

<p>Terms and Conditions</p>
<p>Overview of Infraco Phoenix Proposal Position</p> <p>Proposal is heavily qualified and protected: <i>“This Proposal is submitted without prejudice to Infraco’s whole rights and remedies and no party may seek to rely on any statement, declaration or representation contained within this Proposal, whether express or implied, in any court proceedings, arbitration, adjudication, mediation or other form of determination or negotiation without the express written consent of Infraco. This Proposal shall not create any legally binding obligation on Infraco.”</i></p> <p>Revised Clause 80 tie change mechanism is proposed including acceptance of any Infraco notifications as tie changes and an offer to <u>progress</u> works whilst agreeing the valuation provided demonstrable (estimated or actual) cost is paid by tie.</p> <p>It proposes a mutually acceptable independent third party to continually engage both parties in constructive dialogue. This would need to be linked to any amendments to the Dispute Resolution Process to give it a locus. It does highlight if the real intention is to lead towards a separate certifying body” other than tie / CEC.</p> <p>The drawings define the scope, and anything different is a tie change. There is no explicit confirmation that the drawings are warranted to achieve the Employers Requirements. This includes performance obligations such as run time etc. In essence this is an updated BDDI position without the obligation to complete the design or to complete Infraco Design. Definitely a worsening of the risk balance.</p> <p>Seeks to reverse adjudicator decision on Key Sub Contractors and require only one Infraco Member to contract with the sub contractor.</p> <p>Carves out from PPP Price, but expects direct payment of SDS Incentivisation.</p> <p>Principal Liquidated Damages apply as per Infraco Contract, but based on revised completion dates. Infraco seek to exclude application of TSA LDs</p> <p>Schedule Part 4 Pricing Assumptions are retained but proposed to be <i>“substantially”</i> reduced.</p> <p>Maintenance Scope and Conditions are proposed to be amended, particularly with reference to commercial terms and conditions. There is no linkage to the Phoenix Proposal as a reason for such change.</p> <p>Tram Maintenance costs proposed to be amended as km running expected to be reduced from that originally envisaged.</p> <p>Novation of CAF to tie is proposed.</p>
<p>Key Areas of Agreement</p> <p>3rd Party Agreement timescales for EAL & New Edinburgh Ltd to be extended to match PPP programme.</p>

Liquidated damages apply.
Key Areas of Disagreement <p>tie Change proposals are wide ranging and need careful analysis. Infraco seek to dictate elements which are tie Changes unilaterally. Interface with process for progressing the work and interim cash flow not acceptable currently. Options being developed with McGrigors and CEC input.</p> <p>Independent third party role and DRP mechanism amendments need to be fully explained before proper consideration can be given.</p> <p>Approvals and Consents risk transfer back to tie / CEC. Infraco require qualifications (at the insistence of Infraco) in previous tie Change orders to hold. Siemens materials and equipment demand payment within 60 days post delivery to warehouse. Warranties for equipment and materials expire on 10 March 2013.</p> <p>SDS Incentivisation principle and valuation.</p> <p>Sectional Completion Dates to trigger LDs still to be agreed. Infraco seek to exclude application of TSA LDs</p> <p>Schedule Part 4 Pricing Assumptions are retained but proposed to be "<i>substantially</i>" reduced. At first (second and third) read, Infraco may be said to have actually increased their exclusions / assumptions.</p> <p>Maintenance Services:</p> <ul style="list-style-type: none">• Infraco seeks to eliminate the tie "break" clause (89) which can operate after 3 years, thus setting the period to ten years.• Indexation Cap proposed to be removed and indexation applicable scope proposed to be extended to cover mobilisation and initial spares.• Seeks renegotiation of liability caps and benchmarking point proposed at year 5. <p>Infraco Change not contemplated.</p> <p>Seeks to reverse adjudicator decision on Key Sub Contractors and require only one Infraco Member to contract with the sub contractor</p>
Detailed Work and Analysis required Pre-mediation <ol style="list-style-type: none">1. Cyril Sweett plus Engineering & PM team to systematically check all of the attached drawings for completeness and areas of inconsistency with tie / CEC requirements. Completion by 7/3/11.2. Detailed analysis of the likely range of cost associated with each of the items listed in the "disagreements" box). [Dedicated QS team mobilised for this week to tackle.] First pass included in Risk Register summary circulated 4/3/11.3. Legal contribution to relevant T&C possible changes. Underway with McGrigors.

<p>Risk Transfer</p>
<p>Overview of Infraco Phoenix Proposal Position</p> <p>Infraco state they believe it is a fair and reasonable price.</p> <p>They include 8 groups of pricing exclusions which are further defined in the body of the proposal and have over 30+ qualifications / amplifications or exclusions. In addition, there are Terms and Conditions statements which will, when evaluated, mean a risk transfer is proposed.</p> <p>The proposal introduces new defined terms which require analysis, particularly the Actual Cost and Estimated Actual cost elements.</p>
<p>Key Areas of Agreement</p> <p>Fossils and Antiquities are a retained tie risk.</p> <p>Landscaping: planting season risk associated with Sectional Completion to be accepted by tie/CEC but Infraco have obligation to complete next planting window.</p> <p>Includes for below ground obstructions but not for soft ground.</p>
<p>Key Areas of Disagreement</p> <p>tie still require Infraco to complete design and construct obligations.</p> <p>Approvals and consents risks attempted to be transferred back to tie / CEC.</p> <p>Network Rail Form C approvals based on standard timescales (but need to meet quality and timetable threshold for NR)</p> <p>Water connection issues at Depot (including existing BSC Non compliance) sought to be transferred to tie / CEC.</p> <p>Flooding risk at airport sought to be transferred to tie/CEC.</p> <p>Ground conditions /treatment risk not included</p> <p>Gogar Castle Access Road land availability to be in place by 31 March 2011.</p> <p>TRO misalignment risk sought to be transferred back to tie / CEC.</p> <p>Drainage alignment and Integration risk sought to be transferred back to tie / CEC.</p> <p>Earthing issue at Depot sought to be transferred back to tie / CEC.</p> <p>Contaminated materials included at maximum quantity (51000m³) and at specified locations but no upside benefit for tie/CEC and no specification of necessary treatment. No Price transparency for such inclusion.</p> <p>Utilities, unless already instructed via a tie Change Order, are excluded. No "unknown" utilities allowed for.</p> <p>Noise & Vibration "floating slab" requirements are excluded. Needs to be checked against the drawings. Previous exclusion is only for "special" floating slab.</p> <p>Murrayfield Stadium Retaining wall (W18) & RRRW4 LOD issues sought to be excluded by Infraco. PPP allows for close out of Planning and Technical Informatives as listed only.</p>

CEC Open Comments: any design or construction work proposed to be a **tie** Change. Siemens part of PPP apparently does not include for any storage beyond Rev 1 sectional completion C (March 2011!) therefore warehousing costs to be added. The costs of storage post-vesting are excluded.

27 trams and their costs required by Infraco under TSA.

No allowance made for any further work on design to satisfy Approvals as SDS say it could all be accepted now. (Note Infraco quote SDS, and then exclude the costs of further change under the PPP Price.)

Specific list of 14 exclusions to PPP Price for Design services: mixed bag: 1 -9 should be resisted; 10,11 ok; 12,13 included elsewhere; 14 resist.

SDS Incentivisation principle and valuation to be resisted.

Further Extended Construction and design support resource based on PPP Programme means no control over resource.

Performance Risks may be disguised or ignored as there is no explicit run time commitment included. That would be an element of transfer back to **tie**/CEC by default.

Maintenance proposals seek to move indexation risk back to **tie** / CEC.

Programme section includes resource constraints / assumptions:

- See separate report.
- Milestones for delivery of "excluded elements" linked into programme.

Only one Infraco Member to contract with the key sub contractor then risk of delay if contracting party fails.

Detailed Work and Analysis required Pre-mediation

1. Cyril Sweett plus Engineering & PM team to systematically check all of the attached drawings for completeness and areas of inconsistency with **tie** / CEC requirements. Complete by 7/3/11.
2. Detailed analysis of the likely range of cost associated with each of the items listed in the "disagreements" box). [Dedicated QS team mobilised for this week to tackle.] Initial assessment included in Risk Register circulated 4/3/11.
3. Programme analysis work stream also underway.

Scope
<p>Overview of Infraco Phoenix Proposal Position</p> <p>Infraco propose a physical scope of Airport to Haymarket; Section 1A enabling works and works already completed in section 1B, 1C and 1D (primarily Princes Street with some minor works on Leith Walk).</p> <p>The work to date for Princes Street is included in their proposal.</p> <p>Infraco have proposed a scope for the Phoenix Proposal Price (PPP) as above but appear to indicate a willingness to discuss a different method for realising the On Street works (east of Haymarket) as they call them "undefined".</p> <p>It is submitted without prejudice and can be amended / withdrawn by Infraco at any time.</p> <p>The drawings define the scope, and anything different is a tie change. There is no "development and completion of the design". There is no explicit confirmation that the drawings are warranted to achieve the Employers Requirements.</p> <p>The proposal does not explicitly commit to delivering the performance characteristics (e.g. run time) incorporated into the Employer's Requirements.</p> <p>Infraco state that this proposal is based on a scope they are able to agree on (implying they will be unable agree to some alternative scope proposals).</p> <p>Infraco say their price includes of all assurance and approvals for the design, construction, testing and commissioning for ETN (Phase 1a), which implies as far as Newhaven, but also qualifies it "<i>as defined in this Proposal</i>".</p> <p>Infraco say it is based on previous Infraco submissions described as Project Carlisle and it excludes completion of Phase 1b design and any construction work.</p> <p>It does provide a clear basis to measure Infraco's Price against, although it targets reduction / minimisation and transfer of risk to tie / CEC.</p> <p>Stated as superseding all previous estimates and proposals.</p> <p>Infraco insist on supplying 27 Trams under the Tram Supply Agreement.</p> <p>No further work is included in the scope to address any remedial work / defect rectification at Princes Street.</p> <p>No Value Engineering to be considered (unless a tie Change).</p> <p>Maintenance Scope limited to that defined in PPP and Maintenance Conditions are proposed to be amended, particularly with reference to commercial terms and conditions.</p> <p>Mutually acceptable independent third party proposed to continually engage both parties in constructive dialogue. This would need to be linked to any amendments to the Dispute Resolution Process to give it a locus.</p> <p>Novation of CAF to tie is proposed.</p>

<p>Key Areas of Agreement</p> <p>Airport to Haymarket is included in the PPP. Infraco appear to consider including (at some future time) Haymarket to St Andrews Square. Fossils and Antiquities are a retained tie risk. Combined poles specified as originally designed. (Need to check where these apply and re scope of materials.) PPP includes for below ground obstructions PPP allows for close out of Planning and Technical Informatives as listed in Appendix 3.3a & 3.3b. tie to discharge their Informatives to meet the PPP Programme.</p>
<p>Key Areas of Disagreement</p> <p>Edinburgh Gateway is excluded. Airport Kiosk & Canopy is excluded. Work beyond Haymarket is excluded (and OHL tie ins will be required) Any 3rd party (e.g. EAL / Forth Ports/Scottish Water, etc) "impact" on the PPP drawings is proposed as a tie change (even if it is a current requirement to satisfy). Noise & Vibration "floating slab" requirements are excluded. Excludes transitions at 1A structures (Tower Place bridge) Utilities, unless already instructed via a tie Change Order, are excluded. Soft Ground treatment is still excluded. Roseburn Viaduct scope to be finalised. Gogarburn surcharge solution final scope. Trackform type Overview now considered fixed irrespective of any necessary ER requirements / detailed design completion issues. NIL scope of design and construction does not appear to be in PPP. Airport Gogarburn Retaining walls based on PPP drawings, irrespective of flood modelling output.</p> <p>Tramstop elements are based on the PPP drawings and are a retained tie / CEC risk post satisfaction of Informatives.</p> <p>1a/1b interface design drawings are unlikely to be the finished requirement and Infraco seek to transfer scope risk to tie / CEC.</p> <p>Combined poles specified as originally designed. (Need to check where these apply and re scope of materials.) Cable ducts for UTN sought to be excluded by Infraco from PPP. LV HV supply qualification re Airport to be checked.</p> <p>Delay risk for earthing and Scottish water issues at the depot are qualified. Contaminated materials included at maximum quantity (51000m³) but no upside benefit for tie/CEC and no specification of necessary treatment. No Price transparency for such inclusion.</p> <p>Protection & support of "unknown" utilities excluded. "known utilities" defined in Appendix 4.1 (To be checked)</p> <p>Murrayfield Stadium Retaining wall (W18) & RRRW4 LOD issues sought to be excluded by Infraco.</p>

PPP only allows for close out of Planning and Technical Informatives as listed. (check listing)
Excludes close out of construction related Informatives which are not in the scope of PPP. (e.g. Shandwick Place Boundary wall MS).

Assumes all construction works can commence before close out of Informatives.

Excludes any further work to close out CEC technical Open comments and says they are additional.

Potential ambiguity over scope of assurance of design.

All Siemens materials and equipment for whole route to Newhaven included in PPP. Infraco seek to offload storage asap after construction.

Infraco insist on 27 trams under TSA.

Design services: PPP includes all costs claimed by SDS, whether driven by an Infraco requirement or an original obligation. Details items not included (Appendix 1.4) and which would be a further change. Excludes any further comments from CEC on any heading.

14 Exclusions to PPP Price for design services.

Maintenance Services:

- Infraco seeks to eliminate the **tie** "break" clause (89) which can operate after 3 years, thus setting the period to ten years.
- Indexation Cap proposed to be removed and indexation applicable scope proposed to be extended to cover mobilisation and initial spares.
- Seeks renegotiation of liability caps and benchmarking point proposed at year 5.

Detailed Work and Analysis required Pre – mediation

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Complete by 7/3/11
2. Detailed analysis of the likely range of cost associated with each of the items listed in the "disagreements" box). [Dedicated QS team mobilised for this week to tackle.] Initial assessment included in Risk Register circulated on 4/3/11.