



Edinburgh Tram Network

Termination of DPOFA

Introduction

This note considers the consequences of termination of the Development Partnering and Operating Franchise Agreement ("DPOFA") in relation to the Edinburgh Tram Project ("ETN"). This Note does not calculate the economic outcome of these two scenarios but it sets out the foreseeable contractual consequences and related legal liabilities, entitlements and risks.

DPOFA controls the terms of appointment of Transdev as the potential operator of the ETN, **tie** is the Client counterparty. The DPOFA stands independently of the Infraco suite, so that the DPOFA could be subject to a termination without termination of the Infraco Contract and the key subcontracts.

Voluntary Termination in Phase C1

tie may terminate DPOFA in whole or in part, where Phase 1a of the project development has not yet gone beyond Project Phases A, B and C1 under the terms of Clause 32 (*Termination During Development Phase*). For the purpose of any 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. We are clearly still in C1 currently, as C2 (which relates to the recruitment and training of staff for the testing, commissioning and operation of the system) has not commenced to date.

A termination of the DPOFA in part is also permitted under Clause 32 in relation to Phase 1b or any future expansions of the network so long as C2 has not commenced in relation to the relevant expansion.

tie are required to provide 30 days notice to terminate the Agreement pursuant to Clause 32.

The consequences for such a termination are not likely to be financially severe from **tie's** perspective, but are subject to Clause 41 (*Effect Of Termination*) which provides for payment of undisputed sums due from **tie**. Under Clause 40 (*Compensation On Termination*), demobilisation costs may also be applicable, but these can be expected to not be extensive at this stage of project development. Such costs are subject to the test of them being "demonstrably and reasonably incurred". Transdev is also under a duty to minimise and mitigate any applicable demobilisation costs.

There may be one or more contracts entered in to by Transdev in relation to the ETN that may have to be honoured in terms of cancellation cost, which would be added to the demobilisation figures: for example additional consultancy agreements and the like. The DPOFA requires that Transdev should have made any such agreements known to **tie** for consent, and therefore any which are a surprise to **tie** should be capable of challenge on the grounds of breach and/or not being reasonably incurred.

Voluntary Termination after Phase C1

Once the testing and commissioning phase commences, **tie** have much more limited options in terms of termination.



DPOFA only allows for termination on a voluntary basis either where: (1) an operating deficit, where operating costs exceed operating revenues, arises (only relevant after 3 years of operation); or (2) where the Parties meet after full service commencement and cannot agree amendments to Transdev's payments or performance indicators following the reset process set out in the Operating Appendix.

If either of these scenarios applies, the compensation involved would again be limited to undisputed sums and demobilisation costs. Clearly, Transdev would have much greater personnel redundancy costs than is currently the case, arising from having taken on the full complement of operating staff and drivers.

Default Termination

Options for termination arise in the event of breach of the DPOFA by Transdev. Certain defaults are incapable of remedy, such as insolvency or corrupt gifts. The majority of defaults will be capable of rectification, or will be minor enough that the persistent breach regime in Clause 34 (*Persistent Breach*) must be applied over a significant period. It is unlikely therefore that Transdev will perform poorly enough to incur a default termination. If they were to do so, Transdev would be entitled to nothing from **tie** other than sums owed for services provided prior to termination.

If **tie** had decided that the DPOFA must come to an end, **tie** could opt to commit a default and thereby become liable to termination under Clause 33 (*Termination on tie Default or at Operator Option*). This would most likely be engineered by failing to pay Transdev. This approach would carry reputational consequences alongside the compensation sums involved. There is also the possibility of unintended complications since the option to terminate would be with Transdev, who might seek to proceed in a different way than issuing a termination notice. If Transdev did not take up this option to terminate within 30 days of awareness of the **tie** Default, the option to terminate is waived.

Demobilisation costs and undisputed sums would form part of the compensation. Notably, DPOFA was drafted so that the liability sums, or method of calculation, for a **tie** Default termination are not prescribed. This permits **tie** the opportunity to assert that any Transdev loss was not great, and could be properly mitigated. In this way **tie** can contain the liability by negotiation or proof through DRP. Transdev could be expected to argue for other compensation heads which would entail a level of negotiation to resolve.

Negotiated Termination

If there were a real will to terminate the DPOFA after the commencement of the C2 recruitment and training phase, and there were no clear defaults by Transdev which could entitle **tie** to terminate, the optimal approach would be a negotiated termination. This would need to address similar elements of the Transdev costs and expenses requiring evaluation under a **tie** Default termination, but these ought to be capable of presentation and verification in a less adversarial environment. Demobilisation and related costs of Transdev should still be at a reasonable level in the run up to service commencement (dependant upon employment terms such as the notice period and call-off options in the Transdev contracts of employment).

It is, however, unrealistic to suppose that Transdev would be willing to engage in negotiation unless Transdev appreciated that there has been a change in the circumstances of the Project which made its role as Operator untenable. Transdev could be expected to seek a sum of compensation to reflect the loss of the opportunity to operate the ETN (both a financial



opportunity and a high profile role for the Transdev business). A debate over such sums might result in any contractual compensation being significantly delayed and/or subject to an unpredictable risk of being reduced below a tolerable level by contest under DRP.

Ongoing Service

Following termination on whatever grounds above, **tie** would need to provide the various services which Transdev are contracted to provide under the DPOFA. These will extend to the provision of drivers, operations at the depot, soft services such as cleaning and graffiti removal of vehicles and tramstops, inspection for damage and defects, primary responsibility for service deficiencies, ticketing, assessments of passenger patronage, affordability and opinions, provision of the customer helpdesk, public address system and other control centre functions, security and surveillance, monitoring, integration with other transport modes, and timely reporting of matters requiring attention by the Infraco.

Handover from Transdev and preparing **tie** or another party to undertake these roles must be assumed to be much easier at a point significantly before service commencement than during operation.

DLA Piper
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