

## IN CONTEMPLATION OF LITIGATION - FOISA EXEMPT

### MEETING NOTES

**MEETING:** 8<sup>th</sup> November 2010

**LOCATION:** Citypoint, Edinburgh

**Present:** Tony Rush, Carol Campbell, Alastair Richards, Nigel Robson, Brandon Nolan, Simona Williamson, Jo Glover, Hazel Moffat, Steven Bell, Susan Clark, Mike Patterson, Jim Molyneux, Bill Mowatt,

Torquil Murray

**Apologies:** Richard Jeffrey, Andrew Fitchie, Blair Anderson,

### PURPOSE OF MEETING – BRIEFING OF LEGAL TEAM

#### 1. INTRODUCTION

- 1.1 General discussion and consensus was that time was not on our side as regards providing a report for the council to consider.
- 1.2 In respect of the issue of the Interdict against Chairman it was mooted that **tie** should not be seen to back the statements made. In addition that **tie** should not be paying for the former Chairman's legal fees in respect of the matter.
- 1.3 Brandon Nolan discussed the recent consultation with Richard Keen QC. The issue of running the contract when it was unworkable was discussed. In particular that previously the Infraco had acknowledged that the Contract was unworkable. Richard Keen QC stated that if **tie** decide or wish to terminate on Infraco default then it must be certain of its grounds. Richard Keen QC advised that **tie** concentrate on its strongest single issue. It was up to **tie** to find the strongest case.
- 1.4 Brandon Nolan commented on Richard Keen QC view that it was up to the Infraco to decide whether to terminate the contract if there is a default. That is to say that the Infraco does not have to stop working and are within their rights to continue with the works.
- 1.5 Brandon Nolan also noted that the Infraco termination cannot be seen to be predetermined



- 1.6 Carol Campbell noted that CEC required the **tie** report for 25<sup>th</sup> November 2010. This was to enable a review of the report prior to the council meeting.
- 1.7 Hazel Moffat raised the issue of the potential of a judicial review of CEC decision. Given the recent court action by the Infraco this matter required to be considered.
- 1.8 Discussion was held around the open letter sent to the council by the Infraco. It was suggested that the letter is discussed with Richard Keen QC.

## **2 AGENDA ITEM 1-DATA CONTROL**

- 2.1 It was stated that access would be required to CEC documents to enable relevant items to be included in the data room.
- 2.2 Susan Clark advised that the data room was in the process of being set up. It was also noted that accounts were being set up/had been set up for most people to allow access.
- 2.3 It was advised that the IT department had improved the database as compared to the current system.
- 2.4 Susan Clark advised that the structure of the data room will be based on the RTN's.

## **3 AGENDA ITEM 2 – PROGRESS ON RESPONDING TO THE “99 CESSATION” INTC’S**

- 3.1 Mike Patterson gave an update on this matter and that pro-forma's were almost complete for all the items on the list.
- 3.2 The issue of as to whether Infraco letter 25.1.201/KDR/5587 dated 6 May 2010 could be deemed to be an agreement under clause 10 was discussed. It was suggested further consideration be made as well as the implications of clause 80.20 and 30.4.
- 3.3 In respect of the 99 INTC's it was stated that it was necessary to identify who does what as regards dealing with the issues and corresponding on the matters.
- 3.4 It was noted that works have stopped in a section of the works based on a particular INTC. However, it did not follow that all works in the section were covered by the INTC relied upon by the Infraco. In such instances the Infraco were effectively suspending the works. **tie** is undertaking further investigation into this issue.



**4 AGENDA ITEM 3- PROGRESS ON CATEGORISATION OF INTC's**

- 4.1 It was noted that the INTC's have been Split into 4 categories following the Dervaird decision. In respect of the off street works all the relevant INTC's had been reviewed.
- 4.2 Discussion in respect of the INTC's was undertaken and was 90.1 249 meeting. In respect of letters issues by tie in respect of the INTC's the Infraco has failed to act.
- 4.3 It was discussed that the RTN route should be used where the Infraco has failed to act. Jo Glover is drafting an RTN in respect of this issue.

**5 AGENDA ITEM 4 – RESPONSE TO BSC 6860**

- 5.1 Steven Bell advised that a response was being prepared to BSC 6860 as well as to the Extension of Time INTC [536].
- 5.2 Following on from the previous item Steven Bell noted that not all of the works are impacted by the issue of INTC relied upon by the Infraco and this would be reviewed as part of the response.
- 5.3 In respect of the understanding that not all of the suspended works were covered by an INTC Brandon Nolan queried if the response to the letter should be based on an RTN.

**6 AGENDA ITEM 5 - CLAUSE 90.2 RESPONSE TO RECTIFICATION PLAN FOR TRACKWORK DESIGN AND 6 RESPONSE TO BSC 52170 AND 52171**

- 6.1 In respect of this matter the Infraco deny they are in breach of contract. However, they have provided a rectification plan.
- 6.2 Responses as to the acceptance of the rectification plan are being considered.
- 6.3 The RTN's documents are to be passed to Robin Blois-Brooke and he is to be asked to consider them but not too analyse the documents. It was noted that there could be a risk his becoming contaminate by the contents of the documents. However, it was generally considered that he would not let that happen. Documents to be forwarded to Robin Blois-Brooke are the 2 letters from Infraco, proposed response, the 2 reports and the comment documents.



**7 AGENDA ITEM 7 – RESPONSE TO BSC 7265 & 6833 (response INF Corr 6464/MP INTC 527 – Section 5A&5B – Network Rail Access Road)**

7.1 It was noted that prior to a response it would be necessary to ensure that any **tie** issues are not likely to be or may become the dominant delay in the matter.

7.2 It was noted that an Estimate was still awaited from the Infraco in respect of this matter. RTN based on the Infraco's failure to respond and issue an INTC.

7.3 It was noted that it was not as simple as relying on the timescales from the correspondence. While it may be that correspondence on an issue may go back some considerable time and the Infraco have raised an INTC it may be that under the terms of the contract (in particular as regards IFC) that the initial INTC may not be valid and as such may be deemed as not having been issued.

**8 AGENDA ITEM 8 - EXPLAIN AND REPORT ON RESPONSE TO INTC 536 CLAIM**

8.1 The Infraco are pursuing the Extension of Time under the INTC process. The question needs to be asked if this is correctly a compensation event under the Contract. It was noted that Howie said that either route, Compensation Event or Clause 80 could be used.

8.2 Whether or not **tie** could mount a challenge, based on different circumstances, to in effect overrule Howie was discussed. It was stated that further consideration was required on this matter.

8.3 It was accepted that there was a danger that Infraco could put INTC 536 into adjudication and this could prove difficult for **tie** as regards timing of decisions concerning termination. The potential of challenging the route for the EOT claim (CE or Clause 80) should be considered by **tie** and perhaps used as a delay tactic to avoid the full EOT claim going to DRP.

8.4 In respect of the analysis of the Extension of Time claim it was noted that this was made difficult by their being no agreed baseline. The analysis that is being carried out is based on Programme Rev 1. It was reported that **tie** had created baseline on the day of this meeting and will analyse the results. The analysis will also incorporate the design programme. The analysis will be used to identify the dominant delay.

8.5 It was noted that there would be a meeting on Friday (12/11/10) with the Infraco to discuss the EOT claim. It is understood that the purpose of the meeting is that the



Infraco want to discuss the claim and provide further oral information. It was noted that it was up to the Infraco to provide documentary proof of entitlement. It was suggested that perhaps further dialogue should be entered into with the Infraco to control/stall the matter being referred to DRP.

- 8.6 In respect of the EOT claim it was highlighted that the entitlement to time was not the issue but entitlement to Loss and Expense was of major concern. It was understood that the Infraco position was that the EOT 1 award stated that any further EOT awards would be calculated on the same financial basis. It is understood that BB figures have been submitted based on EOT1 but that the Siemens figures have not.
- 8.7 In summary the causation of delay is not the main issue but the consequences for tie as regards the quantum are and this still has to be assessed.

## **9 AGENDA ITEM 9 – REPORT ON AND EXPLAIN CURRENT DRP PROGRAMME**

- 9.1 Steven Bell advised that 10 groupings had been identified of up to 40 INTC's. Examples of groupings were Lindsey Road, Drainage issues and Ducts.
- 9.2 The question was raised as to what extent DRP's should be issued. It was noted that the key issue in respect of issuing DRP's was resource.

## **10 AGENDA ITEM 10 – REPORT AND EXPLAIN CURRENT SCOTT WILSON AUDIT OF DESIGN**

- 10.1 Susan Clark advised that the report would be due later in the week. Explained that Scott Wilson undertook a 2 week exercise to validate the design. It was understood the report would highlight that only 80% of the design was complete. This is against the purported 85% of design being complete at novation. It was noted that it was not a direct comparison as changes would have to be taken into account.
- 10.2 A discussion took place around what would happen to the designer if termination occurs. It was suggested that an Independent checker could be utilised to overcome some of the issues.
- 10.3 It was noted that consideration would have to be given to reducing the SDS payment if design complete does not reflect payment made for design.



**11 AGENDA ITEM 11 – EXPLAIN METHOD AND OPERATION FOR, INFORMATION REQUIRED AND SCOPE OF COST EXERCISE**

11.1 Jim Molyneux and Bill Mowatt advised that they would be meeting for further discussions on the matter. They did note that there were important issues that had to be addressed.

11.2 In respect of reporting they noted that the parameters of costs would be wide and the best case and worst case scenario will be the only outcome. In addition they would need to rely on tie figures. The timescale involved did not allow for anything other than an interrogation of the tie figures.

11.3 It was noted in discussion that interpretation of Clause 88.90 was required.

11.4 It was noted that the issue of Loss & Expense would form part of termination matters. As such this would be considered by McGrigors

**12 AGENDA ITEM 12 - EXPLAIN METHOD OF OPERATION FOR, INFORMATION REQUIRED AND SCOPE OF LITIGATION EXERCISE**

12.1 McGrigors is to start with the RTN's and will undertake interrogation of same. It was noted that the factual matrix was important.

12.2 Following the consultation with Richard Keen QC a decision tree has been developed to clarify the process that would be used.

**13 AGENDA ITEM 13 – EXPLAIN METHOD OF OPERATION FOR, INFORMATION REQUIRED AND SCOPE OF DESIGN EXPERT'S REPORT**

13.1 Nigel Robson advised that there were 9 areas that required to be considered with 22 questions. Given the timescales it was suggested a review of the questions was required, as well as the order of the questions to be answered. This would need to be discussed with Robin Blois-Brooke. It was thought that this would be beneficial as Robin Blois-Brooke would perhaps be able to suggest rationalising the scope and questions based on his review to date.

**14 AGENDA ITEM 14 – INFORMATIVES**

14.1 Topic covered under other discussions.



**15 AGENDA ITEM 15/SUMMARY – OPEN DISCUSSION AND QUESTIONS**

15.1 It was advised that CEC would want to see the correspondence regarding the RTN.

15.2 Alastair Richards to consider areas of fact.

15.3 Generally the issue of timescale was discussed. It was noted that CEC would require a definitive answer that was to be subjected to independent reviewed prior to council meeting. Susan Clark suggested some information could be handed over in stages to allow a degree of flexibility over the 25<sup>th</sup> November 2010 deadline.

15.4 The general consensus of the attendees to the meeting was that a complete full definitive report/recommendation was unlikely given the timescales. It was noted that the most likely outcome would be a report providing a recommendation of the best opinion available but based on facts that had been uncovered to that date. The report would not be exhaustive and is likely to be heavily caveated.