufacture of the trams themselves shall continue to be payable, notwithstanding the any such suspension.

Development Partnering and Operating Franchise Agreement ("DPOFA")

A reduction in the planned size of the ETN or tram services resulting, for example, in a smaller tram fleet would change Transdev's responsibilities and require a change to the scope of operational services in the DPOFA. Whether such an adjustment would



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be cost neutral or cost beneficial for **tie** would depend upon the timing and nature of the ETN reduction in scope and associated specification changes.

A change in the tram specification of infrastructure could, for example, require the Transdev tram driver to take on additional functions. It may also impact on run-times throughout the scheme and the level of long-term maintenance required.

tie may terminate DPOFA in part, where project development is still in Project Phases A, B and C1 under the terms of Clause 32 (*Termination During Development Phase*). For the purpose of termination in the context of a termination in the next few months, C1 is the relevant Project Phase, which comprises of functions such as Transdev advice and support to **tie** about certain aspects of the detailed design and construction of the Infrastructure and Equipment. **tie** are required to provide 30 days notice to terminate the Agreement during this Phase.

6. THIRD PARTY ARRANGEMENTS

It is not possible to affirm that a scope reduction would be cost and liability neutral to CEC and **tie** without conducting an analysis of third party agreements (forming part of the Infraco Contract), the parliamentary undertakings (of lesser order but nevertheless binding upon CEC and **tie**) and any CPO activities and requirements. If the extent of a proposed reduction in ETN scope or specification were known, the level and likelihood of exposure to liabilities to affected Third Parties could be evaluated. This would need to capture:

- consents/permission from or agreements with a third party for works on or alterations to its property to accommodate tram infrastructure or operations which proved abortive and/or inconvenient if no tram works or services ever eventuated;
- money paid or contribution in kind committed by a third party on basis that tram infrastructure and services will benefit its business;
- where a third party has refrained from a course of action for the benefit of **tie**/ETN incurring a demonstrable irrecoverable cost or suffering a proven detriment;
- potential property blight claims;
- the consequential impact (as opposed to a liability) of reliance upon tram services as a component of public transport (i.e. Lothian Bus fleet size).

7. TRAM ACTS

A scope reduction would not generate any additional contractual liabilities or exposure for **tie** or for CEC under the Acts themselves. Truncating the ETN scope carries a risk that these decisions could be judicially reviewed through a challenge about the appropriate discharge by the Authorised Undertaker of its statutory authority under the Tram Acts. What was presented by **tie** to the Scottish Parliament in terms of commitment to the installation of an entire system might be of relevance if such a challenge happened. Analysis of this type of risk is beyond the scope of this note.



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One of the main obligations for restorative works is listed under Section 11 of the Tram Acts. This requires that if the Authorised Undertaker (CEC) permanently ceases to operate the tramway, all on-street works, equipment and apparatus which have become redundant must be removed and the roads which carry the tramway must be restored to the reasonable satisfaction of the roads authority. These obligations must be satisfied as soon as reasonably practicable. There is an ability to reach agreement with the roads authority for a different approach than is expressed by this Section. Potentially, that could include the ability to agree that no restoration is required.

Under Section 7 of the Act(s), the Authorised Undertaker would no longer have reason to temporarily stop up, alter, or divert certain roads, and so that provision could be constructed as meaning that CEC would need to restore any such temporary arrangements in the area of suspension or truncation within a reasonable time.

Similarly, Section 26 of the Act(s) provides that where there has been temporary possession of land, the authorised undertaker shall, before giving up possession, remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land. The work required in such instances would therefore vary, dependant on the attitude of the owner.

Any compensation calculations based upon Sections 31 to 33 of the Act(s) in respect of permanent and temporary land acquisition, or rights of way interference, might need to be revisited if they are affected by the reduction in scope or suspension.

DLA Piper
3 July 2009