

**Sandra Elgin**

---

**From:** Alastair Maclean  
**Sent:** 20 April 2011 22:40  
**To:** Sue Bruce (Chief Executive); Colin Smith FRICS MAPM  
**Subject:** Fwd: tie Report on MOV4  
**Attachments:** Report on Minute of Variation 4 Version 160411.docx; ATT1290390.htm; FW\_ Comments on MOV1 Draft.eml; ATT1290391.htm; Appendix 1 - DV of MoV - 14 April (2).doc; ATT1290392.htm; ATT1290393.doc; ATT1290394.htm; ATT1290395.doc; ATT1290396.htm; Review of IDC Procedure proposed by Infraco.eml; ATT1290397.htm; image001.jpg; ATT1290398.htm; image002.png; ATT1290399.htm; image003.jpg; ATT1290400.htm

FYI

Begin forwarded message:

**From:** "Steven Bell" <Steven.Bell@tie.ltd.uk>  
**To:** "Dave.Anderson@edinburgh.gov.uk" <Dave.Anderson@edinburgh.gov.uk>, "Alastair Maclean" <Alastair.Maclean@edinburgh.gov.uk>  
**Cc:** "Richard Jeffrey" <Richard.Jeffrey@tie.ltd.uk>, "Nolan, Brandon" <Brandon.Nolan@mcgrigors.com>, "Macphail, Iain" <Iain.Macphail@mcgrigors.com>, "Graham, Drysdale" <Drysdale.Graham@mcgrigors.com>, "VRE - MobileMe" <vice.████████████████████>  
**Subject:** tie Report on MOV4

Legally Privileged and FOI(S)A Exempt

Dave, Alastair

Further to Richard's email earlier this evening, please find attached tie's Report on MOV4 with appendices. If you have any questions please do not hesitate to give me a call at you convenience.

Regards,

Steven

Steven Bell  
Project Director

Edinburgh Trams  
Citypoint  
65 Haymarket Terrace  
Edinburgh  
EH12 5HD

Tel: (+44) (0) ██████████  
Mobile: (+44) (0) ██████████  
Email: [steven.bell@tie.ltd.uk](mailto:steven.bell@tie.ltd.uk) <<mailto:susan.clark@tie.ltd.uk>>

Find us online (click below):

[cid:image001.jpg@01CBFFA4.D63FB590]<<http://www.edinburghtrams.com/>>

[cid:image002.png@01CBFFA4.D63FB590]<<http://www.twitter.com/edinburghtrams>>  
[cid:image003.jpg@01CBFFA4.D63FB590]<<http://www.facebook.com/pages/Edinburgh-Trams/108054517028>>

Moving the capital to a greener future

---

The information transmitted is intended only for the person to whom it is addressed and may contain confidential and/or privileged material. If you are not the intended recipient of this e-mail please notify the sender immediately at the email address above, and then delete it.

E-mails sent to and by our staff are monitored for operational and lawful business purposes including assessing compliance with our company rules and system performance. TIE reserves the right to monitor emails sent to or from addresses under its control.

No liability is accepted for any harm that may be caused to your systems or data by this e-mail. It is the recipient's responsibility to scan this e-mail and any attachments for computer viruses.

Senders and recipients of e-mail should be aware that under Scottish Freedom of Information legislation and the Data Protection legislation these contents may have to be disclosed to third parties in response to a request.

tie Limited registered in Scotland No. SC230949. Registered office - City Chambers, High Street, Edinburgh, EH1 1YT.

---

## Executive Summary

MOV 4 reached agreed form (but has yet to be executed) following extensive engagement between the CEC negotiating team and Infraco negotiating team on Saturday 16 April 2011.

This agreed document was provided to tie and has been reviewed, including a detailed discussion with tie, CEC legal and McGrigors on 19 April 2011.

This report highlights advice from tie to the CEC negotiating team over the last three weeks and includes detailed mark up comments to fully inform CEC decision makers in the attached Appendices.

For ease of reference, tie considers that the principal issues that CEC should consider when deciding on executing this Variation to the Infraco Contract are as follows:

1. **Valuation of Entitlement under this MOV.** The value of the payment schedule included in the MOV (particularly the £49m payments scheduled over certificates 1, 2 and 3) cannot be supported by our analysis. It is noted this is a commercial decision for the funders.
2. **Certifier Agreement.** This needs to be prepared and in agreed form, including mechanics of operation, and compatible with responsibilities and accountabilities (and necessary Insurances).
3. **Payment.** The payment mechanics in Clause 6 prescribe payment by 22 April 2011 based on a Certificate which has still to be received by tie (or CEC?); with no vesting of materials until cash has been received by Infraco; with no executed version of the MOV4; with a Certifier Agreement which has yet to be agreed and executed by the Certifier, tie, CEC or Infraco); with no instruction from CEC to tie to pay on the basis of the MOV4 terms and with no revised delegated authority from CEC above the current £545m approved budget (tie considers that these payments include entitlement beyond the £545m). In addition, all payments are now classified as final and binding, allowing no changes to these amounts at a final account stage.
4. **Removal of Design approval rights and Infraco Obligations / ROGS duty holder risks.** The proposed changes to utilising only the Infraco IDC procedure, deleting obligations under Clause 10 and removing tie rights of approval under Schedule Part 14. If the transparency of the "self certification" being undertaken by Infraco is not suitable and timely, it is very likely to increase the risk of tie (and potentially the ICP) being unable to discharge their duties under ROGS. This could result in the city being unable to open the tram system for revenue services. Recent correspondence demonstrates an uncooperative approach from Infraco.
5. **Design obligations.** The MOV does not require Infraco to achieve any completed design for the payments made under this variation and there is no transparency of what the Certifier may be considering within Certificate 1 for design.
6. **Outstanding Consents.** The MOV transfers the risk of all outstanding Consents to tie, irrespective of whose obligation they currently are. The risk exists that tie will not be able to procure these outstanding consents in time, or indeed at all.

7. **HSQE rights regarding subcontractors.** The MOV removes all rights of tie to impose any restrictions on Key Sub-Contractors including Health and Safety performance measures. Given Infraco's underwhelming attention to this matter, tie will have no rights to address this for the Prioritised Works.
8. **Programme amends Section A completion irrevocably.** By agreeing to MOV4 it is accepted that Infraco are entitled to EOT to December 2011 to complete a reduced scope of works and that no LDs will be levied before then. If MOV5 is never signed this cannot be taken back.
9. **MOV4 sets a number of precedents.** MOV 4 contains a number of issues, which we understand CEC consider to be acceptable given the limited duration and scope of works to be carried out under MoV4, but which would not be acceptable for MoV5. tie are concerned that precedents agreed to under MOV 4 will be very difficult to water down for MOV5, and it is best to resolve these before signing MoV4.
10. **Review and incorporation of Schedules** The MOV refers to a number of schedules and other documents. They have not been collated in one place yet and therefore we have been unable to verify that they are all consistent with each other and with the body of the MOV. Examples would be the valuation certificate number 1 referred to in clause 6.1, the Certifier Agreement (mentioned at 2 above) and the Prioritised Works Programme (Schedule 1). In the case of this last example, is the programme agreed and realistic, in particular in relation to Princes Street? If not this may create a risk of a claim for additional payment under clause 5.4 of the MOV.
11. **Formal Advice Note from McGrigors.** The tie advice incorporated in this report should be read in conjunction with the legal advice note prepared by McGrigors on the impact of MOV4.

## Introduction

The Minute of Variation 4 (MOV4) agreed between CEC negotiating team (supported by McGrigors) and Bilfinger Berger and Siemens representatives (supported by their legal advisors) representing Infraco was prepared to amend the Infraco Contract in line with the Heads of Terms agreed at Mar Hall Mediation in March 2011.

It is intended to be a "stepping stone" to MOV5 but also needs to cater for the circumstances if MOV5 is never signed.

The scope is restricted to defined Prioritised Works, associated preliminaries plus payments for the vesting of materials and equipment and payment for Infraco remobilising to undertake works after their cessation of work in October 2010.

tie has provided detailed separate commentary on the above valuation issues to CEC and their lead negotiator (C Smith) during 12 March to date.

The risk exists that the Infraco will see the "precedents" set by MOV4 as the building blocks to start negotiations from on MOV5. Tie's experience to date has been that once an approach has been "agreed" Infraco will resist any dilution of such movement.

## Commentary on proposed Minute on Variation 4

### Overview

Design is not explicitly within scope of works although it is in the justification for the Certifier's Certificate 1.

The parties have agreed to a joint risk register approach but that has made little headway so far. This MOV is silent on it.

A formal legal advice note has been requested from McGrigors to advise CEC and tie on the significance of the amendments to the Infraco Contract enacted by this MOV and the consequent changes to the client rights, obligations and remedies available once this has been executed.

### Clause 1: Definitions

Generally, not all Schedules are in final form and need final review before sign off.

Certifier Agreement needs to be in available in final form and mechanics agreed before MOV is signed. Current drafting does not fit with processes described by C Smith.

Fixed Sum Prioritised Works Price appears to have mismatch between Programme, Scope and Cost schedule.

IDC definition is ok in its own right but operative clauses a major concern.

Materials and Equipment definition allows for other than items originally listed to be vested.

Prioritised Works definition east of Depot should to be tidied up with diagram inconsistency.

Outstanding Consents obligation now all moved to tie. Major Concern.

Prioritised Works Programme is not yet agreed (Princes Street Remedial Works still under discussion). If this is left as currently drafted it will generate immediate change.

Vesting Certificate is still to be formally reviewed by McGrigors. tie considers that an on demand bond associated with this should be provided or, if not, the bond arrangements must be increased for MOV5 to avoid dilution of client security arrangements.

### Clause 2: Amendment of the Infraco Contract

No comments.

### Clause 3: Application of the Infraco Contract to the Prioritised Works.

Clause 3.2 removes the requirement for Infraco to progress any other Infraco Works with due expedition whilst MOV4 is in effect. Tram Maintenance Services (or mobilisation for same are not considered. This will increase the likelihood of an unsuccessful claim regarding failure to progress the works if "hostilities" resume.

Clauses 3.3 and 3.4 seek to cater for circumstances where MOV5 is not signed and the parties are restored to the positions they would have been in save for the agreement that there shall be a termination.

The drafting of 3.3 may need to be tweaked as the section "on or before..." could fit better after "entered... "

In any circumstance, this still obliges tie to pay the materials identified and certified in 8.2 and 8.3 even if agreement is not reached on MOV5. This has the potential to increase the cash paid versus value earned discrepancy.

Clause 3.5 merely states what tie believes is Infraco's obligation under the existing contract anyway.

Clause 3.7 is a major concern. Removal of the review and approval rights under Schedule Part 14 increases the risk of tie as duty holder under ROGS being unable to verify and sign off for Open for revenue service. This may also impact the ICP's ability to give a "no objection" and hence prevent a legal opening. In addition, it waives all of Infraco's obligations under Clause 10 which is very broad ranging. McGrigors must formally comment on this point regarding the obligations and potential impacts which are being excused.

Clause 3.8 needs to be workable to avoid breach if tie/CEC third party obligations and licences etc. particularly if used for future MOV. In addition, legal review is required if deleting the Permit to Work obligation is compatible with the Tram Acts as they rely upon the Code Of Construction Practice.

#### Clause 4: Sole Entitlement etc.

Following discussion on 19 April 2011, we have no further comment. It is noted that design is not mentioned.

#### Clause 5: Amendment to Programme

In Clause 5.1 by amending the Planned Section A completion date and the Section A definition means that an irrevocable Extension of Time has been granted to Infraco until 16 December 2011. This will allow no return to previous positions if MOV5 is never signed. In addition, the carve out needs to check and ensure that the items omitted re then included in Section B completion and that interface with TSA obligations and Depot Licence agreements will work.

Clause 5.2 is understood to be on the basis that CEC have agreed to lift such embargos. It is assumed that all other obligations within the C.o.C.P. such as notifications for out of hours working are unchanged.

Clause 5.3 repeats the Outstanding Consents major issue raised under Clause1. This appears to enact a significant risk transfer. In addition, the method related access requirements to address the access items are not included in the scope diagrams as far as we can determine.

Clause 5.4 negates any need to mitigate, demonstrate critical path impact, address concurrency but it does limit EOT to an equivalent time rather than what can be proven. This risks both parties. Discussion on 19 April suggested the negotiating team considered this a "give" by Infraco.

Clause 6: Certificate 1- First Materials and Equipment and First Mobilisation

Clause 6.1 contains items of major concern.

The valuation stated here cannot be supported by any of the analysis tie has undertaken and shared with CEC and their advisor team. tie understands this valuation has resulted from a commercial decision by CEC and other funders.

The payment mechanics in Clause 6 prescribe payment by 22 April 2011 based on a Certificate which has still to be received by tie (or CEC?).

It is proposed that there is no vesting of materials until cash has been received by Infraco. Currently there is no executed version of the MOV4; with a Certifier Agreement which has yet to be agreed and executed by the Certifier, tie, CEC or Infraco)

There is no instruction from CEC to tie to pay on the basis of the MOV4 terms and with no revised delegated authority from CEC above the current £545m approved budget (tie considers that these payments include entitlement beyond the £545m).

In addition, all payments are now classified as final and binding, allowing no changes to these amounts at a final account stage.

Clause 6.2 states that Parties acknowledge that materials may not be required as part of the Infraco Works. That should only be to the extent that the Infraco Works are curtailed by any incremental delivery.

Clause 6.3 is silent on where the materials are when Vested and previous correspondence identified a significant quantity (~50% by value) located other than on site or at Infraco's warehouse in Broxburn. In addition, the MOV is silent on responsibility for security, storage and transport post Vesting.

Clause 7: Certificate 2 - Second Mobilisation

Comment as per Clause 6 applies regarding valuation. In addition, the drafting requires tie to pay a value on a date irrespective of any certification.

Clause 8: Certificate 3 (A, B and C) – Second Materials and Equipment

Comments are as per Clause 6 on valuation and Clause 7 on payment irrespective of any certification. In addition there appears to be no reconciliation of Vesting Certificate value to the agreed sums.

Clause 9: Payment for the Prioritised Works

There appears to be no mechanic to avoid double recovery. There is no express mechanism to require Infraco to apply for payment. The action / responsibility is on the Certifier, again which is inconsistent with the process described by C Smith to tie.

Clause 9.3 brings forward payment by 7 days from the terms of the Infraco Contract.

Clause 9.4 identifies the certificates issued pursuant to this MOV4 as final and binding, which will mean that any final accounting for whatever reason cannot adjust any of these values in future, unlike the main Infraco Contract. This is a movement of risk to the client.

Clauses 9.6 to 9.8 have conceded on the principle of time related preliminaries with no further justification. In addition, we note that it is drafted with a bias to pay rather than to value according to progress. We understand that this is a commercial decision made by CEC.

#### Clause 10: Total Price

No comments

#### Clause 11: Excess Trams

It is noted that CEC require tie to issue a tie Notice of Change to reflect the impact of such matters. It appears difficult to do such a thing when the client may require the assistance of Infraco to get to a point where such matters can be fully defined, yet Infraco are not obliged to assist until such matters are defined in a tNC.

#### Clause 12: Mar Hall Confidentiality

No comments

#### Clause 13: Communications Protocol

It would appear not to contemplate a circumstance where Infraco wish to release a statement.

#### Clause 14: Moratorium

Provided an MOV5 is executed then this looks ok although the following points should be noted.

Clause 14.1.1 will probably generate an argument over whether facts and circumstances existed or were allegations.

Clause 14.1.3 still seems to waive for ever tie/CEC's rights to (unless overwritten in MOV5 explicitly) liquidated and ascertained damages. This would be an enormous concession.

Clause 14.2.2 is related back to the date of exchange of mediation statements however, Infraco continued to serve notices thereafter (e.g. Depot EOT Claim on 4 March 2001)

#### Clause 15: Sub-contractors

It is noted that this reflects the commercial intent of items conceded in the Heads of Terms from Mar Hall.

Clause 15.2 gives a major cause for concern as it eliminates tie's rights under Clause 28.6 and 38 in the Infraco Contract to require removal of sub contractors on Health and Safety grounds. Given Infraco's underwhelming performance to date, this removes some of the few teeth that the Infraco contract has left. It is important that CEC consider this point extremely carefully.



Clause 16: Preservation of rights

Subject to detailed legal comment this appears to be ok.

Clause 17: Disputes

The Forum proposal is in order but both contracting parties need to retain rights to continue DRP if the matter is not resolved at the Joint Project Forum.

Clause 18: Variations

No comments

Clause 19: Law and jurisdiction

No comments.

**Conclusions**

CEC decision makers should be aware that execution of this MOV4 will transfer significant financial benefit to Infraco and dilute Infraco contract terms related to design, valuation of the Prioritised Works and Programme. There are increased risks in relation to successful compliance with duty holder responsibilities under ROGS.

tie Ltd

20 April 2011

Appendices

- Appendix 1      Commentary provided 12/04/11  
                    Commentary provided 14/04/11  
                    Email analysis of Infraco's IDC proposal 15/04/11
- Appendix 2      Commentary provided 18/04/11 on MOV4 circulated 16/04/11
- Appendix 3      Consolidated Commentary provided 20/04/11 following review on 19/04/11 and  
                    20/04/11

