

**DLA PIPER SCOTLAND LLP**

**DRAFT FINDINGS OF PRELIMINARY FORENSIC EXAMINATION  
OF DOCUMENTARY EVIDENCE OF INFRACO DEFAULT**

relating to

the contract among **tie** Limited, Bilfinger Berger UK Limited and Siemens Public Limited Company

in connection with the works authorised by the *Edinburgh Tram (Line Two) Act 2006*

24 February 2009

## EXECUTIVE SUMMARY

This report is a review of the copied highlights from the project files (see para 1.1), following the brief to look for written communications which appear to touch on one or more of the identified potential default issues ("the 29 issues").

Most of the problems have concerned changes, both actual and anticipated. This covers both the "soft" obligations (to minimise, mitigate and cooperate, with a related section on best/reasonable endeavours and reasonable skill and care) and the differences of opinion on the "hard" issues beginning with the question of what constitutes a compensable change, as opposed to design development or changes brought about through Infraco default, what constitutes a competent Notice of Change, what constitutes a competent Estimate, failure or delay in giving Estimates, the difficulty and cost of providing Estimates, what constitutes an Instruction and the correct basis of monetary and time entitlement in implementing a change order.

Where DLA have made their own comment on the exchanges showing in the files, we have said that those exchanges are inconclusive. That is not to say that this was unexpected, nor is it a criticism - it merely indicates that both parties have understood their own position (or at least the position they wanted to present) from an early stage and have not been substantially persuaded by any points in the other party's stated position, hence the points and counterpoints have not produced synthesis. This is magnified by the Infraco failure to provide competent estimates, meaning that **tie** has little understanding of Infraco's position on actual entitlement beyond discrete issues such as the treatment of preliminaries. The logical conclusion is that these positions will have to be organised and stated for DRP purposes in order to obtain a definite Infraco position and see which one will persuade a third party - see recommendations below.

Although the file has not revealed evidence of novel or substantially changed positions on either side, the review does at least give us a better view of the real drivers for the Infraco position on changes. In our view it is reasonably clear (see paragraph 2.2.4.5 and 2.2.4.8) that administering the change process from the point of receipt of a Notice of Change, has been a real problem for Infraco, to the point where they have made explicit complaint that they have not received a "detailed request" for an Estimate and they have put that complaint in another way, in stating that the work required from the SDS Provider in order to create the Estimate would normally have been carried out by the Employer and contained within the Notice of Change. We can see no basis for those contentions but this is clearly a big issue for Infraco who have sought in various correspondence to establish in advance their entitlement to payment for this work, and indeed to establish that this entitlement is on the basis of full reimbursement.

The cost (specifically design cost) in providing Estimates is of course only one issue within the problems surrounding the change order process. It is not the whole story, given that **tie** strongly suspect that Infraco simply have not had the resource (internal and among sub-contractors and suppliers) to produce competent Estimates but the cost issue is noteworthy as something we were not expecting to see discussed at such length.

We noted a brief Infraco reference to instructions under clause 80.3 (see paragraph 2.2.4.17) but it does not take us any further in our understanding of their position on this.

Both "reasonable/best endeavours" and "competent contractor" issues are covered fully in this report. It is difficult to make any conclusive connection between the nature of the obligations and real actions without having seen evidence of compliance from Infraco's own file but if and when those issues do move forward on a formal basis, **tie** will be entitled to see evidence of some substantial effort by

Infraco to comply and to bring about the desired outcome as a matter of diligent project management. At the very least, **tie** will want to see that the desired outcome was promoted by Infraco as the first option!

Similarly, in relation to the requirement of reasonable skill and care of a competent contractor, a DRP which includes that issue would involve an audit of Infraco's file to show the steps they took internally and within their supply chain to manage the change order process. There are repeated complaints from **tie** as to lack of Infraco Management resource, without much in response. It is clear, specifically, that Infraco has been late or has failed completely to deliver Estimates on time or to notify lateness although they have at least attempted to explain why, in their view, all but the simplest Estimates would be late.

In conclusion on this review, there is nothing in the file which is both new and substantially different to expectations - only some straight forward rehearsals of positions and some interesting pointers about Infraco's motivation. At base, we still have only a very generalised dispute on the "hard" issues of the proper time and cost to carry out and complete these works, incorporating changes. So far those issues have been stated in global terms of additional time and money. The establishment of Infraco failure to perform their "soft" obligations to mitigate, minimise and cooperate - also to respond competently to notified changes - looks very likely to be made out but that can only be a guess. Establishment of those failures depends on establishing that Infraco are wrong on the hard issues of time and cost, in other words the proper approach to time and cost valuation of changes, the difference between change and development, the complexity of notified changes and the difficulty (and cost) in estimating them.

The "soft" performance obligations are very important. Unless the above "global" dispute on time and cost is also settled on a global basis immediately and without detailed analysis, we would predict that allegations of Infraco failure to organise themselves and to manage the changes efficiently as to time and cost will be central to the dispute. In that regard we recommend the compilation and sending of detailed notices of default for the record and to put Infraco in no doubt as to their position. More fundamentally however, on the above logic, resolution of the base dispute issues requires referral of one or some or all of the unresolved Notices of Change into the DRP.

## 1. INTRODUCTION

- 1.1 **tie** Limited (hereinafter referred to as "**tie**") on 18 February 2009 requested DLA Piper Scotland LLP (hereinafter referred to as "**DLA**") to conduct a preliminary forensic examination and review of certain documentary evidence (as further particularised below); to consider the nature, content, quality and sufficiency of that evidence; and thereafter to report on the issue as to whether or not that documentary evidence is such as to support **tie's** opinion that the Bilfinger Berger ("**BBUL**")/Siemens/CAF delivery consortium ("**Infraco**") have breached the obligations undertaken by them in terms of the contract between **tie** and the Infraco (hereinafter referred to as the "**Infraco Contract**").
- 1.1.1 DLAP were provided with access to the Incoming and Outgoing files held at the Edinburgh Park site office. These were explained as being the entire history of correspondence from BSC in terms of the Incoming documents. In respect of the Outgoing documents, the available files comprised those which were headed with the reference designation INF CORR, and were dated between 13 June 2008 (INF CORR 001) up to current correspondence (INF CORR 758 onwards). Our searchable correspondence lists contain a record of all correspondence deemed material for the purposes of the review and clearly note where correspondence numbers were not in the files.
- 1.1.2 An additional file also held some of the letters designated PRO CORR, PD CORR and DEL HSQE, but was clearly incomplete. **tie** subsequently sent over a folder comprising the full history of PD CORR letters, which was reviewed but the contents not added to our searchable correspondence lists. **tie** also provided DLAP with the minutes to relevant meetings and details of Critical Impact Notices for the Project, which DLAP have subsequently reported upon.
- 1.1.3 In relation to the items with a lot of discussions on the file, this report has gathered together the communications expressing the **tie** view and those expressing the Infraco view - and on some of those issues then expressing a DLA view of those communications.
- 1.2 The Infraco Contract contemplates that certain events or occurrences shall be construed as being sufficiently serious to warrant punitive action against the Infraco (such as eventual termination of the Infraco Contract). In particular, *Schedule Part 1* to the Infraco Contract provides:
- 1.2.1 "***Infraco Default***" means one of the following events:
- (a) *a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works;*
  - (b) *the occurrence of an Insolvency Event in relation to the Infraco or either of the Infraco Members;*
  - (c) *the Infraco fails to commence the Infraco Works within 90 days of the Commencement Date or permanently abandons the Infraco Works (or a material part of them) at any time;*

- (d) *the Service Commencement Date or Sectional Completion Date (as appropriate) in respect of a Section is not achieved or is programmed to not be achieved (as set out in the Programme) on or before the date falling 12 months after the Planned Service Commencement Date or Planned Sectional Completion Date (as appropriate) except as a result of a Compensation Event, Relief Event, Force Majeure Event, tie Change, Accommodation Works Change, a Change in Law (where compliance with such Change in Law is the sole reason for the Infraco failure to achieve the relevant date) and any legitimate suspension of the Infraco Works by the Infraco pursuant to Clause 87 (Suspension of Work);*
- (e) *the Infraco does not confirm its agreement in writing to a Liquidated Damages Cap Increment in accordance with Clause 62.10;*
- (f) *a breach by the Infraco of its obligations to take out and maintain the Required Insurances which is not remedied by the Infraco within 10 days of written notice from tie to the Infraco specifying the relevant breach and requiring it to be remedied;*
- (g) *the issue of four or more Underperformance Warning Notices in any 12 month period;*
- (h) *NOT USED*
- (i) *the Infraco has reported a change in the legal status of the Infraco or a Change in Control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works; or*
- (j) *the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from tie's Representative a written notice to proceed." (our emphasis added)*

1.3 In the context of the preliminary forensic examination conducted by DLA, only the Infraco Default described in *paragraph (a)* above has been considered (which is not to say that the other matters which are included within the term "*Infraco Default*" do not merit further examination or consideration).

1.4 **tie** are of the opinion that there is a stateable argument that Infraco Default (as defined in *paragraph (a)* above) has occurred and, in particular, that the Infraco has breached the following obligations:

1.4.1 The Infraco is not working in mutual co-operation with **tie** to fulfil its agreed roles and responsibilities and apply its expertise to carry out and complete the Infraco Works in accordance with the Infraco Contract (*Clause 6.1* of the Infraco Contract).

1.4.2 The Infraco is not co-operating with **tie** in order to facilitate the performance of the Infraco Contract (*Clause 6.3* of the Infraco Contract).

- 1.4.3 The Infraco is not using reasonable endeavours to avoid unnecessary complaints, disputes and claims with **tie** (*Clause 6.3.2* of the Infraco Contract).
- 1.4.4 The Infraco is preventing **tie** from enjoying the benefits of its rights under the Infraco Contract (*Clause 6.3.4* of the Infraco Contract).
- 1.4.5 The Infraco has not been seen to be taking reasonable steps to mitigate any foreseeable losses and liabilities of **tie** which may arise out of Infraco's failure to comply with *Clause 6.3.2* of the Infraco Contract (*Clause 6.3.5* of the Infraco Contract).
- 1.4.6 The Infraco is not taking all reasonable steps to manage, minimise and mitigate all costs (*Clause 6.3.6* of the Infraco Contract).
- 1.4.7 The Infraco is not using reasonable endeavours to ensure that in carrying out the Infraco Works it minimises costs (*Clause 7.5.5* of the Infraco Contract).
- 1.4.8 The Infraco is not exercising the reasonable level of professional skill, care and diligence to be expected from a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity (*Clause 7.2* of the Infraco Contract).
- 1.4.9 The Infraco has not complied with its obligations under *Clause 28* of the Infraco Contract in respect of the appointment of Key Sub-Contractors, which directly impacts upon the ability to provide Estimates.
- 1.4.10 The Infraco is employing, or causing to be employed (via recruitment agencies), in the construction and completion of the Infraco Works, persons who are not careful, skilled and experienced in their trades and callings, in breach of *Clause 27.1* of the Infraco Contract.
- 1.4.11 The Infraco is providing and employing technical assistants who are not skilled, experienced and assessed as competent for undertaking a specified range of activities in their occupations, in breach of *Clause 28.5.1* of the Infraco Contract. The Infraco has not provided and employed such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely execution of the Infraco Works (*Clause 28.5.2* of the Infraco Contract).
- 1.4.12 The Infraco is not approaching all Permitted Variations on a collaborative and Open Book Basis (as defined in the Infraco Contract) (*Clause 6.3.1* of the Infraco Contract).
- 1.4.13 The Infraco is not compliant with its obligations in respect of the delivery of Estimates. In particular, the Infraco:
  - 1.4.13.1 has not provided **tie** with Estimates within 18 Business Days of receipt of the tie Notice of Change, or in the case of alleged Notified Departures, within 18 Business Days of the date of notification by the Infraco of the Notified Departure (*Clause 80.2.2* of the Infraco Contract);

- 1.4.13.2 when submitting a request for a period of longer than 18 Business Days to submit its Estimate, the Infraco has not delivered to **tie** a reasonable request for a reasonable extended period of time for return of the Estimate (to be agreed between the Parties, acting reasonably). In particular, the Infraco has not stated the reasons why it considers the Estimate required to be too complex to be completed and returned within 18 Business Days (*Clause 80.3* of the Infraco Contract); and
- 1.4.13.3 has not delivered valid Estimates in compliance with *Clause 80* of the Infraco Contract.
- 1.4.14 The Infraco is not carrying out the Infraco Works so as to assist **tie** in relation to providing information that best value has been secured in respect of the carrying out of the Infraco Works (*Clause 7.3.15* of the Infraco Contract). **tie** currently cannot properly report to Transport Scotland.
- 1.4.15 The Infraco is not progressing the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under the Infraco Contract in accordance with the Programme (*Clause 60.1* of the Infraco Contract).
- 1.4.16 The Infraco is not taking all reasonable steps to mitigate the effects of any Infraco-driven delay to the progress of the Infraco Works (*Clause 60.9* of the Infraco Contract).
- 1.4.17 The Infraco is not using 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 delay in the progress of the Infraco Works. The Infraco is not using its reasonable endeavours to avoid altogether any delay in the progress of the Infraco Works. The Infraco is not using its reasonable endeavours to mitigate the costs (*Clause 65.8.2* of the Infraco Contract).
- 1.4.18 The Infraco is not currently carrying out and completing the Infraco Works in such a manner so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained (*Clause 7.3.2* of the Infraco Contract).
- 1.4.19 In relation to Permitted Variations, the Infraco is not collaborating and liaising with **tie** throughout the carrying out of the Infraco Works to ensure due consideration is given to the type of materials and optimum and cost effective construction methods, construction programmes, and temporary works (*Clause 7.12* of the Infraco Contract).
- 1.4.20 The Infraco is not in compliance with *Clause 10.2* of the Infraco Contract: the Infraco is obliged to submit any Deliverables associated with any Permitted Variations to **tie's** Representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan).
- 1.4.21 The Infraco is not fully compliant with *Clause 10.4* of the Infraco Contract: the Infraco is not maintaining an extranet by which **tie** and other parties may

access remotely any Deliverable, including any drawings comprised with the Deliverables, and electronically store and/or print copies of any Deliverable.

- 1.4.22 The Infraco is not adhering to the requirements of the Design Management Plan (*Clause 10.17* of the Infraco Contract).
- 1.4.23 The Infraco is not maintaining a change control register which details the status and gives summary information on all withdrawn, pending and confirmed variations under the Infraco Contract. The Infraco has not provided a copy of the change control register to **tie**. The Infraco has not provided updated of the change control register to **tie** every Reporting Period (*Clause 79.2* of the Infraco Contract).
- 1.4.24 The Infraco is not carrying out all required management activities in order to manage the performance of the SDS Services (*Clause 11.4* of the Infraco Contract).
- 1.4.25 The Infraco is not carrying out the Infraco Works so as to ensure compliance with the Tram Legislation (*Clause 7.3.9* of the Infraco Contract). **tie** has a public duty to execute the project efficiently.
- 1.4.26 The Infraco is not carrying out the Infraco Works in accordance with Good Industry Practice (*Clause 7.3.13* of the Infraco Contract).
- 1.4.27 The Infraco is not carrying out the Infraco Works so as to ensure that the design of the Edinburgh Tram Network is buildable and maintainable (*Clause 7.3.14* of the Infraco Contract).
- 1.4.28 The Infraco is not acting in accordance with the OGC's "*Excellence in Construction*" initiative (*Clause 7.3.17* of the Infraco Contract).
- 1.4.29 The Infraco is not using reasonable endeavours to ensure that in carrying out the Infraco Works it maximises productivity by reference to Good Industry Practice (*Clause 7.5.1* of the Infraco Contract).
- 1.5 This report considers whether or not and to what extent a breach of any of the foregoing obligations identified by **tie** is made out in the documentary evidence reviewed by DLA.

## 2. SUMMARY OF FINDINGS OF PRELIMINARY FORENSIC EXAMINATION

- 2.1 The Infraco is not working in mutual co-operation with tie to fulfil its agreed roles and responsibilities and apply its expertise to carry out and complete the Infraco Works in accordance with the Infraco Contract (Clause 6.1 of the Infraco Contract)**

Clause 6.1 of the Infraco Contract provides "*The Parties agree to work in mutual co-operation to fulfil their agreed roles and responsibilities and apply their expertise to carry out and complete the Infraco Works in accordance with this Agreement.*"

- 2.1.1 The obligation here may be described as a '*soft*' obligation (as opposed to a '*hard*' obligation, such as time and quality obligations). The precise nature of the duties comprised in an obligation of this type are however difficult to ascertain, but may involve a balance between what must be done to allow the



contract to be performed and what may be done to assist a party in the performance of its obligations - the balance between 'good faith' type obligations and a party's entitlement to act in its own interest which is also expressed in the contract.

- 2.1.2 By and large, we see that Infraco have issued a number of Notices of Change to which **tie** have responded. Generally there is technical discussion and requests for meetings. The factual background to these written communications has not yet been investigated to understand the level of dialogue and co-operation between **tie** and Infraco as to the exchange of information.
- 2.1.3 It is noted that Infraco express concerns about the quality of backfill and reinstatement works carried out by the MUDFA Contractor.
- 2.1.4 It is also noted that Infraco allege that **tie** have been providing verbal instructions and agreeing changes with the SDS Provider without Infraco's involvement and request that **tie** stop this behaviour. It is accepted by **tie** that this was a mistake (but such action was taken due to the urgency of a review required).

## 2.2 **The Infraco is not co-operating with tie in order to facilitate the performance of the Infraco Contract (Clause 6.3 of the Infraco Contract)**

Clause 6.3 of the Infraco Contract provides "*Subject to Clause 6.4, each Party ("First Party") undertakes to co-operate with the other ("Second Party") in order to facilitate the performance of this Agreement and in particular the First Party shall:*

6.3.1 *approach all Permitted Variations on a collaborative and Open Book Basis;*

6.3.2 *use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;*

6.3.3 *comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the Second Party;*

6.3.4 *not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;*

6.3.5 *take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive); and*

6.3.6 *take all reasonable steps to manage, minimise and mitigate all costs."*

- 2.2.1 The foregoing clause provides for "*reasonable endeavours*" and "*reasonable steps*" undertakings. The issue is then what obligations do they put on the performing party. This is a very wide-ranging provision, touching a lot of individual actions and it is useful to consider it in detail.
- 2.2.2 There is little case law on this issue in Scotland, however some guidance can be taken from the decision of the English Commercial Court in *Rhodia International Holdings Limited & Another v Huntsman International LLC* [2007] EWHC 292 (Comm).

### 2.2.2.1 "Best Endeavours"

- (a) According to the court in Rhodia, this "*probably*" requires the party subject to the obligation to exhaust all of a number of reasonable courses that could be taken in a given situation to achieve a particular aim. Earlier cases have also imposed limitations such as:
- (b) While best endeavours may require expenditure, they do allow the party some regard for its own commercial interests and exclude steps that would cause serious detriment.
- (c) An obligation to use best endeavours may impose an obligation to litigate or appeal against a decision, providing there is a reasonable chance of success and subject to other financial considerations.

### 2.2.2.2 "Reasonable Endeavours"

- (a) Reasonable endeavours obligations are a less tangible concept. According to Rhodia, this "*probably*" requires the party subject to the obligation to take only one reasonable course in a given situation to achieve a particular aim but not to exhaust all of them. Earlier cases have suggested that:
- (b) The party obliged to use its reasonable endeavours can weigh up the obligation in the contract against commercial considerations including the uncertainties and practicalities related to fulfilling its obligation when deciding what action was required.
- (c) An exception to this arises if the contract, as it did in Rhodia, specifies that certain steps must be taken in performance of the obligation. If so, these steps must be taken even if they involve sacrificing a party's commercial interests.
- (d) The obligation may not extend to taking legal action of a doubtful outcome, but that is not to say it would never justify any legal action to be brought as is sometimes suggested.

### 2.2.2.3 "All Reasonable Endeavours"

- (a) This term is often adopted as a compromise between best and reasonable endeavours. The court in Rhodia doubted that an obligation to use "*all reasonable endeavours*" was any different to an obligation to use "*best endeavours*", because it may well be that both obligations required a party to take all reasonable courses it could in the circumstances.
- (b) In coming to this conclusion the court expressly agreed with the decision of *Yewbelle v London Green Developments [2006] EWHC 3122 (Ch)* where it was held that the obligation to use all reasonable endeavours "*requires you to*

*go on using endeavours until the point is reached when all reasonable endeavours have been exhausted."*

- (c) Earlier cases have suggested that the term is probably a middle position somewhere between the two, i.e. something more than reasonable endeavours but less than best endeavours.
- 2.2.3 The Infraco has issued a number of notices to **tie** of an Infraco Notification of a **tie** Change.
- 2.2.4 In the exchanges of correspondence concerning Infraco Notification of a **tie** Change, the Infraco has expressed the following opinions:
- 2.2.4.1 Notices issued refer to drawing changes which are outwith the normal development and completion of designs contrary to the pricing assumption in *Clause 3.4* of Schedule 4 - view of Infraco that self evident that changes are contrary to *Clause 3.4* of Schedule Part 4 and that **tie** has had the opportunity to comment upon or query the changes as the drawings went through the design completion phase and subsequent approval to achieve IFC status - because of **tie** involvement in the approval process it is unreasonable for **tie** to demand that Infraco elaborate on the reasons for changes and use this as a pretext for rejecting valid Change Notifications;
  - 2.2.4.2 Value Engineering opportunity is not feasible;
  - 2.2.4.3 Value Engineering savings contemplated in Schedule Part 4 were manifestly not programme feasible;
  - 2.2.4.4 **tie** have not fulfilled the contract requirements in connection with Value Engineering;
  - 2.2.4.5 where evaluation of a Notice of Change requires design work to be carried out to produce design for pricing, Infraco are entitled to receive a Change Order for such design thus providing assurance that an agreed design cost will be reimbursed;
  - 2.2.4.6 in accordance with *Clause 3.5* any other demolition or alteration works required to existing buildings is a Notified Departure which is deemed to be a Mandatory **tie** Change;
  - 2.2.4.7 notices issued are sufficient to demonstrate that a Notified Departure has occurred;
  - 2.2.4.8 cost of preparing budget costing is payable - this work would normally be carried out by the client and his agents in preparation for issuing a detailed request for an Estimate;
  - 2.2.4.9 Infraco entitled to recover abortive estimating costs caused by an instruction which was subsequently withdrawn;

- 2.2.4.10 the cost of preparing an Estimate is a reasonable additional cost to be included within any Estimate prepared in accordance with *Clause 80* (as it is the converse of the position where an Estimate which has been prepared for a **tie** Notice of Change is not withdrawn) - as this is an actual cost Consortium Overheads and Head Office overhead, and other preliminaries elements if appropriate, are added;
  - 2.2.4.11 Infraco have estimated almost £20 million worth of **tie** Changes;
  - 2.2.4.12 accept the position that Head Office Overhead and Consortium Overhead percentages should both be applied to the base cost;
  - 2.2.4.13 failure by **tie** to issue **tie** Notices of Change by trigger dates set in the Infraco Contract are Compensation Events to which *Clause 65* applies;
  - 2.2.4.14 disagree with **tie's** opinion that certain works are not a variation and Infraco will submit an Estimate for the work upon receipt of **tie's** acknowledgement that the work is a **tie** Change;
  - 2.2.4.15 confirm that in respect of certain works they will proceed, in good faith, to implement additional works on the basis of agreed direct costs and suggest that **tie** and Infraco meet to agree a protocol for agreeing the extension of time and associated costs arising from **tie** Changes;
  - 2.2.4.16 property of a third party (BT Phone Box) is not included within the Infraco scope of works;
  - 2.2.4.17 do not agree with **tie's** interpretation of *Clause 80.13* - "*unless otherwise directed by tie*" which is clearly a cross reference to the end of *Clause 80.15* which states that "*tie may instruct Infraco to carry out the proposed tie Change*";
  - 2.2.4.18 discussions between **tie** and Infraco ongoing regarding BSC Construction prelims and overheads and profit; and
  - 2.2.4.19 various requests for **tie** Notice of Change and statement that any delay arising as a consequence of **tie's** failure to provide the corresponding Notice of Change will be the sole responsibility of **tie**.
- 2.2.5 In the exchanges of correspondence concerning Infraco Notification of a **tie** Change, **tie** has expressed the following opinions:
- 2.2.5.1 that Infraco has in certain instances not acted diligently and has produced unsubstantiated and unrealistic Estimates resulting in delay to agreement;
  - 2.2.5.2 acceptance that in the absence of IFC drawings certain works are a Notified Departure under *Clause 3.5* of Schedule Part 4 and as such a Mandatory **tie** change;

- 2.2.5.3 works concerning demolition of existing structures do not require to be covered under the issue of an IFC drawing and as such **tie** do not accept that certain works are a Notified Departure under Clause 3.5 of Schedule Part 4 or a Mandatory **tie** change;
- 2.2.5.4 **tie** do not in certain circumstances accept the basis for Change alleged by the Infraco or that a **tie** Change has been made out by the Infraco;
- 2.2.5.5 the risk of not gaining Technical Approvals in a satisfactory timescale only lies with **tie** where SDS submits a complete package for approval in accordance with the version 31 programme;
- 2.2.5.6 Infraco are to investigate and put forward proposals with the parameters of the Infraco Contract provisions and the design in connection with value engineering and there is no requirement in respect of certain items to '*design to cost*' - rather it is for the Infraco to provide proposals as to how it is going to deliver a final design acceptable to **tie** and the relevant stakeholders as required by the Infraco Contract;
- 2.2.5.7 SDS have not provided the Designer's Response along with the Road Safety Audit and there are examples of the Designer's Response not being provided in good time to allow CEC to make that determination;
- 2.2.5.8 Infraco have not provided Estimates (in terms of *Clause 5.7.1* of Schedule Part 4) and it is not for the Infraco to unilaterally decide whether '*design to cost*' VE opportunities are commercially viable but it is for **tie** to decide this upon receipt of an Estimate as set out in *Clause 5.7.2* of Schedule Part 4)
- 2.2.5.9 the valuation of certain **tie** Changes are dependent upon the conclusion of a programme impact exercise (V26/V31 design programme together with instructed mitigation measures);
- 2.2.5.10 delay by Infraco in providing Value Engineering Estimates;
- 2.2.5.11 interim assessments of Programme delay impact in respect of certain Notified Departures and agreement that **tie** is to meet with the Infraco programme team to demonstrate **tie**'s assessment in detail;
- 2.2.5.12 that in respect of certain changes no detailed programme has been submitted by Infraco to demonstrate programme impact of any associated preliminary costs;
- 2.2.5.13 that 7.4% and 10% to cover Consortium Prelims and Head Office Overheads respectively should be added to '*Actual Cost*';
- 2.2.5.14 that Infraco has not complied with *Clause 5.7.1* in terms of which it is obliged to deliver its Estimate setting out the net cost or

saving of implementing Value Engineering opportunities and that **tie** may incur a loss as a consequence of non-achievement of the full amount of a saving in connection with a VE opportunity;

- 2.2.5.15 request by **tie** for the Infraco to propose how it intends to implement certain VE items such as to mitigate and minimise any loss that **tie** may suffer as a result;
- 2.2.5.16 there is no entitlement for Infraco to be reimbursed its estimating costs as it is deemed to be included within the agreed 7.4% increase for Consortium Overheads;
- 2.2.5.17 the Infraco is required to submit a programme to justify its claims for additional Preliminaries;
- 2.2.5.18 for certain notices to be Notified Departures they must first relate to the Base Data Design Information;
- 2.2.5.19 revised SDS design programmes are only Notified Departures if the revisions are not a result of a breach of contract by Infraco, an Infraco Change or a change in law - Estimates provided by the Infraco relating to Notified Departures will require to demonstrate that design delays are not due to this but instead are a direct consequence of matters for which **tie** are responsible under the Infraco Contract;
- 2.2.5.20 request that Infraco confirm where within the SDS Agreement that there is an entitlement for SDS to claim recovery of a cost to prepare an Estimate;
- 2.2.5.21 providing estimates for Client Change Orders is additional work to the current scope included in the SDS Agreement and therefore the provisions of *Clause 115.4* of the SDS Agreement should apply;
- 2.2.5.22 **tie** do not agree with the Infraco assertion that "*Schedule Part 4 Pricing Assumption, paragraph 3.4.1.1 assumes that this Issued for Construction Drawings do not differ from this base Infraco Proposals, Appendix A of 12.5.2008*";
- 2.2.5.23 in the absence of information from Infraco, certain Notices of Change are not sufficient to demonstrate that a Notified Departure has occurred;
- 2.2.5.24 in terms of the SDS Agreement (*Clause 15.3.7*) rates for additional work are to be applied to any Changes when implemented - this does not include estimating costs;
- 2.2.5.25 SDS Changes should be valued in accordance with *Clause 80.11* and the Infraco Contract does not provide for any further uplift on this valuation until SDS Post Novation value increases beyond £5m at which point BSC will be entitled to recover 10% Head

Office overheads and profit as set out in *Schedule Part 4 item 4.7.2*;

- 2.2.5.26 if **tie** notice of Change is withdrawn Infraco are entitled to claim reasonable costs incurred in compliance with *Clause 80*;
- 2.2.5.27 Infraco are in breach of contract on the basis that 24 weeks after contract award Infraco have failed to supply **tie** with an Estimate for any Value Engineering items which are '*Design to Cost*' and Infraco are failing to use all reasonable endeavours to achieve the identified Value Engineering savings and as such are in breach of their contract obligations; and
- 2.2.5.28 it is the obligation of Infraco to complete the design to achieve the Employer's Requirements; if completion of the design is different to the Base Date Design Information then subject to provisions of *Pricing Assumption 3.4.1.*, it may result in a Notified Departure.

**2.3 The Infraco is not using reasonable endeavours to avoid unnecessary complaints, disputes and claims with tie (Clause 6.3.2 of the Infraco Contract)**

Clause 6.3.2 of the Infraco Contract provides "*use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party*"

- 2.3.1 Infraco allege that there is a discrepancy regarding the Base Date Design Information, primarily in relation to the surfacing works in Section 1. Infraco have provided to **tie** a list of what they believe to be the Base Date Design Information and request that **tie** accept that the lists provided by Infraco represent the Base Date Design Information.
- 2.3.2 In connection with BDDI to IFC Infraco also assert that Schedule 4 does not require BSC to demonstrate why the design has changed; it simply gives rise to a mandatory **tie** change where the facts and circumstances differ from the pricing assumptions - if factually there is a change, then this leads to a mandatory **tie** change save where the change is a consequence of '*normal design development*'.
- 2.3.3 In connection with BDDI to IFC **tie** assert that it is clear that Schedule Part 30 drawings cannot be restricted in meaning to '*all information issued*' and nor can the Schedule Part 30 drawings be read as '*all drawings available*' and that there is no ambiguity or discrepancy.

**2.4 The Infraco is preventing tie from enjoying the benefits of its rights under the Infraco Contract (Clause 6.3.4 of the Infraco Contract)**

Clause 6.3.4 of the Infraco Contract provides "*not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights.*"

**2.5 The Infraco has not been seen to be taking reasonable steps to mitigate any foreseeable losses and liabilities of tie which may arise out of Infraco's failure to comply with Clause 6.3.2 of the Infraco Contract (Clause 6.3.5 of the Infraco Contract)**

Clause 6.3.5 of the Infraco Contract provides "*take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive)*"

2.5.1 Listed below are authorities which provide some guidance as to what is required in regard to an obligation to take "*reasonable steps*":

2.5.1.1 *Lodge Holes Colliery & Co. v Mayor of Wednesbury [1908] A.C. 323* - One reasonable step a contracting party can make is to consult a competent expert and follow his advice;

2.5.1.2 *British Westinghouse v Underground Railways Co. [1911] 1 K.B. 575* - No obligation to do what no "*reasonable and prudent man*" would not do in the ordinary course of business";

2.5.1.3 *Banco de Portugal v Waterlow & Sons Ltd [1932] A.C. 452* - One is entitled to have regard to one's own commercial reputation when deciding what steps are reasonable;

2.5.1.4 *Phillips Petroleum Company UK Limited v Enron Europe Limited [1997] C.L.C. 329* - A party which is required to use "*reasonable endeavours*" is not obliged to sacrifice its commercial interests in order to comply with the obligation;

2.5.1.5 *Rhodia International Holdings Ltd v Huntsman International LLC [2007] 2 Lloyd's Rep. 325*- A "*reasonable endeavours*" clause "*only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all reasonable courses he can*";

2.5.1.6 *Ryanair Ltd v SR Technics Ireland Ltd [2007] EWHC 3089 (QB)* - an undertaking to use "*best*" endeavours is a promise not to be given lightly; it is a stringent obligation which will be treated accordingly by the courts; and

2.5.1.7 *Hiscox Syndicates Ltd v Pinnacle Ltd [2008] EWHC 145 (Ch)* - the court observed that '*reasonable steps*' are not to be equated with '*best*' or '*all reasonable*' endeavours, as the latter represent more onerous obligations.

2.5.2 In July 2008 tie requested that the Infraco proceed to make all necessary arrangements to allow the earliest construction start as required by the mitigation obligations under the Infraco Contract in respect of certain programmed activities.

**2.6 The Infraco is not taking all reasonable steps to manage, minimise and mitigate all costs (Clause 6.3.6 of the Infraco Contract)**



Clause 6.3.6 of the Infraco Contract provides "*take all reasonable steps to manage, minimise and mitigate all costs.*"

2.6.1 On 15 August 2008 tie rejected documents concerning works package plan in connection with site demolitions.

2.6.2 On 24 October 2008 Infraco advised that it did not accept tie's contention that Infraco have a "*serious lack of management resource*" and requested that tie advise the Infraco of the basis for this view. Nothing seen on the file in direct response to this.

**2.7 The Infraco is not using reasonable endeavours to ensure that in carrying out the Infraco Works it minimises costs (Clause 7.5.5 of the Infraco Contract)**

Clause 7.5 of the Infraco Contract provides "*The Infraco shall (and shall procure that the Infraco Parties) use reasonable endeavours to ensure that in carrying out the Infraco Works, it:*

7.5.1 *maximises productivity by reference to Good Industry Practice as applicable to construction or maintenance as relevant;*

7.5.2 *minimises disruption to the city of Edinburgh;*

7.5.3 *maintains safety, and minimises the potential for accidents, and safeguards the Infraco Works;*

7.5.4 *safeguards efficiency in the obtaining of Consents; and*

7.5.5 *minimises costs"*

**2.8 The Infraco is not exercising the reasonable level of professional skill, care and diligence to be expected from a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity (Clause 7.2 of the Infraco Contract)**

Clause 7.2 of the Infraco Contract provides "*Notwithstanding the specific responsibilities set out in Clause 7.3, the Infraco undertakes to tie that in carrying out and completing the Infraco Works it has exercised and undertakes to continue to exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity. The Infraco acknowledges that tie will rely upon the skill, care and diligence of the Infraco in connection with all matters for which the Infraco is responsible under this Agreement"*

2.8.1 The undertaking given by the Infraco in terms of the foregoing clause is in the nature of an undertaking that in the performance of their obligations in carrying out the Infraco Works the Infraco will achieve a certain specified standard of care.

2.8.2 As a matter of law, the tests for what constitutes "*reasonable skill and care*" are set out in the case *Hunter v Hanley 1955 S.C. 200* and in the case *Bolam v Friern Hospital Management Committee [1957] All ER 118* in which the test set out in *Hunter* was further developed. In *Bolam*, McNair J stated at [120]:

*"where you get a situation which involves the use of some special skill or competence then the test whether there has been negligence or not, is not the test of the man on the Clapham Omnibus because he has not got this skill. The test is the standard of the ordinary skilled man exercising and professing to have that skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient, if he exercises the ordinary skill of an ordinary competent man exercising that particular art... there may be one or more perfectly proper standards and if a medical man conforms with one of those proper standards then he is not negligent... the mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds... a practice (accepted as proper by a reasonable body of medical men skilled in that particular art), is not negligent merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."* (our emphasis added)

2.8.3 So, generally, the Infraco would be in breach of this obligation, only if they were negligent in the performance of their obligations.

2.8.4 A mistake or error in the performance of obligations does not necessarily equate to negligence. In order to prove negligence, it is not enough to call expert evidence in the relevant field to show that there is a body of opinion within the relevant profession that would have approached the matter differently or better. Nor is expert opinion that the expert would have regarded the Infraco's acts or omissions as negligent. What must be shown by way of expert evidence is that there is no reasonable body of opinion within the relevant profession that would regard the Infraco's acts or omissions as acceptable at the time of those acts or omissions. In other words it must be proved that no reasonably competent Infraco would have acted in the way that this particular Infraco did in all the circumstances.

**2.9 The Infraco has not complied with its obligations under Clause 28 of the Infraco Contract in respect of the appointment of Key Sub-Contractors, which directly impacts upon the ability to provide Estimates**

Clause 28.3 of the Infraco Contract provides *"In respect of the Key Sub-Contractors not already approved and listed in Schedule Part 38 (Approved Suppliers and Sub-Contractors and Trades), the Infraco shall supply a reasonable level of relevant information (including curriculum vitae, information on relevant experience and technical capacity, insurance details and the methodology for provision of the sub-let works) required by tie to enable a decision to be made by tie on the suitability of the proposed Key Sub-Contractors to perform the relevant part of the Infraco Works. tie's decision on the use of and identity of any sub-contractor, supplier, sub-consultant, specialist and/or other party shall not be unreasonably withheld or delayed provided that tie is entitled to so withhold its decision if:*

28.3.1 *tie considers that the proposed Key Sub-Contractor has an unacceptable safety record;*

28.3.2 *such Key Sub-Contractor will not provide a collateral warranty in accordance with Clause 28.7 unless Infraco provides a collateral warranty in accordance with Clause 28.10"*

Clause 28.10 of the Infraco Contract provides "*In any case where the Infraco is unable to obtain a collateral warranty from a Key Sub-Contractor in accordance with Clause 28.7 and can demonstrate to tie's satisfaction that it has used reasonable endeavours to do so prior to entering into contract with such Key Sub-Contractor the Infraco shall, if so required by tie, expressly warrant the Key Sub-Contractor's works in the form as would have been granted by the Key Sub-Contractor with the exception of the cap on liability under such collateral warranty which shall be expressed in the same terms as the Infraco Collateral Warranty. The inability to provide the collateral warranty from the Key Sub-Contractor in the circumstances described in this sub-clause shall not constitute a breach of this Clause 28*"

- 2.9.1 By letter dated 4 July 2008 tie noted that tie responded to Infraco's request that tie approve Key Sub-Contractors by requesting basic information which was not responded to by Infraco and reiterated that Infraco have not procured Key Sub-Contractors in accordance with the Programme.
- 2.9.2 There is reference to a Compensation Event having been submitted by Infraco in connection with Key Sub-Contractors.
- 2.9.3 By letter dated 27 August 2008 tie noted that Infraco have not yet concluded any sub-contractors nor have provided tie with any finalised proposed sub-contract terms and conditions for final review.
- 2.9.4 By letter dated 23 September 2008 Infraco requested tie approval of Crummock (Scotland) Ltd.
- 2.9.5 By letter dated 23 September 2008 Infraco requested tie approval of Farrans Construction Ltd.
- 2.9.6 By letter dated 17 November 2008, following an audit, tie expressed concerns with aspects of Graham Construction safety management.
- 2.9.7 By letter dated 1 December 2008 tie insisted that Sub-contractor Direct Agreements due under the Infraco Contract be provided to tie forthwith in substantially the form contained in the appendix to the Infraco Contract.
- 2.9.8 By letter dated 17 December 2008 Infraco gave notice to tie of its intention to appoint Siemens Mobility as a sub-contractor.
- 2.9.9 By letter dated 9 February 2009, following an audit, tie expressed concerns with aspects of Graham Construction lack of railway experience, together with poor implementation on site of their own safety management procedures.

**2.10 The Infraco is employing, or causing to be employed (via recruitment agencies), in the construction and completion of the Infraco Works, persons who are not careful, skilled and experienced in their trades and callings, in breach of Clause 27.1 of the Infraco Contract**

Clause 27.1 of the Infraco Contract provides "*The Infraco shall employ or cause to be employed in and about the construction and completion of the Infraco Works and in the superintendence thereof only persons who are careful, skilled and experienced in their several trades and callings. The Infraco shall ensure that its site supervisors and operatives who are involved in carrying out the Infraco Works shall have CSCS (or equivalent) certification, if relevant to the works they are performing*"

- 2.10.1 By letter dated 11 July 2008 **tie** raised a Non Conformance Report on the basis that survey works being carried out did not comply with the requirements of the Infraco Contract.
- 2.10.2 Infraco note that a Non Conformance Report relating to survey works at the Edinburgh Park site was issued, but disagree with the terms of the Non Conformance Report.
- 2.10.3 Infraco respond to **tie** denying that there is a lack of clarity in the incident/accident reports.

**2.11 The Infraco is providing and employing technical assistants who are not skilled, experienced and assessed as competent for undertaking a specified range of activities in their occupations, in breach of Clause 28.5.1 of the Infraco Contract. The Infraco has not provided and employed such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely execution of the Infraco Works (Clause 28.5.2 of the Infraco Contract)**

Clause 28.5 of the Infraco Contract provides "*The Infraco shall, and shall procure that every Sub-Contractor shall, provide and employ in connection with the execution of the Infraco Works:*

*28.5.1 only such technical assistants as are skilled, experienced and assessed as competent for undertaking a specified range of activities in their respective occupations and, as appropriate, such sub-agents, foremen and leading hands as are competent to give proper supervision to the work they are required to supervise; and*

*28.5.2 such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely execution of the Infraco Works"*

- 2.11.1 By way of letter dated 17 June 2008 **tie** requested information in connection with labour resources and responsibilities.
- 2.11.2 By way of letter dated 16 October 2008 **tie** expressed concern as to Infraco's serious lack of management resource.
- 2.11.3 By way of letter dated 27 October 2008 **tie** expressed disappointment that Infraco continue to ignore any of **tie's** letters on the matter of Construction and Design Support.
- 2.11.4 By way of letter dated 6 November 2008 **tie** noted that progress has been impacted by Infraco's lack of resource and management of its labour resources.
- 2.11.5 By way of letter dated 9 December 2008 **tie** noted that Infraco had given an undertaking to provide evidence that the supervisor being used by a sub-contractor had the required competencies to carry out supervision and this had not been received by **tie**.

**2.12 The Infraco is not approaching all Permitted Variations on a collaborative and Open Book Basis (as defined in the Infraco Contract) (Clause 6.3.1 of the Infraco Contract)**

Clause 6.3.1 of the Infraco Contract provides "*approach all Permitted Variations on a collaborative and Open Book Basis*"

*"Open Book Basis" means the availability and disclosure (consistent with operation of Clause 104 (Information and Audit Access)) of a reasonable level of data and calculations used by the Infraco to create and justify costings and financial analysis presented to tie which shall include any management costs and overheads of Infraco to the extent relevant, and capable of being identified as being attributable to such costings or financial analysis"*

2.12.1 By way of letter dated 5 August 2008 tie requested that Infraco provide further programme and cost information in connection with St Andrews Square public realm works (Estimate provided by Infraco included various lump sums and provisional sums).

2.12.2 By way of letter dated 8 September 2008 Infraco responded to a tie request for substantiation - Infraco advised that the cost of £24,558.14 was the actual cost of the works and includes attendances at meetings, planning, engineering, commercial management, travel and expenses and with regard to preliminary costs these were in accordance with Schedule Part 4 Appendix G of the Infraco Contract and additional preliminary costs being for the turnkey management time spent for both the preparation of the estimate and the respective coordination of the additional works. This type of work was never allowed for within either the Consortium or Head Office Overhead as suggested by tie and creates an additional cost whether undertaken by Infraco or tie.

2.12.3 By letter dated 2 October 2008 Infraco informed tie that they have instructed SDS to detail design changes to the 300mm diameter sewer for the sum of £8,553.25 which in Infraco's opinion is fair and reasonable. Furthermore, Infraco has issued this instruction to avoid any unnecessary delays to the regular progress of the works and Infraco expect full reimbursement of its instruction and mitigation costs.

## 2.13 The Infraco is not compliant with its obligations in respect of the delivery of Estimates

Clause 80.2.2 of the Infraco Contract provides "*subject to Clause 80.3, require the Infraco to provide tie within 18 Business Days of receipt of the tie Notice of Change with an Estimate, and specify whether any competitive quotes are required and*"

Clause 80.3 of the Infraco Contract "*If, on receipt of the tie Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to tie within 18 Business Days, then the Infraco shall, within 5 Business Days (during the period prior to issue of the Reliability Certificate) and within 10 Business Days (at any time after issue of the Reliability Certificate) of receipt of such tie Notice of Change, deliver to tie a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably"*

Clause 80.6 of the Infraco Contract provides "*The valuation of any tie Changes made in compliance with this Clause 80 (tie Changes) shall be carried out as follows:*

*80.6.1 by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (Pricing) or Schedule Part 7 (Maintenance Contract Price Analysis) as the case may be in so far as such rates and prices apply;*

80.6.2 if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;

80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (Pricing) and Appendix F Schedule Part 7 (Maintenance Contract Price Analysis);

80.6.4 if the value of the tie Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with Appendix G to Schedule Part 4 (Pricing) and Appendix F to Schedule Part 7 (Maintenance Contract Price Analysis);

provided that where any tie Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the tie Change shall be ascertained by measurement and/or valuation at fair rates and prices"

2.13.1 In many instances the Infraco has given a number of notices of an Infraco Notification of **tie** Change which states (or in a similar form of words) "*In accordance with Clause 80.3 of the Infraco Contract, we hereby request a reasonable extension of time to the contract requirement of 18 business days to provide an Estimate*"

2.13.2 In the exchanges of correspondence concerning Estimates, the Infraco has expressed the following opinions:

2.13.2.1 *Clause 80.20* provides for the Infraco notifying **tie** where an instruction has been received by the Infraco, which Infraco considers to be a **tie** Change but which has not been instructed by way of a **tie** Notice of Change;

2.13.2.2 *Clause 80.20* does not operate until an instruction has been issued and received by Infraco - **tie** cannot use *Clause 80.20* and any such instructions are invalid;

2.13.2.3 *Clause 80.15* only operates if all of the following conditions are satisfied - the Estimate has been referred to DRP; Infraco is not entitled to refuse to carry out the work; **tie** determined that the **tie** Change is urgent/has a potentially significant impact on Programme; and does not require work to be done by SDS in respect of which a valuation has not been agreed;

2.13.2.4 In the absence of an appropriate **tie** Notification of Change under *Clause 80.1*, Infraco considers any such instructions are issued pursuant to *Clause 34* which are a deemed **tie** Notice of Change and a Mandatory **tie** Change;

2.13.2.5 where there is not deemed issue of a **tie** Notice of Change *Clause 80.20* may apply, but only after a **tie** instruction has been issued and received by Infraco;

- 2.13.2.6 *Clause 80.13* provides that subject to *Clause 80.15*, Infraco shall not commence work in respect of a **tie** Change until receipt of a **tie** Change order i.e. after the Estimate is agreed;
- 2.13.2.7 if **tie** wish a change they should issue the appropriate notice under *Clause 80.1*;
- 2.13.2.8 do not agree with **tie's** interpretation of *Clause 80.13* - "*unless otherwise directed by tie*" which is clearly a cross reference to the end of *Clause 80.15* which states that "*tie may instruct Infraco to carry out the proposed tie Change*" while the Estimate is in DRP;
- 2.13.2.9 procedure described in *Clause 80* for Estimates is the approach Infraco have taken;
- 2.13.2.10 facts are that Infraco has 18 business days to submit an estimate and Infraco have provided nearly £20 million worth of estimates to tie based mainly on Schedule Part 4 Appendix F Schedule of Rates - yet no **tie** Change Orders have been issued by **tie** to enable work to be implemented (letter dated 3 September 2008);
- 2.13.2.11 opinion that wide ranging of Notified Departures under Schedule Part 4 affecting all aspects of Infraco's works, leading to the onerous and time consuming operation of *Clause 80* and **tie's** apparent inability or reluctance to agree Estimates in a reasonable timescale in accordance with *Clause 80*;
- 2.13.2.12 reference to Infraco not commencing work in respect of certain tie Changes until instructed through receipt of a **tie** Change Order unless tie direct otherwise;
- 2.13.2.13 unable to issue a Client Change Order to SDS under the SDS Agreement until **tie** issue a **tie** Change Order to Infraco under the Infraco Contract;
- 2.13.2.14 various reasons put forward by Infraco for not delivering an Estimate, including Estimate too complex; absence of scope of work; lack of receipt of Prior Approval; awaiting **tie** instructions;
- 2.13.2.15 Infraco not obliged to "*justify*" an extension of time to return an Estimate;
- 2.13.2.16 general denial of any delay in production of an Estimate;
- 2.13.2.17 limited explanations put forward for non-production, although an attempt to forecast dates for delivery of Estimates and acknowledgement that **tie** require some reasoned explanation;
- 2.13.2.18 date of issue of a batch of drawings at IFC does not immediately trigger the start of the production of an Estimate - design has to pass through internal approval system and estimated that this takes around 5 weeks - then take off which takes on average 4 weeks - then validation by change team which takes on average 3 weeks - in addition external subcontractor estimates can take 4 to

5 weeks - in additional external design consultants which takes on average 5 weeks; and

- 2.13.2.19 believe that Infraco have demonstrated beyond reasonable doubt that except in respect of very simple changes, Estimates cannot be provided within 18 Business Days of receipt of **tie** Notices of Change.
- 2.13.3 In the exchanges of correspondence concerning Estimates, **tie** has expressed the following opinions:
  - 2.13.3.1 require Infraco to provide proper reasons for the request for an extension to the time for delivery of Estimates, together with a revised date for delivery;
  - 2.13.3.2 notes that in respect of certain works Infraco was still to submit an Estimate 69 days after works were instructed in writing;
  - 2.13.3.3 **tie** disagree that under the Infraco Contract Infraco no require to carry out work formally instructed in writing by **tie** prior to submission of an Estimate and Issue of a Change Order;
  - 2.13.3.4 **tie** are not obliged to issue a Change Order for design work only;
  - 2.13.3.5 certain extensions to the date for submission of an Estimate have been granted by **tie**;
  - 2.13.3.6 noted that any project delay as a consequence of late delivery of an Estimate will be Infraco's responsibility;
  - 2.13.3.7 **tie** will issue a Change Order when they are satisfied that the Estimate (in its entirety) provided by Infraco is acceptable;
  - 2.13.3.8 any delay associated with the late return of an Estimate where justification has not been produced to demonstrate an entitlement to an extension, which results to a delay will be the responsibility of the Infraco; and
  - 2.13.3.9 in almost all instances where an Infraco Notice of **tie** Change has been submitted Infraco have failed to provide an Estimate within the prescribed 19 Business Day period and in order for **tie** to act reasonably in considering an extension Infraco require to clearly identify the reasons why an extension is required along with an anticipated date when an estimate will be submitted.
- 2.13.4 DLA make the following observations on the foregoing:
  - 2.13.4.1 in the round the correspondence demonstrates a lack of meaningful communication and engagement between **tie** and Infraco (with assertion and counter assertion but no resolution);
  - 2.13.4.2 little evidence has been submitted by Infraco to support its allegations, beyond a general denial of the position put forward by **tie**;



- 2.13.4.3 there is an apparent resistance on the part of the Infraco to produce to **tie** evidence to demonstrate, substantiate and prove that either a Change has occurred or the consequences and effects of that Change;
- 2.13.4.4 the parties do not agree as to the operation of *Clause 80* of the Infraco Contract - in particular the timing of notices/responses and the information to be provided; and
- 2.13.4.5 it is clear that in respect of certain Changes the parties are in dispute as to whether or not a particular matter notified by the Infraco is in fact a Change.

**2.14 The Infraco is not carrying out the Infraco Works so as to assist tie in relation to providing information that best value has been secured in respect of the carrying out of the Infraco Works (Clause 7.3.15 of the Infraco Contract). tie currently cannot properly report to Transport Scotland**

Clause 7.3.15 of the Infraco Contract provides "*so as to assist tie in relation to providing information that best value (pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003) has been secured in respect of the carrying out of the Infraco Works*"

**2.15 The Infraco is not progressing the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under the Infraco Contract in accordance with the Programme (Clause 60.1 of the Infraco Contract)**

Clause 60.1 of the Infraco Contract provides "*The Infraco shall progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme. Notwithstanding the generality of the foregoing, the Infraco shall complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion in respect of each Section or Certificate of Service Commencement (as appropriate) to be issued in accordance with Clauses 44 (Notification of Sectional Completion of Sections A, B, C) and 45 (Notification of Service Commencement) by the Planned Service Commencement Date or the relevant Planned Sectional Completion Date*"

- 2.15.1 By way of letter dated 1 August 2008 Infraco advised **tie** of delay relating to listed building consent by City of Edinburgh Council.
- 2.15.2 By way of letter dated 21 August 2008 Infraco requested **tie** to issue instructions urgently to allow certain works to proceed.
- 2.15.3 By way of letter dated 10 October 2008 **tie** noted that CEC had requested an extension of time for Prior Approvals but noted that technical approval was submitted at a time such that it delays the issue of IFC.
- 2.15.4 By way of letter dated 22 October 2008 **tie** noted that using current logic constraints Infraco had produced an analysis which would support a 38 day extension to the Open for Revenue Service Date of 16 July 2011, but that such assessment also required to take into account mobilisation and advance

works, benefit of mitigation measures; IFC standard timescale; Infraco failure to mobilise; further mitigation measures; and approval by Tram Project Board and CEC. Accordingly, **tie** was of the view that the approach required Infraco to confirm the baseline position of V25-V31 in terms of time and cost; assessment of the benefits of further changes and instructions; and conclude any necessary arrangement on potential acceleration, mitigation or integration opportunities to recover the Programme to 16 July 2011 or better.

2.15.5 Infraco responded to the **tie** letter dated 22 October 2008 by way of letter dated 24 October 2008 denying that any further approach was required and confirming its position that **tie** was required to grant an unqualified extension of time in respect of the situation existing at 14 May 2008 and that Infraco was prepared to accept the evaluation of 38 business days.

2.15.6 The Infraco has given a number of notices to **tie** of an Infraco Notification of a **tie** Change in connection with revisions of the SDS Programme by way of three letters dated 10 December 2008.

2.15.7 **tie** accepts that delays to certain approvals have occurred and prevented certain packages reaching IFC in line with version 31 of the programme.

**2.16 The Infraco is not taking all reasonable steps to mitigate the effects of any Infraco-driven delay to the progress of the Infraco Works (Clause 60.9 of the Infraco Contract)**

Clause 60.9 of the Infraco Contract provides "*The Infraco shall take all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works*"

2.16.1 By way of letter dated 12 February 2009 **tie** expressed concern regarding the 3 month look ahead programme prepared by Infraco.

**2.17 The Infraco is not using 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 delay in the progress of the Infraco Works. The Infraco is not using its reasonable endeavours to avoid altogether any delay in the progress of the Infraco Works. The Infraco is not using its reasonable endeavours to mitigate the costs (Clause 65.8.2 of the Infraco Contract)**

Clause 65.8 of the Infraco Contract provides "*tie shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (Compensation Events)*

*65.8.1 not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties; and;*

*65.8.2 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"*

2.17.1 The Infraco has given a number of notices (by way of a style proforma letter) to **tie** of a "a claim for an extension of time and/or costs and relief from

performance of [the Infraco's] obligations." The aforementioned notices exhibited to DLA are:

- 2.17.1.1 Reference 25.1.201/MRH/1184 dated 16 December 2008 - in connection with INTC 245 - SRU Murrayfield;
  - 2.17.1.2 Reference 25.1.201/MRH/1238 dated 5 January 2009 - in connection with INTC 267 - Section 5C - Scottish Water Diversion at Gogar Roundabout;
  - 2.17.1.3 Reference 25.1.201/IL/1270 dated 12 January 2009 - in connection with delay by MUDFA in completing works to divert utilities;
  - 2.17.1.4 Reference 25.1.201/MRH/1286 dated 14 January 2009 - in connection with failure of SDS provider to achieve the release of Issued for Construction Drawings by dates identified in the Programme;
  - 2.17.1.5 Reference 25.1.201/MRH/1293 dated 16 January 2009 - in connection with Infraco Notice of **tie** Change No. 274;
  - 2.17.1.6 Reference 25.1.201/MRH/1295 dated 16 January 2009 - in connection with failure of SDS Provider to achieve the release of Issued for Construction Drawings by the dates identified in the Programme; and
  - 2.17.1.7 Reference 25.1.201/GC/1450 dated 2 February 2009 - in connection with Infraco Notice of **tie** Change No. 285.
- 2.17.2 The aforementioned notices include the following statements:
- 2.17.2.1 a very brief explanation of the nature of the Compensation Event;
  - 2.17.2.2 as the impact of the event will take time to assess and be dependent upon the state of the works in the area of the event at that time the Infraco is unable to provide full details of the extension of time and relief required and/or any costs;
  - 2.17.2.3 in certain cases reference to the allegation that the duration cannot be assessed until the issue by the SDS Provider of IFC drawings is complete (or that the SDS Provider has not provided drawings by the date identified in the Programme) and that the IFC drawings when issued will take a considerable period of time to assess;
  - 2.17.2.4 reliance upon *Clause 65.2.2* of the Infraco Contract such that it is not practicable for the Infraco to submit full details in accordance with *Clause 65.2* of the Infraco Contract;
  - 2.17.2.5 a reference to the Infraco having submitted to **tie** a written statement with interim written particulars (copies of which have not been considered by DLA);

- 2.17.2.6 an undertaking to provide further written particulars;
  - 2.17.2.7 confirmation that the Infraco could not reasonably have avoided the occurrence; the Compensation Event is the direct cause of delay; and Infraco is using reasonable endeavours to perform its obligations; and
  - 2.17.2.8 a request that **tie** respond to the notice in accordance with *Clause 65.2A1* of the Infraco Contract.
- 2.17.3 In the exchanges of correspondence concerning Compensation Events, the Infraco has expressed the following opinions:
- 2.17.3.1 *Schedule Part 4 paragraph 3.3 (a)* excludes works associated with utilities from the construction works price and therefore works involved in dealing with any utilities outwith the Defined Provisional Sums are Compensation Events (reference 25.1.201/IL/1207; 1208; 1231 1232);
  - 2.17.3.2 it is not part of the Infraco works to determine extent to which the MUDFA Contract should have deal with utility diversions;
  - 2.17.3.3 it does not agree with **tie's** opinion; is unable to "*ascertain the contractual basis of [tie's] conclusion that [tie] do not consider the work identified to be a Compensation Event*" and affirms that in respect of certain Compensation Events which it has notified (the merits of which Compensation Events DLA has not considered) the Infraco is of the opinion that they are Compensation Events;
  - 2.17.3.4 in certain instances the Infraco has informed **tie** of the particular Compensation Event upon which it relies (although alternatives are stated);
  - 2.17.3.5 there is no obligation upon the Infraco to provide reasons for late issue of IFC drawings, nor provide an analysis and statement of why late issue of IFC drawings is a Compensation Event;
  - 2.17.3.6 the Infraco Contract does not oblige the Infraco to "*identify or justify the reasons*" why a Change is a Compensation Event;
  - 2.17.3.7 delay is being measured against the contract programme modified to account for V31 design delay (later reference to SDS Design Programme Revision 40 and lack of agreement on previous revisions V32 to V39);
  - 2.17.3.8 alleging that **tie's** response to Infraco's notice of the Compensation Event was not issued within 20 Business Days as required by *Clause 65.2A1* of the Infraco Contract;
  - 2.17.3.9 reference to an agreement between **tie** and Infraco that they will analyse separately the impact of delays arising from Change; and

- 2.17.3.10 reference to an agreement to deal with matters of delay by the issue of a letter in the first instance.
- 2.17.4 In the exchanges of correspondence concerning Compensation Events, **tie** has expressed the following opinions:
- 2.17.4.1 that works identified in certain **tie** Notices of Change are not Compensation Events (although no detailed explanation as to why this is the case was provided by **tie**);
- 2.17.4.2 in order for **tie** to consider whether a Compensation Event has occurred and any claim for extension of time and/or costs the following information is required from the Infraco (in the absence of which the notice does not set out the reasons why the matter referred to is a Compensation Event and upon receipt of any further interim written particulars **tie** shall complete its review under *Clause 65.2.A1* of the Infraco Contract):
- (a) which Compensation Event under the contract definition of Compensation Event are the notices based;
  - (b) reasons why any IFC drawings have been issued late, together with any analysis and statement of why any late IFC issues is a Compensation Event; and
  - (c) identification in notices whether the IFC release is within the programme movement from V26 to V31 or whether there are further delays beyond V31.
- 2.17.4.3 reliance upon *Clause 65.2* of the Infraco Contract which provides that Infraco should notify **tie** of a Compensation Event within 20 Business Days and stating that certain notices have not been issued in compliance with this clause and therefore **tie** do not accept that the Compensation Event notified is valid;
- 2.17.4.4 requests that Infraco provide particulars as required under *Clause 65.2* of the Infraco Contract; and
- 2.17.4.5 acknowledging that the Infraco has failed to submit full details, that the Infraco has undertaken to submit further written particulars and at this stage **tie** does not accept certain works identified constitute a Compensation Event.
- 2.17.5 DLA make the following observations on the foregoing:
- 2.17.5.1 in the round the correspondence demonstrates a lack of meaningful communication and engagement between **tie** and Infraco (with assertion and counter assertion but no resolution);
- 2.17.5.2 little evidence has been submitted by Infraco to support its allegations, beyond a general denial of the position put forward by **tie**;

- 2.17.5.3 there is an apparent resistance on the part of the Infraco to produce to tie evidence to demonstrate, substantiate and prove that either a Compensation Event has occurred or the consequences and effects of that Compensation Event;
  - 2.17.5.4 the parties do not agree as to the operation of *Clause 65* of the Infraco Contract - in particular the timing of notices/responses and the information to be provided; and
  - 2.17.5.5 it is clear that in respect of certain Compensation Events the parties are in dispute as to whether or not a particular matter notified by the Infraco is in fact a Compensation Event - either as to principle or as to whether the notice was timeous.
- 2.18 The Infraco is not currently carrying out and completing the Infraco Works in such a manner so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained (Clause 7.3.2 of the Infraco Contract)**

Clause 7.3.2 of the Infraco Contract provides "*so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained*"

- 2.19 In relation to Permitted Variations, the Infraco is not collaborating and liaising with tie throughout the carrying out of the Infraco Works to ensure due consideration is given to the type of materials and optimum and cost effective construction methods, construction programmes, and temporary works (Clause 7.12 of the Infraco Contract)**

Clause 7.12 of the Infraco Contract provides "*The Infraco shall in relation to any proposed Permitted Variation, collaborate and liaise with tie throughout the carrying out of the Infraco Works to ensure due consideration is given to the type of materials and optimum and cost effective construction and maintenance methods, construction and maintenance programmes, and temporary works, as appropriate*"

- 2.20 The Infraco is not in compliance with Clause 10.2 of the Infraco Contract: the Infraco is obliged to submit any Deliverables associated with any Permitted Variations to tie's Representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan)**

Clause 10.2 of the Infraco Contract provides "*The Infraco shall submit any Deliverables associated with any Permitted Variations to tie's Representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan)*"

- 2.21 The Infraco is not fully compliant with Clause 10.4 of the Infraco Contract: the Infraco is not maintaining an extranet by which tie and other parties may access remotely any Deliverable, including any drawings comprised with the Deliverables, and electronically store and/or print copies of any Deliverable**

Clause 10.4 of the Infraco Contract provides "*The Infraco shall establish and maintain an extranet which tie, any tie Parties and any other party reasonably required by tie may access remotely by computer (through an appropriate login/security regime) to view any Deliverables including any drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables*"

2.21.1 By letter dated 16 December 2008 tie noted that Infraco were tasked with providing a schedules set of deliverables synchronised to the main construction programme and by that date Infraco have supplied only high level milestone dates lacking the necessary detail.

**2.22 The Infraco is not adhering to the requirements of the Design Management Plan (Clause 10.17 of the Infraco Contract)**

Clause 10.17 of the Infraco Contract provides "*The Parties shall adhere to the requirements of the Design Management Plan in terms of timescales, packaging, sequencing and provision of information to support the design approval process*"

2.22.1 By letter dated 4 December 2008 acknowledged receipt of a drawing register from Infraco, but noted that outstanding drawings were to be issued to tie and a programme was required detailing when outstanding drawings will be issued.

- 2.23 The Infraco is not maintaining a change control register which details the status and gives summary information on all withdrawn, pending and confirmed variations under the Infraco Contract. The Infraco has not provided a copy of the change control register to tie. The Infraco has not provided updated of the change control register to tie every Reporting Period (Clause 79.2 of the Infraco Contract)**

Clause 79.2 of the Infraco Contract provides "*The Infraco shall maintain a change control register which shall detail the status and give summary information on all withdrawn, pending and confirmed variations under this Agreement. The Infraco shall provide a copy of the change control register to tie and the Infraco shall provide updates of the change control register to tie every Reporting Period*"

- 2.24 The Infraco is not carrying out all required management activities in order to manage the performance of the SDS Services (Clause 11.4 of the Infraco Contract)**

Clause 11.4 of the Infraco Contract provides "*The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services*"

- 2.24.1 By letter dated 25 July 2008 tie noted the issue concerning a design requirement at First Scotrail Depot Entrance Gate arose from the incomplete survey initially undertaken by SDS.
- 2.24.2 By letter dated 5 August 2008 tie noted that SDS warranted prior to novation that there were not outstanding claims against tie and accordingly the variation concerning additional prior approval at the depot is deemed to be included within the agreed final account for all works carried out to 14 May 2008.
- 2.24.3 By letter dated 21 August 2008 tie noted that a Change Request had been duplicated and urged Infraco to discuss the matter with SDS in order to avoid a repeat of the waste of time and money.
- 2.24.4 By letter dated 28 August 2008 tie noted that the Change raised by SDS in connection with Hilton Hotel planning permission was raised by SDS prior to the date of novation and therefore is deemed to be included in the final account agreed between tie and SDS.
- 2.24.5 By letter dated 15 September 2008 tie noted that it was not the case that tie had failed to progress the procurement of drainage outfall consent from Scottish Water and that consents were not subject to delay arising from unresolved issues between tie and Scottish Water.
- 2.24.6 By letter dated 29 October 2008 tie noted that it was for Infraco to manage Estimates which include a design portion and it is for Infraco to manage the process with SDS.



- 2.25 The Infraco is not carrying out the Infraco Works so as to ensure compliance with the Tram Legislation (Clause 7.3.9 of the Infraco Contract). tie has a public duty to execute the project efficiently**

Clause 7.3.9 of the Infraco Contract provides "*so as to ensure compliance with the Tram Legislation*"

- 2.26 The Infraco is not carrying out the Infraco Works in accordance with Good Industry Practice (Clause 7.3.13 of the Infraco Contract)**

Clause 7.3.13 of the Infraco Contract provides "*in accordance with Good Industry Practice*"

"*Good Industry Practice*" means using standards, practices, methods and procedures conforming to Law and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably be expected from a large, reputable, professionally qualified, competent and skilled organisation experienced in carrying out activities of a similar nature, scope and complexity to those comprised in the Infraco Works and seeking in good faith to comply with its contractual duties and all duties owed by it"

- 2.27 The Infraco is not carrying out the Infraco Works so as to ensure that the design of the Edinburgh Tram Network is buildable and maintainable (Clause 7.3.14 of the Infraco Contract)**

Clause 7.3.14 of the Infraco Contract provides "*so as to ensure that the design of the Edinburgh Tram Network is buildable and maintainable*"

- 2.28 The Infraco is not acting in accordance with the OGC's "Excellence in Construction" initiative (Clause 7.3.17 of the Infraco Contract)**

Clause 7.3.17 of the Infraco Contract provides "*in accordance with the OGC's "Excellence in Construction" initiative*"

- 2.29 The Infraco is not using reasonable endeavours to ensure that in carrying out the Infraco Works it maximises productivity by reference to Good Industry Practice (Clause 7.5.1 of the Infraco Contract)**

Clause 7.5 of the Infraco Contract provides "*The Infraco shall (and shall procure that the Infraco Parties) use reasonable endeavours to ensure that in carrying out the Infraco Works, it:*

7.5.1 *maximises productivity by reference to Good Industry Practice as applicable to construction or maintenance as relevant;*

7.5.2 *minimises disruption to the city of Edinburgh;*

7.5.3 *maintains safety, and minimises the potential for accidents, and safeguards the Infraco Works;*

7.5.4 *safeguards efficiency in the obtaining of Consents; and*

7.5.5 *minimises costs"*

- 2.29.1 The Infraco by way of letter dated 28 August 2008 requested tie issue appropriate written instruction in accordance with Clause 25 pursuant to Clause 20.2.1.1 of the Code of Construction Practice Schedule Part 3 to carry

out appropriate additional site investigations to determine the extent and type of contaminants on the site.

2.29.2 The Infracore by way of letter dated 24 November 2008 requested **the** issue instructions in connection with land contaminated by Japanese knotweed.

DLA

24/02/09