

PROJECT PITCHFORK

The three alternative options are identified in Richard's email of 13 January. Moreover there is now a policy of being "commercially aggressive":

- Formal termination of the whole BSC contract (definitely the least attractive option)
- Negotiating BB out of the consortium (this is definitely the current favourite of the board but we must be balanced in our assessment)
- Carrying on slugging it out with BB in an uneasy marriage (the status quo)

Essential to Infraco's approach to the Contract is the way they seek to interpret Schedule 4. Richard Keen in his draft opinions concludes:

*"where the Design prepared by the SDS Provider involves an amendment from the drawings forming the **Base Date Design Information** or an amendment from the scope shown on the **Base Date Design Information** then the onus of proof will shift to **tie** to establish why this should not constitute a **Notified Departure**".*

In short the burden of proof is on **tie**.

Whichever option is chosen tie has to demonstrate that Infraco are in breach of contract in the way that it has acted – the level of proof required is much the same whichever option is preferred.

Option 1 – Termination

Termination would follow the issue of a Remedial Termination Notice pursuant to Clause 90.2:

- Following service of a Remediable Termination Notice by **tie** in accordance with Clause 90.1.2 (notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred)
- the Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default in respect of which the Remediable Termination Notice has been served to **tie** within 30 Business Days of the date of such notice (or such longer period as **tie** may agree to in its absolute discretion).
- **tie** shall consider such rectification plan and determine, at **tie's** absolute discretion, within 10 Business Days of receipt whether the rectification plan is acceptable.
- If **tie** accepts the rectification plan, the Remediable Termination Notice shall no longer be effective and no further Remediable Termination Notice will be served by **tie** in respect of the relevant Infraco Default, provided that the Infraco complies in full with the terms of the rectification plan as accepted by **tie**.
- Any failure by Infraco to comply with the terms of such rectification plan shall entitle **tie** to terminate the Agreement on 5 Business Days written notice to the Infraco and there shall be no obligation on **tie** to consider any further rectification plan.

The Infraco Defaults **tie** would rely on are:

- a. a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works; and
- j. the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from **tie's** Representative a written notice to proceed.

At this point in time I am minded the breaches on which **tie** may rely upon are:

- refusal to mitigate the impact of alleged changes; and
- failure to progress the works with due expedition.

Infraco are entitled (have due cause) to suspend work under Clause 88.9:

- Pursuant to Clause 89.9.1 if **tie** shall fail to pay the Infraco in full any amount properly due and payable under this Agreement by the final date for payment in accordance with the requirements of Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) (as appropriate) and no effective notice to withhold payment has been given by **tie** to the Infraco, the Infraco may, after giving **tie** ninety days' notice in writing of the same, stating the ground or grounds on which it is intended to suspend performance, suspend the performance of the Infraco Works until payment in full is made by **tie**.
- Pursuant to Clause 89.9.1 Infraco shall be entitled to suspend performance of the Infraco Works in accordance with Clause 88.9.1 on 60 days notice where **tie** has failed to pay and CEC has failed to make payment of the relevant amount in accordance with the CEC Guarantee (for the avoidance of doubt such period of 60 days shall operate instead of the 90 day period in Clause 88.9.1).

Consequently any other cause of suspension is arguably without due cause.

However, as I understand the Law on “suspension” it presents difficulties for either party and we should seek DLA’s advice. I understand that for the Employer to have rights to terminate the wording has to be very precise. I am not certain whether the expression, “has suspended the progress of the Infraco Works without due cause for 15 Business Days” would satisfy the test required.

On the other hand I understand that in some jurisdictions suspending works because the Employer had refused to sanction additional payment would be seen as a way of permitting the Contractor to exert improper duress on the Employer to agree to unwarranted and inflated claims. I am not certain whether Infraco would be prevented from exercising such pressure under Scots Law.

If we are to succeed in either option 1 or 2, or have to accept option 3 it is imperative that we act in a way which is consistent with supporting Remedial Termination Notices if it comes to that.

I am minded that further negotiations on OSSA could prejudice this option and may make the task of delivering option 2 more difficult. However, given that its terms are acceptable and legal it could be a benefit for option 3. On-going negotiations on the OSSA have to be very skillfully managed.

Option 2 – part exit by BB(UK)

As you explained it to me the meaning of this option is for BB (UK) to step out of the On-street Works, but to complete the Off-street Works.

The substantive difficulties with this option are:

- the other Infraco Parties would have to be in agreement;
- the new arrangement would have to comply with EU procurement regulations;
- guarantees and warranties would have to be renegotiated;
- any claims between Infraco Members (including SDS) would have to be settled

- any advance payment under the Milestones would need to be recovered by **tie**: and
- BB (UK) have proven extremely difficult to deal with on any compromise.

Whilst this option may be favoured by the Board it would not be at all easy to deliver. The more **tie** would be prepared to pay the easier it would become. We would have to obtain early agreement in principle from the other Infraco Members.

Essential to successfully bringing about this option would be to shake BB (UK)'s confidence in their position. This may be achieved by either or:

- sensible discussion with David Darcy; or
- presenting our best case in adjudication; or
- mounting a potentially successful case in the Courts; or
- succeeding in the Courts.

Richard's exchanges with Darcy and the Chairman's letters are the opportunity to begin the process. They need to be full and frank supported by the "aggressively commercial" strategy. The extent to which we want to be aggressively commercial has to be balanced with the risk of driving Infraco into a more frustrating modus operandi. Although the Tentative Schedule for off street works recently issued by Infraco could hardly be more frustrating.

Option 3 – Status Quo.

I am minded that however undesirable this may well be the option we have to accept. In the absence of Infraco changing their ways by agreement or by order from the Courts we may have to accept that they proceed as they are. Failure by Infraco to respond to notices to proceed with due diligence would lead us to termination of the Agreement with all Infraco Parties, including SDS unless we have step back rights. But we must not proceed without making **tie**'s position clear.

Our overall position should be stated very much as I have outlined in previous notes. We may also make the point that CAF and Siemens have demonstrated a willingness to proceed with due diligence and indeed CAF are in the process of building the trams. In summary I am minded that we must make it clear that Infraco Members are jointly and severally responsible for the frustration being caused by BB (UK) and ask them how they propose rectifying the situation. Such approach would need careful consideration.

I am also minded that we should consider suspending works from York Place to Newhaven (but not from Haymarket to Princes Street) until the MUDFA has progressed to an extent which satisfies, I think, the "On Street Construction Works Methodology" in Schedule 15.

Before we finalise this statement we should have a clear understanding of the performance of SDS and sub-contractors, and the causes of delay – obtained by the Audit.

Whatever option we end up following it is imperative that all communications with Infraco Members are closely monitored and approved. We have to present a consistent message and this requires all "messengers" to understand the complexities and uncertainties of the contractual and legal arguments.

