

Terms and Conditions

**Overview of Infraco Phoenix Proposal Position**

Proposal is heavily qualified and protected: *“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.”*

Revised Clause 80 **tie** change mechanism is proposed including acceptance of any Infraco notifications as **tie** changes and an offer to progress works whilst agreeing the valuation provided demonstrable (estimated or actual) cost is paid by **tie**.

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.

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.

Seeks to reverse adjudicator decision on Key Sub Contractors and require only one Infraco Member to contract with the sub contractor.

Carves out from PPP Price, but expects direct payment of SDS Incentivisation.

Principal Liquidated Damages apply as per Infraco Contract, but based on revised completion dates. Infraco seek to exclude application of TSA LDs

Schedule Part 4 Pricing Assumptions are retained but proposed to be “*substantially*” reduced.

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.

Tram Maintenance costs proposed to be amended as km running expected to be reduced from that originally envisaged.

Novation of CAF to **tie** is proposed.

**Key Areas of Agreement**

3<sup>rd</sup> Party Agreement timescales for EAL & New Edinburgh Ltd to be extended to match PPP programme.

Liquidated damages apply.

### Key Areas of Disagreement

**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.

Independent third party role and DRP mechanism amendments need to be fully explained before proper consideration can be given.

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.

SDS Incentivisation principle and valuation.

Sectional Completion Dates to trigger LDs still to be agreed.

Infraco seek to exclude application of TSA LDs

Schedule Part 4 Pricing Assumptions are retained but proposed to be "*substantially*" reduced. At first (second and third) read, Infraco may be said to have actually increased their exclusions / assumptions.

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.

Infraco Change not contemplated.

Seeks to reverse adjudicator decision on Key Sub Contractors and require only one Infraco Member to contract with the sub contractor

### 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. 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.