

EDINBURGH TRAMS PROJECT

HEADS OF TERMS FOLLOWING MEDIATION – MARCH 2011

AGREED BY

CITY OF EDINBURGH COUNCIL

TIE LIMITED

BILFINGER BERGER CIVIL UK LIMITED, SIEMENS PLC AND CONSTRUCCIONES Y  
AUXILIAR DE FERRCOCARRILES SA

("the Parties")

1. PREAMBLE

1.1 The parties have participated in a mediation with Mr Michael Shane, Mediator, on 8-11 March 2011, in order to resolve disputes and differences arising from the Edinburgh Tram Project. The parties have reached agreement on certain matters which are recorded in this document.

~~1.2 The agreement reflects certain aspects of Infraco's proposal, referred to as the Project Phoenix Proposal. References to the Project Phoenix Programme are references to the document as defined in the Project Phoenix Proposal and as amended in accordance with the principles set out in these Heads of Terms.~~

~~1.3.1.2 These Heads of Terms are non-binding and subject to Contract.~~

2. DEFINITIONS

2.1 Unless otherwise specified capitalised terms referred to herein have the meaning given in the Infraco Contract.

3. GENERAL

3.1 The Infraco Contract shall not be amended and shall remain in force save as provided for in these Heads of Terms or as required to reflect the principles herein.

3.2 The parties shall agree all amendments to the Infraco Contract, the TSA and TMA and any other documents which are necessary in order to implement these Heads of Terms on or before 1 May 2011.

4. PARTIES

~~4.1 The Infraco Contract (and any other ancillary documents) shall be novated from tie Limited to City of Edinburgh Council (CEC). The parties will agree changes to their respective management teams and working practices on or before 7th April 2011.~~

~~4.24.1 CEC shall employ a professional Project Management practice to administer the Infraco Contract (and any other ancillary documents) on their behalf and shall perform the function of the "tie Representative" under the Infraco Contract.~~

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5. SCOPE

- 5.1 Infraco shall not be required to carry out the ~~further~~ Infraco Works related to the section St Andrew Square to Newhaven (ch 121,000 to 100,000) except as provided for below.
- 5.2 The Infraco shall complete the integrated Design from Airport to Newhaven (Phase 1A), ~~and the Enabling Works, both as identified in Project Phoenix Proposal.~~
- 5.3 The Infraco will supply to CEC materials and equipment in relation to Systems and Trackwork in relation to the section St Andrew Square to Newhaven.
- 5.4 The ~~remaining~~ Infraco Works from Haymarket to St Andrew Square (ch 200,000 to 121,000) shall be defined as the On-Street Works and shall be agreed between the parties. ~~CEC tie~~ shall take the risk relating to all utility diversion works required to complete the On-Street Works.
- 5.5 The remaining Infraco Works from the Airport to Haymarket (ch 712,579.5 to 200,000) shall be defined as the Off-Street Works including the Enabling Works at Section 1A (Lindsay Road Retaining Wall, Lindsay Road lowering and the civil works at Tower Place Bridge including rail installation).
- 5.6 The works at the Tram Depot (including depot access), mini-test track (to be defined by agreement), Haymarket Yards, Princes Street Remedial Works (to be agreed) and any other works agreed by the parties shall be defined as the Prioritised Works and form part of the Off-Street Works.
- ~~5.7 The Project Phoenix Proposal will apply to the carrying out of the Infraco Works except to the extent it is inconsistent with any provision herein.~~
- ~~5.8 Infraco shall continue to warrant that the technical Design meets the Employer's Requirements.~~
- ~~5.9.5.7 The Employer's Requirements shall be amended to reflect the revised scope.~~

6. PRICE

- 6.1 The Construction Works Price including SDS Price shall be adjusted to the total sum of THREE HUNDRED AND SIXTY TWO MILLION FIVE HUNDRED THOUSAND POUNDS (£\*\*\*362,500,000.00) and shall relate only to the Off-Street Works. The price for the On-Street Works shall be dealt with in accordance with clause 6.3.
- 6.2 ~~An additional price and any programme changes will be agreed for the Project Phoenix Proposal in respect of (a) the carrying out of the Edinburgh Gateway Interchange Enabling Works and (b) dealing with any occurrence of Fossils or Antiquities and added to the Construction Works Price.~~
- ~~6.2~~
- 6.3 ~~The Construction Works Price and the Project Phoenix Programme do not include for the exclusions identified in the Project Phoenix Proposal.~~
- 6.4.6.3 The On-Street Works will be paid for on a Target Cost basis. A Target Cost of £39 million is proposed. The mechanism for calculating and amending the Target Cost will be agreed.
- ~~6.5.6.4 CEC tie and CEC agrees that Infraco is due to, and shall pay to Infraco, the sum of £13,103,804.23 (excluding VAT) representing preliminaries owing to the Infraco on or before 31 March 2011. (£8,882,364.63 (excluding VAT) representing preliminaries~~

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owing to Billfinger Berger and £4,221,439.60 (excluding VAT) representing preliminaries owing to Siemens).

6.66.5 Future payments shall be made in accordance with the Project Phoenix Proposal and in accordance with agreed A revised, simplified milestone payment schedule shall be agreed.

## 7. FUNDING

7.1 The parties acknowledge that CEC will require additional funding for works beyond the Prioritised Works. CEC shall use best reasonable endeavours to obtain such additional funding.

7.2 Unless CEC confirms to Infraco's reasonable satisfaction that sufficient funding is available to meet its obligations under the Infraco Contract, as amended by these Heads of Terms, the Infraco Contract shall automatically terminate at 5pm on 31 September 2011 (the "Funding Deadline").

7.3 Upon automatic termination, the parties shall have no rights or obligations in respect of future performance save as provided for in clause 94.6 of the Infraco Contract. CEC/ie will make payment to Infraco of the sum of £\*\*\* (to be agreed by 1 May 2011) which shall include a payment in respect of all materials (whether delivered or not) to date by Infraco. All Bonds and Guarantees procured or provided by Infraco and its parent companies shall be returned.

## 8. TIME

8.1 The Sectional Completion Dates shall be amended as follows:

8.1.1 Section A 16 December 2011

8.1.2 Section B 7 February 2013

8.1.3 Section C 22 December 2013

8.1.4 Section D 22 March 2014

8.2 The definition of each Section will be amended to remove any conditions associated with the Tram supply.

8.3 There shall be a single commissioning date for the route from Airport to St Andrew's Square.

8.4 The Project Phoenix Programme shall be amended to reflect these Heads of Terms.

8.5 Infraco shall commence the Prioritised Works on or before 1 May 2011 subject to (a) all approvals having been given by CEC and other Third Parties (b) the parties having amended the Infraco Contract (and other ancillary documents) to reflect these Heads of Terms/ie having issued a Change Order to proceed with the Prioritised Works on the agreed basis and (c) payment in full of the outstanding sums due in respect of Preliminaries (as set out above). Infraco shall not carry out any works other than the Prioritised Works prior to Funding Deadline referred to above.

8.6 CEC/ie shall procure that all permits and access are given timeously to permit Infraco to work in accordance with the agreed amended Project Phoenix Programme.

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9. **CLAUSE 80, CLAUSE 65 AND SCHEDULE PART 4**

9.1 ~~The parties shall agree amendments to Clause 65, Clause 80 and Schedule Part 4. Schedule Part 4 shall not apply to the Off-Street Works save as required to document the Project Phoenix Exclusions and Clarifications.~~

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9.2 ~~Schedule Part 4 shall not apply to the On-Street Works save in respect of Specified Exclusions 3.3 (a), b) and (c), 3.3.1 and Pricing Assumptions 5, 6, 7, 8, 9, 11, 15, 17, 22, 23, 24 (amended), 29 (amended), 30, 31, 32 (amended), 33, 34, 37, 38, 39, 40, 42, 43 and Clause 3.5 (amended), Appendix 1 (Network Rail Immunisations).~~

9.39.2 ~~In the event of a Notified Departure, Infraco shall carry out the works associated with the Notified Departure unless instructed to do otherwise by CEC. Infraco shall be paid in line with its Estimate for the Notified Departure until the Estimate is agreed or determined.~~

10. **CAF**

10.1 ~~The Tram Supply Agreement and Tram Maintenance Agreement shall be novated from Bilfinger Berger Civil (UK) Limited and Siemens plc ("BBS") to The City of Edinburgh Council tie and CAF's outstanding claims will be settled between CAF and tie. BBS and CAF shall have no new claims against each other in relation to the Infraco Contract, TSA and/or TMA and any existing claims under the Infraco Contract, TMA and/or TSA (including liquidated damages) shall be extinguished. BBS shall have no liability to tie or CEC in respect of any claims by CAF arising out of the TSA and/or the TMA or otherwise. CEC/Transport Scotland/TEL/tie shall have no claims against CAF for liquidated damages in respect of any delay under the TSA or TMA that has occurred or will occur due to progress of manufacture of the trams prior to novation.~~

10.2 ~~Liquidated and ascertained damages in respect of the delivery and commissioning of trams shall be removed from the Infraco Contract.~~

10.3 ~~The Infraco Contract and ancillary documents shall be amended to remove all rights and obligations relating to the supply and maintenance of trams. Interfaces between BBS, tie CEC and CAF in relation to completion, delivery, commissioning and integration of the Trams shall be agreed.~~

10.4 ~~CAF shall be removed as a party to the Infraco Contract and shall cease to be a member of the Infraco consortium.~~

10.5 ~~CEC/Transport Scotland/TEL/tie will accept and pay for all 27 trams under the TSA and will not be entitled to reject any of them. This shall be without prejudice to CAF's obligations to provide trams certified by the Tram Inspector in accordance with TSA and any right that may exist under the TSA to reject trams that do not comply with the Employer's Requirements under the TSA.~~

11. **DESIGN AND APPROVALS**

11.1 ~~CEC shall procure that CEC Roads Department shall meet with Infraco and its designers in order to agree and resolve all outstanding, Technical Informatives and critical issues with the design within 1 month of the date of execution of the Heads of Terms.~~

11.2 ~~CEC shall procure that CEC Planning Department shall notify Infraco of all outstanding issues which preclude discharge of Planning Informatives within 3 weeks of the date of execution of the Heads of Terms.~~

11.3 ~~Infraco shall self-certify the civils and systems technical design and tie Limited (prior to novation) and/or Transport Edinburgh Limited and CEC (as a party to the Infraco~~

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~~Contract and not in respect of any statutory role (after novation) shall have no right of obligation to review and/or approve the civils and systems design~~

11.4 Any remaining unresolved issues shall be dealt with at a meeting of senior representatives from CEC and Infraco on 7 April 2011.

11.5 ~~The parties shall work together to ensure that the statutory approvals for Design of the On-Street Works are obtained shall be approved before 1 September 2011.~~

12. **EXISTING REMEDIABLE TERMINATION NOTICES AND UNDERPERFORMANCE WARNING NOTICES**

12.1 ~~Tie/CEC agrees that it will not terminate the Infraco Contract on the basis of any Remediable Termination Notices and/or Underperformance Warning Notices served prior to the date of execution of these Heads of Terms unless parties agree amendments to the Infraco Contract in accordance with clause 3.2 before 1 May 2011 and such notices shall be withdrawn.~~

12.2 ~~Tie/CEC agree it shall not seek to recover liquidated and ascertained damages in respect of any delay in achieving the Planned Sectional Completion Dates in the Infraco Contract as unamended.~~

13. **COMMUNICATION**

13.1 There will be a substantive cultural shift in the behaviour of all parties including interaction, co-location and empowerment.

13.2 A Joint Communications Protocol will be established with immediate effect to cover all external communications by the Parties in respect of the Edinburgh Tram Project.

14. **OTHERS**

14.1 Each of the Infraco Members will be entitled to enter into its own Key Subcontracts. There will be no requirement for all the Infraco Members to be a party to the Key Subcontracts. No restriction shall be placed on the management of Key Sub-Contractors and the replacement of them.

~~14.2 CEC shall indemnify Infraco (including CAF) in respect of any costs and expenses arising out of or in connection with any procurement challenge or other challenge to the validity of these Heads of Terms or any agreement entered into by the parties to implement these Heads of Terms. Within 14 days of agreement of the Heads of Terms, the parties shall agree a variation to the Infraco Contract to add a new Compensation Event in respect of any procurement challenge or other challenge to the validity of the Heads of Terms of any subsequent agreement entered into by the parties to implement these Heads of Terms.~~

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