

tie Limited

Paper to : **tie Board / Tram Project Board**
Subject : **DISPUTE RESOLUTION PROCEDURE**
Date : **11th March 2009**

1. Introduction

Despite lengthy and intensive efforts to conclude a range of issues with BSC through direct discussions, frequent problem solving sessions, facilitated partnership workshops and several escalation meetings with the most senior UK based staff from Bilfinger and Siemens it has proved impossible to progress works in an acceptable manner with BSC over the last three months.

In addition, a meeting of Principals from tie, Bilfinger Berger, Germany and Siemens, Germany on 17 February resulted in a highly unsatisfactory reiteration of Bilfinger demands without any substantiation or written justification.

Progress on estimates for change and practical delivery of core works has stagnated, culminating in a refusal by BSC to accept that they were contractually obliged to progress the Princes Street works from 21 February when the Princes Street closure was instigated. They had offered to commence works at Princes Street but "at no risk" to themselves.

It is considered essential to generate a significant change in behaviour by BSC to enable effective execution of the works. The cost impact of this stagnation is increasing with every day of delay.

It should be noted that a proposal was received from Siemens on 5 March which proposed a parallel process to try to unlock the "impasse" and was not intended to override BSC or tie's entitlements under the contract unless mutually agreed. The concept is designed to allow recommencement of Princes Street immediately and establish a "*Framework development team as soon as possible to develop a working methodology to:*

- *Expedite the work*
- *Expedite the changes and associated commercial agreements*
- *Expedite a recovery programme*
- *Expedite design and approvals*
- *Expedite access*
- *Expedite a greater focus on consortium and tie integration.*

The framework will be developed and live within the existing contractual environment, to achieve success a commitment from all parties on fair and equitable approach is required, 'micro-level' discussion is incompatible with success in this situation."

There has yet to be a definitive response to this proposal from Bilfinger.

1. Proposed Approach

It is intolerable to **tie** to accept further refusal by BSC to progress legitimate works. Therefore, further to the Strategic Options Paper developed last week, **tie** is currently preparing a range of issues for use in a series of "surgical" applications of the Dispute Resolution Procedure (DRP) (Option E as identified in the paper). This is the formal contract mechanism for the resolution of disputes.

This approach allows **tie** to focus on the important areas which are either of the largest contractual/ commercial significance, or have a material delay of programme effect, or both.

tie is preparing a "shortlist" of particular items with the support of DLA to increase the intensity of issues resolution with BSC.

As suggested above, the items selected will be focussed on:

- A very strong likelihood of successful resolution for **tie** at DRP.
- Priority on examples of "blockers" which are holding up progress on construction works so that work can commence under clause 80.15
- Items which are of particular commercial / contractual significance.

It is compatible with other choices as laid out in the Strategic Options paper.

It allows these items to progress in parallel even if a "Framework Management Team" approach is underway with BSC.

If agreement is reached on any of the items under dispute in the meantime, the related DRP action would halt.

2. Why use the Dispute Resolution Procedure (DRP)?

There are a number of mutually compatible reasons for utilising DRP on selected items, including:

- Short term to address specific issues at Princes Street.
- Can be maintained, even with potential parallel initiatives such as the "Framework Management Team" approach recently suggested by Siemens.
- Tactical use to unblock "stuck" items with significant programme or commercial impact.
- It is a clear cut well defined and time bound process which ensures parties cannot prevaricate or obfuscate.
- Supports, or is compatible with, broader strategic Options A to E.

Appendix 1 details the Dispute Resolution Process within the Infracore Contract for information. The timescales shown are Business Days, with the exception of the Adjudication Process which is calendar days.

3. Current items in DRP

There are currently two items in within the formal, internal part of the DRP. Both items relate to Princes Street and were referred by **tie** on 19 February 2009.

Issue One:

*Failure to agree the Estimate in relation to the **tie** Change for the west bound bus lane.*

Issue Two:

BSC believe they are not contractually obliged to commence in Princes Street.

The first stage of this process was completed on 20 February and the formal exchange of position papers on both issues took place on 2 March 2009. If no agreement is reached, the internal stage of the process is exhausted by 19 March 2009, when a decision has to be taken regarding referral to external resolution. This is likely to be adjudication.

4. Proposed next items / issues for DRP

Based on initial analysis undertaken, and the criteria indicated in section 2 and 3 of this report, the next tranche of items being validated at present is highlighted below:

- Application and calculation of Preliminaries.

(This impacts the agreement of all changes across the works, even if the direct cost is already agreed.)

- Base Date Design Information (BDDI) definition.

(Base building block to measure changes from and BSC are trying to redefine certain drawings and hierarchy. Particularly relevant as a precursor to the likely dispute over design development and changes from BDDI to IFC)

- Inclusion of Hilton Hotel Car Parks works with the Construction Work Price and therefore not a change.

(A straight forward disagreement over whether it qualifies as Accommodation Works (a provisional sum drawdown) or in included in the Works price. This has broader application).

- Edinburgh Park INTC 091 Estimate.

(An incompetent and grossly inflated estimate submission)

- Evaluation of Costs associated with V26-V31 agreed extension of time entitlement.

(Time already agreed and goes to the basis of all future Preliminaries calculations for any legitimate extension of time)

If necessary, there are a number of other items to pursue after this tranche is referred.

5. Timetable

Appendix 2 details a programme for concluding the two existing DRP items and has laid out the likely timetable to progress the next tranche of items. These have been identified and prioritised in accordance with Appendix 3.

6. Resources / Cost Effect

The requirement to progress matters utilising the Dispute Resolution Process inevitably brings a range of additional direct costs (e.g. legal costs and specialist advisor costs) together with more indirect "friction" costs, including diversion of the project management team's focus in supporting the preparation of DRP items, advising on the arguments, evidence and defence of points raised, and increased "adversarial" environment to work within. The initial range of cost for pursuing the first two DRP items to conclusion via adjudication is estimated as £90k - £120k.

7. DRP Risks

As with all forms of dispute resolution, utilising the mechanisms in the contract could result in success for Infracore rather than **tie**.

Whilst **tie** does not consider this a high risk in the DRP items currently referred, or with those under active consideration for referral, it should be considered as a possibility.

To mitigate this risk, careful analysis of the items referred is being undertaken prior to commencing such action. A short summary analysis has been prepared as Appendix 3 to demonstrate the criteria utilised to select potential DRP issues. The analysis will be subject to internal **tie** / DLA challenge and engagement with the Tram Monitoring Officer and CEC. **tie** also proposes to utilise an external technical advisor to validate specific DRP items which are of a technical nature rather than a legal /contractual nature.

tie will select the adjudicator from a pre-agreed listing in the contract and those parties are being "warmed up".

Please note that BSC may choose to bring items forward via the Dispute Resolution Process in parallel with any of the above activity and **tie** will be required to defend such items at that time.

8. Recommendations

That the Board:

Note and support the DRP approach as laid out in this paper to facilitate progress in the Construction Works.

Note and support the programme of proposed DRP items, including the two current disputes.

Prepared by: Steven Bell
Recommended by: David Mackay
Date: 11th March 2009

Appendix 1



Dispute Procedure
Time line.xls



Narrative for Dispute
Resolution Flow Chart

Appendix 2



Microsoft Office
Project - Resolution P

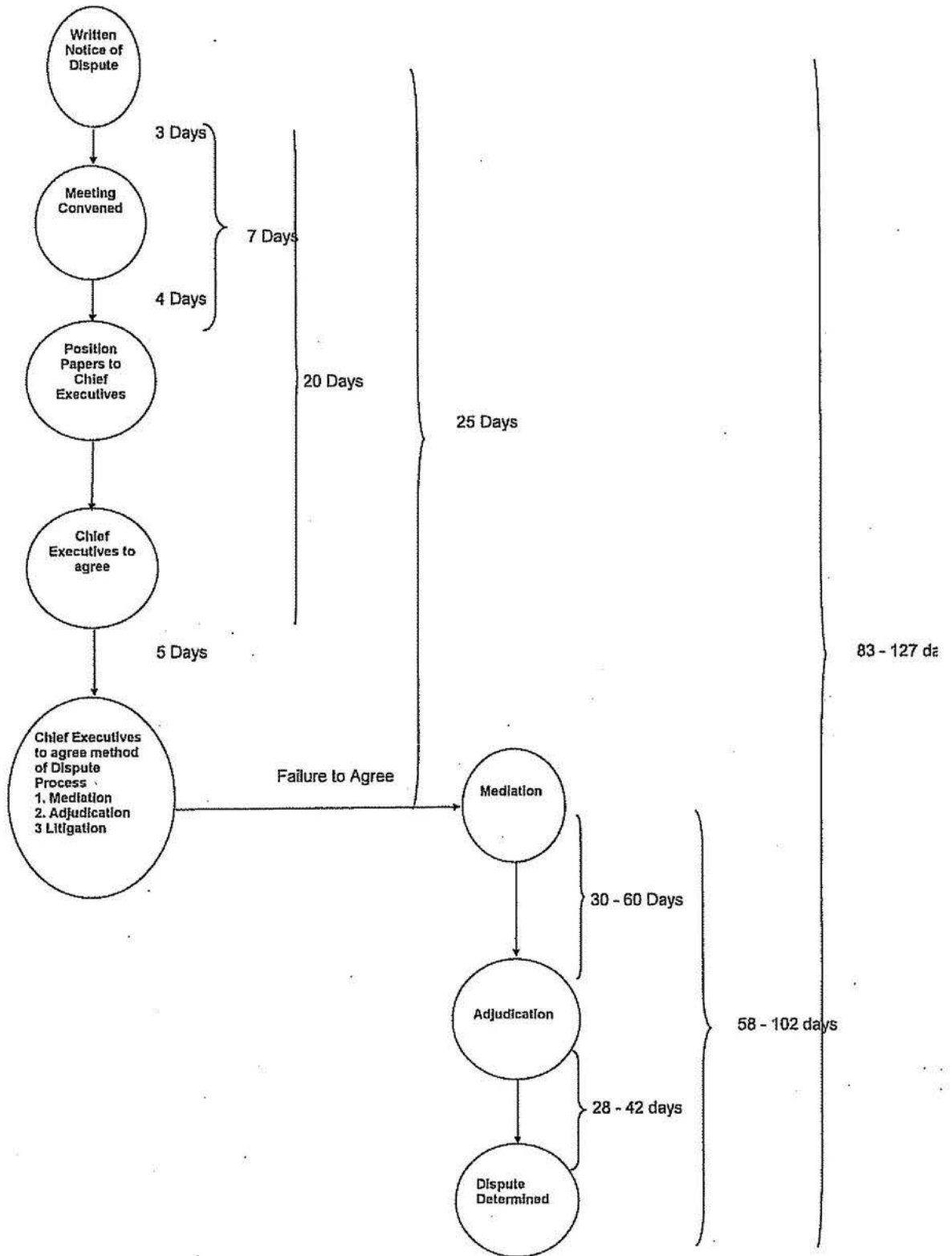
Appendix 3



DRP.xlsx

Dispute Resolution Procedure
Schedule Part 9
Time Line

APPENDIX ONE



Narrative for Dispute Resolution Flow Chart

The Dispute Resolution Procedure is set out in Schedule Part 9 of the Infraco Contract. It is split into two parts – Internal and External.

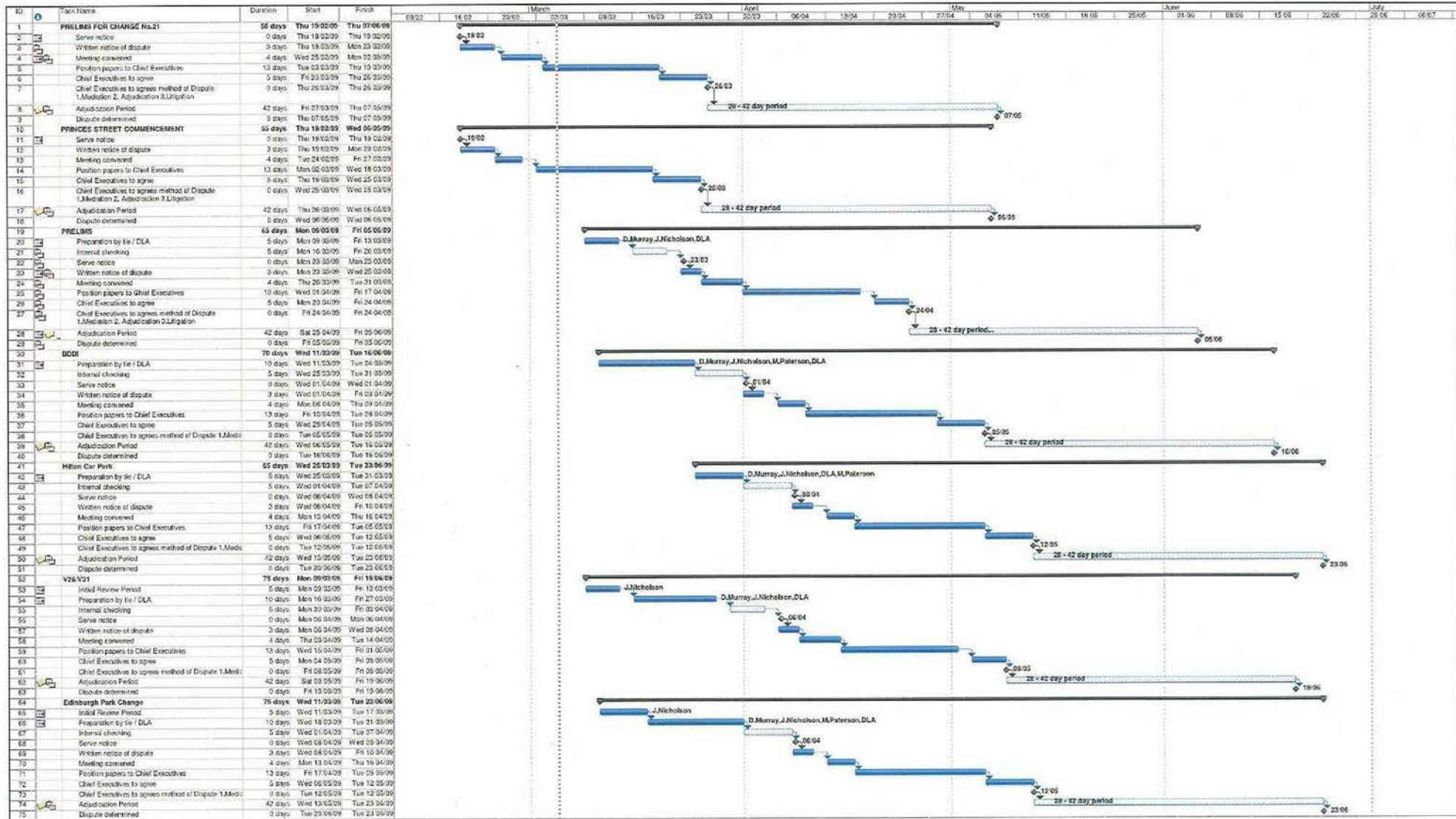
Internal Dispute Resolution

This is a fairly fast track process to attempt to agree any notified disputes without the need for an external mediator and/or an Adjudicator. Agreement can be reached at an internal meeting (Project Directors) to take place within three days of receipt by either party of a written notice of dispute or failing that by the Chief Executives following presentation of respective position papers in 20 days following the notice.

If the Chief Executives fail to agree then the dispute will flow to External Dispute Resolution. The Chief Executives will agree the method of dispute process – mediation/Adjudication/Litigation.

External Dispute Resolution

The Chief Executives are to agree the method or failing this a process beginning with mediation will commence. The mediation procedure shall be in accordance with the CEDR mediation rules. The dispute should be resolved within 30 days by mediation (or longer if agreed) but if it is not resolved within 60 days then the dispute will be referred to Adjudication. An Adjudicator will decide within 28 days (or 42 if extended). Following the Adjudication procedure set out in the Contract either party may take the matter further to litigation.



Potential DRP Issues	Likely Success Rate	Commercial Importance	Strategic Importance	Time to produce Paper (wks)	Additional Resource Required	Comments
Base Date Design Information	High	High	High		2 None	MP/DM/JN + DLAP
Hilton Hotel Car Park	High	High	High		1 None	MP/DM/JN + DLAP
Edinburgh Park INTC 91	High	medium	not critical		1 None	MP/DM/JN+DLAP
Scottish Power Connections	medium	medium	not critical		4 Engineering	External engineer perhaps required to assess work scope
V26/V31 Estimate	high	High	high		2 none	DM/JN
Sub Contractor Terms	High	low	high		2 None	DM/JN +dlap
Refusal To Progress until Estimate agreed	High	delay cost	high		4 Yes	planning research work required
BDD1 - IFC	medium	high	high	months	Yes - PQS requirement	Select an area of work initially
South Gyle Access Bridge Estimate	high	medium	medium		4 Yes	Engineering review
Demolition of Leith Walk Bus Station	High	low	low		2 none	Mainly Prelims issue, but only one quote given therefore no competition
VE Issues	Medium	High	high		6 Yes	Engineering and QS Resource
Access vs Licence to occupy	medium	medium	high		4 yes	Legal review
Management of SDS	medium	high	high		8 Yes	Independant design review
Design Responsibility	medium	high	high		8 yes	Independant design review
Design review	medium	high	high		8 yes	Independant design review
The time to produce a paper is based upon no concurrency. If two or more issues are tackled concurrently then that will extend durations						