



## Heads of Terms for the Multi-Utilities Diversions Framework Agreement ("MUDFA")

### Edinburgh Tram Network

Second Draft - 17 August 2005

#### Introduction

The MUDFA will be based on ICE 7th Edition with the following amendments:

- amendments previously circulated by DLA Piper;
- relevant tie standard amendments (e.g. FOISA, DRP etc)
- Utilities/NRSWA amendments; and
- amendments to ensure appropriate interfaces between the Contractor, the Utilities, the SDS Provider and the Infracore.

#### General Issues for Consideration in the Development of the MUDFA

- The drafting in the MUDFA will need the approval of the affected Utilities. To this end, it is proposed that the draft contract will be sent to these Utilities for review over a 42 day period.
- The drafting in the MUDFA will also need CEC/SE approval. It is proposed that the draft contract will be subject to review by CEC/SE. There will also be a requirement for an appropriate delegation of authority to **tie** by CEC and for there to be SE sign off.
- Generally, the relevant terms of the agreements with the Utilities will need to be flowed down into the MUDFA. For example, compliance with C3/C4 scopes (**tie** is producing a single specification based on specifications provided by the relevant Utility companies), and provisions to deal with whether the

Utility or the Contractor is to assume responsibility for carrying out connection works. If the Utility is to carry out connection works, it will be carrying out such works under an agreement with the Contractor.

- If any wayleaves are required over/through land outwith the road or other existing wayleaves then the Relevant Utility Company will obtain such wayleaves and charge **tie**.
- Consideration will need to be given to any agreements which have been made with third parties (including BAA and Forth Ports for land access) and which will impact on the MUDFA, as any such agreements will need to be flowed down into the MUDFA. For example, any restrictions on construction working from any third party (including CEC as roads and planning authority) will need to be included as commitments in the MUDFA. The provisions of the Code of Construction Practice will also need to be incorporated into the MUDFA (for the purposes of tendering, MUDFA Contractors could be required to highlight areas of the CCP which will cause additional expense so that **tie** can consider seeking amendment) .
- The drafting in the MUDFA will need to deal with the concept of identified and unidentified utilities.
- Consideration will need to be given as to how the utilities diversions will impact on the work to be carried out by the Infraco. For example, provisions on liquidated damages will need to be included in the MUDFA.
- The Contractor appointed on the MUDFA, could also be appointed as the Infraco for the main construction works. No conflict of interest is perceived.
- Provisions will need to be inserted to ensure that there is a forum created in which the Contractor can propose innovative solutions with regard to the design produced by the SDS Provider. Drafting on maximisation of construction productivity will also be incorporated.
- Construction methods should be developed by the Contractor to maximise construction productivity.
- Incentivisation provisions are to be included (e.g. early completion bonus).
- It is intended that the MUDFA may ultimately be novated to TEL, therefore, DPOFA assignment provisions should be included.
- **tie** community liaison needs to be put in place and the TSS Provider shall put in place a Utilities and NRSWA specialist to assist **tie**.
- The drafting in the MUDFA will need to include the requirements of the Tram (Line One) and Tram (Line Two) Acts as enacted by the Scottish Parliament.
- 7½% "discount" through NRSWA - is this worth having given that 72% of payment needs to be paid up front. **tie** need to further consider this issue. [*tie to confirm*].

PART I - PRELIMINARY MATTERS		
Clause	DLA Piper Comment	tie Comment
<b>Contracting Parties</b>	<ul style="list-style-type: none"> <li>• The "Contractor" and</li> <li>• the "Employer"</li> </ul> <p>Will the Employer be <b>tie</b> or TEL ? Consideration needs to be given to the fact that the Contractor will be particularly interested in the financial covenant of the Employer.</p> <p>If the contract is being entered into by <b>tie</b> or TEL, an agreement will need to be in place which illustrates how the money to pay MUDFA is being paid to <b>tie</b>/TEL from the Scottish Executive via CEC.</p>	<p>Will be <b>tie</b>. Change references to "Employer" to "<b>tie</b>".</p>
<b>Engineer</b>	<p>Under the ICE Contract, decisions are taken on a number of issues by the Engineer appointed by the Employer. Who will this be? A <b>tie</b> employee or the TSS Provider? Is the role of Employer's Representative also required?</p>	<p>Engineer to become "<b>tie</b>'s Representative".</p> <p>No impartiality.</p>
<b>The Specification</b>	<p>The standard ICE Contract assumes one specification. The MUDFA will have a Specification in respect of the works to be carried out in relation to each utility.</p>	<p>Will be drafted as one specification in different parts.</p> <p>Specification will need to deal with conflicts where the utilities are physically close. The Specification will need to include not only the specific requirements of each utility but also general requirements on working practices, safety etc. It will be a major exercise to pull together all of the "Special Requirements" of each affected Utility.</p>



PART I - PRELIMINARY MATTERS		
Clause	DLA Piper Comment	tie Comment
<b>Contract Duration</b>	Programme for MUDFA to be further considered. How long will the defects liability period be? What is the interaction with the Infraco Contract on timing?	<p><b>Programme</b></p> <p>18 month Construction Period</p> <p>12 month defects liability from date of last completion certificate</p> <p><b>Sector Completion Dates</b></p> <p>tie will give Infraco Sector Availability Dates ("SAD"). If MUDFA does not achieve a SAD, tie will pay a Pre-Agreed Sector Acceleration Payment ("PASAP") which is a set cost agreed between tie and Infraco for the acceleration required to reach the Infraco Sector Completion Date. MUDFA will be liable for liquidated damages where SAD is not delivered on time.</p> <p><b>Sections &amp; Certification</b></p> <p>Substantial Completion of Sector will release Sector to control and management of Infraco.</p> <p>Traffic management and overlays to be set out in programme.</p>
<b>Funding</b>	Will there be any requirement for construction financing ?	No

PART II - LAND		
Clause	Comment	tie Comment
<b>Licence to Use the Land for Construction</b>	How is the issue of access to land being dealt with? How much land is already within the ownership of CEC ? For example, the roads within the CEC boundaries will be owned by CEC in its capacity as roads authority and NRSWA licences will be required. Are there any utilities diversions which are taking place on land not owned by CEC?	<p>Authorised Undertakers powers to be checked.</p> <p>Scope levels of Utilities' statutory rights. Can tie "piggy back" on Utilities?</p> <p>Some land is not within CEC ownership.</p>
<b>Planning</b>	Are there any specific planning issues and planning conditions which the Contractor should be aware of? Will the Contractor be required to obtain any planning consents?	None anticipated. Keep as open question and review along with Utilities' rights.
<b>Temporary Traffic Regulation Orders</b>	<p>Will Traffic Regulations Orders be required? If so, there are a number of issues which require to be determined in relation to Traffic Regulation Orders. The principal issues are:</p> <ul style="list-style-type: none"> <li>• who bears the risk that the requisite Traffic Regulation Orders will be in place to carry out Works?</li> <li>• what is the programme for the acquisition of Traffic Regulation Orders?</li> <li>• what specific traffic regulation issues must the Contractor be made aware of?</li> </ul>	<p>Utilities have no special powers as regards TTROs or TROs. Emergency powers are unlikely to apply but may be a possibility at Haymarket Junction.</p> <p>TTROs and TROs to be sufficient for MUDFA and Infracore.</p> <p>Interface with DLA Piper/D&amp;W to work to maximise benefits for Utilities.</p> <p>Meeting required between DLA Piper, D&amp;W and TSS.</p> <p>[Check Nottingham.]</p> <p>The use of TTROs is anticipated. tie will arrange TTROs through SDS Provider. The Contractor will bear no risk unless he wants to programme the works differently or is late. D&amp;W to advise in detail on programme for TTROs - but allow 8 week period. Not anticipated that there will be any TROs for MUDFA. [tie to confirm]</p>

PART II - LAND		
Clause	Comment	tie Comment
<b>Wayleaves</b>	<p>Drafting to cover:</p> <ul style="list-style-type: none"> <li>• use of powers in the Tram Acts</li> <li>• ability to "piggy back" on Utilities existing wayleaves</li> <li>• new wayleaves - <b>tie</b> or utility to obtain?</li> <li>• costs to be borne by <b>tie</b></li> </ul>	To be further discussed. What has been agreed in Utilities Agreements will need to be flowed down.
<b>Necessary Consents and Licences</b>	Will any other necessary consents and licences be required as part of the construction of the Works.	Consents from Utilities. Check other landowners.
<b>Construction Restrictions etc</b>	Will the Contractor be required to give access to third parties, comply with construction restrictions (e.g. hours of working) etc. If so, these requirements will need to be included in the MUDFA.	Check CCP and Third Party Agreements.
<b>The Site</b>	<p>Layout of the site to be discussed. Where will the compound be ? Will access be given on a phased basis ?</p> <p>Is the condition and adequacy of the site to be a responsibility of the Contractor ? This would be the normal position. The Contractor should also be deemed to</p>	<p>Access to site will be phased with regard to Traffic Management Plan and Master Construction Plan. There will be Sector Handover Dates and Sector Handback Dates.</p> <p>There will be various compounds.</p> <p>Full responsibility is to be handed to Contractor.</p>

PART II - LAND		
Clause	Comment	tie Comment
	<ul style="list-style-type: none"> <li>• have inspected the site and its surroundings;</li> <li>• be aware of and satisfied itself on site conditions;</li> <li>• be aware of and satisfied itself on the adequacy of the rights and the means of access to the site;</li> <li>• be aware of servitudes, wayleaves etc; and</li> <li>• satisfied itself on the condition of any existing structures.</li> </ul> <p>The level of risk to be transferred to the Contractor needs to be discussed in detail given that tie has instructed the SDS Provider to carry out various surveys, including the survey of the existing utilites.</p>	<p>Contractor will not have risk of identifying where Utilities are. SDS survey including existing Utilities must be complete before Sector entry.</p> <p>Further surveys may take place around but not through MUDFA works.</p>
<b>Interface with CEC as roads authority</b>	Provisions will be required with regard to temporary roads and traffic management during construction.	MUDFA to deal with Roads Authority direct and ensure reinstatement to relevant quality.
<b>Interface with Network Rail</b>	Will there be any interface?	Yes and have own utilities. [ <i>tie to confirm</i> ]
<b>Interface with BAA</b>	Will there be any interface?	Yes and have own utilities.
<b>Interface with Forth Ports</b>	Will there be any interface?	Yes - Forth Ports have their own utilities.
<b>Special Requirements</b>	Which other bodies will the Contractor be required to liaise with? SNH, SEPA, Historic Scotland etc.	These need to be checked.



PART II - LAND		
Clause	Comment	tie Comment
<b>New Roads and Street Works Act</b>	Drafting in relation to the provisions of this Act will need to be considered.	To be reviewed on basis that post Royal Assent tie will be Tramway Authority. Review of powers granted required.
<b>Site Requirements</b>	Provisions could be inserted in the MUDFA to cover issues such as: <ul style="list-style-type: none"> <li>• removal of rubbish and surplus material from the site;</li> <li>• temporary accommodation and the provision of office space for the Employer; and</li> <li>• works access and construction traffic routes.</li> </ul>	Agree.
<b>Protestor Action</b>	Given that there could be protestor action which could interrupt the construction works, it is suggested that drafting should be inserted into the MUDFA to deal with this situation arising. As the Contractor will not have a heritable interest in the land (as the land will not be leased to him), the options open to the MUDFA for removal of protestors are limited. Therefore, the drafting could consist of obligations on tie to assist the MUDFA where possible.	Risk to be transferred to Contractor but tie will assist. Drafting required.
PART III - DESIGN, CONSTRUCTION AND COMMISSIONING		
Clause	Comment	tie Comment
<b>Design Obligations and Interface with the SDS Provider</b>	tie to confirm that no design will be carried out by the Contractor. However, obligations will need to be placed on the Contractor to liaise and work with the SDS Provider.	No design carried out by Contractor. However, the question of whether there will be any "design" in relation to the location of the cables, pipes etc in the trenches is to be further discussed. The SDS Provider will review designs produced by Utility companies for generic items and the SDS Provider will sign off on these designs. The Contractor will then comply with the Specification and not produce design.

<p><b>Design Review Process</b></p>	<p>Will the Contractor or the Utilities be required to comment on the design produced by the SDS Provider?</p>	<p>Comment from Contractor will be required early in the process. Comment from each Utility will depend on each Utility Agreement.</p>
<p><b>Standard of the Works</b></p>	<p>The Contractor should be required to carry out the works in accordance with appropriate standards which will include:</p> <ul style="list-style-type: none"> <li>• the detailed design prepared by the SDS Provider;</li> <li>• the required level of skill, care and diligence;</li> <li>• the technical specifications/Special Requirements prepared by the Utilities;</li> <li>• the design manual/design quality plan [?];</li> <li>• the Tram Acts;</li> <li>• all applicable laws and consents;</li> <li>• the environmental statement;</li> <li>• good industry practice; and</li> <li>• the code of construction practice.</li> </ul>	<p>Yes - all required.</p>
<p><b>Identified and Unidentified Utilities</b></p>	<p>Drafting to be included if utilities which are not identified in the surveys are found.</p>	<p>Use Croydon drafting. Unidentified Utilities will not be in specification. Any Utility not in scope will be Unidentified, these will be dealt with through variation and valuation procedure based on rates set for Identified Utilities or re-measured/agreed on emerging cost basis. [<i>tie to confirm.</i>]</p>

<p><b>Programme</b></p>	<p>Provisions should be inserted to deal with the development and updating of a detailed construction programme. To be discussed with <b>tie</b> as to the potential phasing of the Works and the development of milestones.</p> <p>Drafting should also deal with amendments to the programme, the provision of progress reports and obligations to report if the works have fallen behind or are ahead of schedule.</p> <p>Should the Master Project Programme drafting from the SDS Agreement be utilised?</p> <p>Obligations should also be placed on the Contractor to progress the works with due diligence in accordance with the Programme, achieve milestone dates (if set), complete works by the planned completion date and achieve service commencement before the planned service commencement date.</p> <p>Provisions should also be inserted with regard to the payment of liquidated damages in the event of a delay caused by the Contractor.</p>	<p>Use SDS style of programme drafting as basis.</p> <p>Nesting of programmes.</p> <p>Primavera (P3E)</p>
<p><b>Fossils and Antiquities</b></p>	<p>Drafting should be included in the MUDFA in relation to the discovery of fossils and antiquities. Are there likely to be any other issues ? (e.g. munitions, contaminated land)</p>	<p>Will constitute delay event.</p>
<p><b>Public Liaison during Construction</b></p>	<p>To be determined whether <b>tie</b> will require the Contractor to provide liaison services to advise the public on the works which are being undertaken.</p>	<p>Hot Line for problems during construction to be established.</p>
<p><b>Project Partnering Approach and Incentivisation</b></p>	<p><b>tie's</b> requirements to be developed.</p> <ul style="list-style-type: none"> <li>• early completion bonus</li> <li>• gain share for Works which are completed cheaper than estimated.</li> </ul>	<p>[No early Completion Bonus - <i>tie to confirm</i>].</p> <p>Gain share to be developed.</p>
<p><b>Parent Company Guarantee, Retention Bond and Performance Bond</b></p>	<p>To be discussed what types of security will be required by <b>tie</b>.</p>	<p>Retention bond is permissible. Also, Contractor will be required to provide a Defects Bond. PCG will be required. [<i>tie to confirm re performance bond</i>]</p>

<p><b>Health and Safety Issues</b></p>	<p>The Contractor will be responsible for all health and safety issues associated with the Works.</p> <p>Provisions will also need to be included within the MUDFA in relation to the CDM Regulations. Who will be appointed as the planning supervisor ?</p> <p>It is suggested that provisions should be included to set out a requirement on the MUDFA to liaise with the emergency services during the Works (e.g. with regard to traffic temporary measures).</p>	<p>Yes</p> <p>TSS will be Planning Supervisor.</p> <p>Yes, in line with Good Practice.</p>
<p><b>Inspection and Access to the Works</b></p>	<p>Provisions should be inserted to allow the Contracting Authority and its authorised representatives to inspect the Works.</p>	<p><b>tie</b> and Utility companies to be able to inspect. Step down Utility requirements from Utility Agreements.</p>
<p><b>Certification and Commissioning</b></p>	<p>To be considered how <b>tie</b> will wish to have the completed Works certified. Will there be a certification of milestones ? Will the services of an independent certifier be required ?</p> <p>Provisions will also need to be inserted to deal with snagging.</p>	<p>No independent Certifier needed but each Utility will need to check that diversion has been carried out correctly and that utility is fully functioning.</p> <p>Pre-agree draft form of Utility acceptance certificate. Form of Completion Certificate will also need to be drafted.</p> <p>The Contractor will need to obtain a certificate of "successful connection" from the Relevant Utility. MUDFA will then pass this certificate to <b>tie</b> who will issue a Completion Certificate for the Sector/Sub-Sector concerned.</p>
<p><b>PART IV - INTERFACE WITH THE UTILITIES</b></p>		
<p><b>Clause</b></p>	<p><b>Comments</b></p>	<p><b>tie Comment</b></p>
<p><b>Interface Issues</b></p>	<p>To be discussed what will be required. Issues such as the preparation of C3/C4 scopes and connection requirements will need to be covered off in the MUDFA. What will the rights of inspection of the utilities be ?</p>	<p>Drafting required to flow down the provisions of the Utility Agreements. Also, drafting required on connection works, design interface, commissioning, inspection etc.</p>

PART V - FINANCIAL PROVISIONS		
Clause	Comments	tie Comment
<b>Payment Mechanism</b>	<p>The payment provisions compliant with the Housing Grants Construction and Regeneration Act 1996 will need to be drafted. The application for and timing of payment will need to be discussed in detail with <b>tie</b>.</p> <p>Will the payment mechanism be on the basis of target costs or milestones ?</p> <p>The contribution provisions within the NRSWA will need to be considered.</p>	<p>To be milestones based on SDS payment mechanism.</p> <p>Will aim to have as much of the works as lump sum as possible but a Bill of Quantities will go out as part of the ITN.</p>
<b>Interest</b>	DPOFA wording should be used.	Yes
<b>Set-Off</b>	DPOFA wording should be used.	Yes
<b>VAT</b>	Drafting which reflects current practice will be sought from a DLA tax specialist.	Yes
<b>Taxation</b>	Drafting will needs to reflect the requirements of the Construction Industry Scheme. Again, drafting which reflects current practice will be sought from a DLA tax specialist	Yes
<b>Mitigation and Cost Management</b>	DPOFA wording should be used.	Yes



PART VI - WARRANTIES, INDEMNITIES AND LIABILITY		
Clause	Comments	tie Comment
Uninsurable Risks	SOPC/DPOFA wording should be used.	Yes
Indemnity	DPOFA wording should be used with suitable amendment for the MUDFA.	Yes
Liability and Sole Remedy	DPOFA wording should be used with suitable amendment for the MUDFA.	Liquidated Damages drafting to be included. Sector Liquidated Damages with ratchet - moving up as the Sector Availability Date approaches. Need to be careful to ensure that LDs are not a penalty.
PART VII - TERMINATION		
Clause	Comments	tie Comment
Termination for Authority Default	ICE Events of Employer Default are narrow (breach of assignation provisions and insolvency).	Use ICE drafting.
Termination for Contractor Default	<p>SOPC/Adapted DPOFA wording should be used. Events of MUDFA Default could include:</p> <ul style="list-style-type: none"> <li>• breach of any obligations;</li> <li>• insolvency;</li> <li>• breach of assignation provisions;</li> <li>• abandonment;</li> <li>• failure to resolve conflicts of interest</li> <li>• breach of confidentiality</li> <li>• failure to maintain insurances.</li> </ul>	Use SDS Events of Default.

<b>No Fault Termination</b>	To be confirmed whether SOPC/Adapted DPOFA wording should be used.	Yes.
<b>Termination by reason of Force Majeure</b>	To be confirmed whether SOPC/Adapted DPOFA wording should be used.	Yes
<b>Termination for corrupt gifts and fraud</b>	To be confirmed whether SOPC/Adapted DPOFA wording should be used.	Yes
<b>Compensation on Termination</b>	None other payment for work properly carried out.	Yes
<b>Effect of Termination</b>	Provisions will need to be inserted to deal with handover on termination, payment of outstanding sums, provision of information etc.	Yes
<b>PART VIII - RELIEF EVENTS ETC.</b>		
<b>Clause</b>	<b>Comments</b>	<b>tie Comment</b>
<b>Relief Events</b>	ICE drafting to be reviewed.	<b>tie standard</b> [ <i>but we shall flag ICE standard provisions</i> ]
<b>Compensation Events</b>	ICE drafting to be reviewed.	<b>tie standard</b> [ <i>but we shall flag ICE standard provisions</i> ]
<b>Force Majeure</b>	ICE drafting to be reviewed. Force Majeure Events could include: <ul style="list-style-type: none"> <li>• war etc;</li> <li>• nuclear, chemical or biological contamination (unless caused or known about by the MUDFA); and</li> <li>• pressure waves.</li> </ul>	<b>tie standard</b>



<b>PART IX - VARIATIONS AND CHANGES IN LAW</b>		
<b>Clause</b>	<b>Comments</b>	<b>tie Comment</b>
<b>Authority Changes</b>	Adapt ICE or use SDS/Croydon ?	Use SDS/Croydon
<b>MUDFA Changes</b>	Adapt ICE or use SDS/Croydon ?	Use SDS/Croydon
<b>Changes in Law</b>	SOPC/DPOFA wording should be used.	Use SDS
<b>Small Changes</b>	Not required given SDS Provider Agreement drafting?	[Suggest not required - but tie to consider]
<b>PART X - ASSIGNATION, SUB-CONTRACTING AND CHANGES IN CONTROL</b>		
<b>Clause</b>	<b>Comments</b>	<b>tie Comment</b>
<b>Assignment, Sub-Contracting and Changes in Control</b>	The assignation provisions should mirror those in DPOFA.	Agreed
<b>PART XI - MISCELLANEOUS PROVISIONS</b>		
<b>Clause</b>	<b>Comments</b>	<b>tie Comment</b>
<b>Dispute Resolution Procedure</b>	DPOFA wording should be used so as the DRP is back to back between the different contracts. However, drafting to be reviewed to ensure Housing Grants Construction and Regeneration Act compliance.	Agreed
<b>Best Value</b>	Adapted DPOFA wording should be used.	Agreed
<b>Information and Confidentiality</b>	DPOFA wording should be used, but updated to cover off tie's FOISA obligations.	Agreed
<b>Intellectual Property Rights</b>	DPOFA wording should be used.	Agreed

<b>Data Protection</b>	DPOFA wording should be used.	[Suggest that this is not required - tie to confirm]
<b>Information and Audit Access</b>	DPOFA wording should be used.	Agreed