



Paper to: TPB
Subject: Project Pitchfork Update
Preparer: Susan Clark

Meeting date: 14th April 2010

1.0 Summary

At the Tram Project Board on 10 March 2010, the following recommendations were approved:

- Eliminate the option of continuing "As is" – Option 3;
- Continue to pursue the rights under the existing contract with vigour and seek acceptable resolution of the main disputes; both according to the action plan described in section 6;
- Rigorously monitor the opportunity to achieve a partial or full exit of BB from the primary contract role they currently play on acceptable cost and risk transfer terms;
- Retain Option 1 (termination), not as an option to be pursued currently but kept under review for serious consideration if evidence emerges which merits this approach;
- Assess affordability and rephasing options, including operational and financial viability;
- Reach a resolution of these matters with BSC in the form of a revised version of the existing contract which remains compliant with procurement regulation;
- Agree a new way of working with BSC which mitigates against further dispute risk;
- Report progress regularly to the TPB; and
- Formally reassess the revised arrangements as soon as practical.

The action plan agreed was:

Mobilise action on Clause 80 and 34.1
Seek conclusion on impact of utility diversion delays and overall EOT claim, with consequent revision to a new agreed programme
Respond to BSC's suggested OSSA and offer the Clause 65 alternative
Refine argument over SDS management and deploy as appropriate
Omnibus approach to resolution of outstanding BDDI – IFC disputes; expedite response to INTC's (other matters)
Quantify and execute amended position on prelims
Seek to resolve the Airport – Edinburgh Park disputes
Action plan for implementing more collaborative working

This paper updates TPB on progress made on the action plan since the last TPB meeting.

2.0 General

tie has continued with the project management approach to Pitchfork and a detailed programme of work is in place.

tie's contractually assertive approach has continued since the March TPB during which time two senior level meetings were held with BSC on the following dates:

- 22 March 2010 - meeting with David Mackay, Richard Jeffrey (tie) and David Darcy (BB)
- 25 March 2010 – meeting with Richard Jeffrey, Tony Rush (tie), David Darcy, Richard Walker, Michael Flynn (BSC). Other meetings are scheduled for 14 and 30 April 2010.

At the latter meeting, tie shared their key issues for resolution with BSC. BSC declined to table any key issues and to date has failed to raise any key issues for resolution. BSC has, however, written directly, once again, to CEC during the period. (a copy is attached for ease of reference only).

Additionally, 2 flowcharts have been produced to show route maps for the overall Pitchfork approach and for the work being done on Clause 80. These aim to provide some definition around the options and decisions required to reach a resolution. Whilst the flowcharts aim to simplify the process it should be recognised that there are a multitude of potential variants dependent on the attitude and engagement by the consortium.

3.0 Mobilise Action on Clause 80 and 34.1

80.13

tie wrote to BSC on 19 March 2010 instructing them to commence works on all areas which BSC deemed to be "held up" by an outstanding change (INTC).

BSC's response was received on 1 April 2010 which was simply a holding response. tie responded on 2 April 2010 confirming our instruction for BSC to commence the works. There are a number of possible consequences of the response from BSC and these have been summarised in a flowchart which illustrates the response which BSC could give and the consequences of such a response. BSC will be deemed to have not complied with this instruction, and therefore will be deemed to have suspended the works, if they have not commenced work by 12 April. This would allow tie to move to Clause 90 (Termination on Infraco Default). There are a number of steps required following this decision before termination can occur. This includes issuing instructions in relation to Clause 80.13 for specific pieces of work and then, if BSC do not proceed, move to issuing Clause 90 letters for these issues.

4.0 Utility Delays

BSC had referred a change in relation to the MUDFA Rev 8 delays into the DRP process. Mediation was held over 16 and 17 March 2010 but no mediated solution was agreed and both parties confirmed that this issue should proceed to adjudication. As BSC is the referring party, it is for them to refer the case to adjudication and, perhaps surprisingly, to date they have elected not to do so. Meanwhile, tie is preparing it's case for the adjudication.

5.0 Respond to OSSA and Offer the clause 65 Alternative

The senior level meeting held on 25 March 2010 was used to discuss this matter. tie agreed to issue a draft scoping document for on-street works to BSC for comment and this was issued on 2 April 2010. No response has been received but BSC have been invited to a further meeting on 14 April 2010 to discuss this proposal.

Meanwhile, arrangements are being made to remove/alter traffic management in the city until agreement can be reached.

6.0 Refine argument over SDS management and deploy as appropriate

Following the audits conducted as part of Pitchfork 1, work has been ongoing to identify further audits required to gather sufficient evidence to prove that Infracore have not managed the designer in accordance with the Infracore Contract and that this has had a material impact to tie. The first of these audits has been scoped and is due to commence week commencing 19 April 2010.

7.0 Omnibus approach to resolution of outstanding BDDI – IFC disputes

The whole issue of BDDI – IFC is related to Pricing Assumption 1 in Schedule Part 4 of the Infracore Contract. McGrigors are now instructed to prepare terms of reference for use in some form of "expert determination" on this issue. This will be ready by 26 April 2010 while the opinion of Senior Counsel in London and Edinburgh is being sought.

8.0 Quantify and execute amended position on prelims

A letter on this issue was sent to BSC on 8 April 2010.

9.0 Seek to resolve the Airport – Edinburgh Park Disputes

A schedule of the "changes" has been put in place and is being tracked weekly. The current status of the 33 "changes" is as follows:

- 5 closed
- 24 with BSC for action
- 1 with tie for action
- 3 require joint action

However, these "changes" are covered by the Clause 80.13 instruction issued to BSC instructing them to proceed with the works whilst the disputes surrounding the estimates are being resolved.

10.0 Action plan for implementing more collaborative working

An initial piece of work has been concluded on this and at the next meeting with BSC regarding on-street works, additional focus will be given to this area in an attempt to understand what will be required for both parties to work collaboratively. From this a series of actions will be put in place.

Our ref: 25.1.201/RW/a/5226
Your ref: ceoltranslbbresp01

1st April 2010

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Chief Executive
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06 APR 2010
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Dear Sir,

Edinburgh Tram Network Project

Thank you for your letter of 24th March 21010 where I note you have agreed with Richard Jeffrey – CEO tie – that he will respond directly to me in respect of the detailed issues I raised with you and the Councillors.

Whilst I accept that any detailed responses you wish to make will be dealt with by Richard Jeffrey I believe that you, as Chief Executive of the Council, need to respond directly in respect of the assurances sought from the Council, as security provider, that it has access to sufficient funding to meet tie's contractual commitments on the project given the current delays and likely additional costs arising from the Adjudication rulings.

The City of Edinburgh Council will ultimately be held responsible by the people of Edinburgh for any delay and cost over-run in the delivery of the Edinburgh Tram Project. The existence of tie, as the Council's arms length company, will not insulate the Council from criticism. This is no doubt clear to you already and, of course, the existence of the guarantee will leave the Council directly responsible for the financial consequences.

It remains my hope, despite the contents of your letter, that the Council will recognise this reality and intervene now, whilst opportunity remains, to urge a sensible way forward. Some of the challenges facing the project which remain in full effect are as follows:

- **Nearly all on-street sections of the project remain obstructed in some way by incomplete utilities.** Though recent statements made in the media would suggest that 98% of the utilities have been completed, it is common knowledge that final cabling and connections will not be complete until November 2010 (some 90 weeks late.);
- **Almost all of the on-street sections are subject to changes in scope and to date, tie has failed to administer the terms of the contract correctly or timeously: an allegation supported by the results of recent adjudications;**
- **Much of the off-street sections are also subject to changes in scope, and again, to date, tie has failed to administer the terms of the contract correctly or timeously;**

Amidst these challenges, the strategy now adopted by tie has been described as 'ensuring adherence to the contract', but it amounts to little more than deliberate frustration. For example:

- **Non agreement of Programme.** A process involving multiple stages of joint analysis by both tie and the consortium, designed to develop a realistic and operable programme for the monitoring of the works was undertaken (Revision 2). Despite programmers from both sides having spent many months meeting and agreeing the likely delays and ways of mitigating them, tie unilaterally abandoned this process in August 2009;
- **The On-street Supplemental Agreement** was a jointly proposed strategy to overcome the consequences of the grossly-delayed Utilities and Changed Works in the on-street areas, and was principally identical to the Princes Street Supplemental Agreement which facilitated the successful completion of Princes Street. Without just cause, tie has recently, unilaterally, abandoned this proposal after months of negotiation;
- **The Revision 3 Programme** was a proposed extra-contractual process involving multiple stages of joint analysis by both parties similar to the Revision 2 Programme exercise. Despite tie's unjustified abandonment of that process in August 2009, the consortium agreed once again to participate, and programmers from both sides, having spent many more months meeting and agreeing the baselines, likely delays and ways of mitigating them, Again, tie unilaterally abandoned this process in February;
- **A tactic of bureaucratic time-wasting** seems to have been adopted whereby a deluge of correspondence is now being sent which requires response by those resources which might otherwise be used to progress the works. Furthermore, tie have also instigated in excess of 14 audits during which information has been requested that was already in tie's position, and in some cases generated by tie itself;
- **A continued refusal to properly acknowledge any entitlements arising from the delayed utility works** remains in effect by tie despite very public acknowledgement of tie's responsibility for those works;
- **A refusal on spurious grounds to allow Infraco to work in the Haymarket area** notwithstanding the allowance of working in other areas (eg. Tower Place Bridge) in contravention of the grounds upon which Haymarket is denied.;
- **A purported 'instruction' to immediately progress work on all disputed changes which is not valid under the Contract** (including changes which are no longer in dispute or where the scope of the change is not agreed).

I must register concern that such behaviour by tie is simply not consistent with that of an organisation wishing to progress the project in an efficient manner or act in the best interest of the City of Edinburgh. In fact it would appear that such behaviours are more consistent with an organisation wishing to substantially frustrate the process.

The current tie strategy will only serve to increase both parties' legal fees and consume management time, whilst completely failing to progress the works. The chance to address the challenges of this project is diminishing as time progresses. I urge you to reconsider the Council's approach.

Finally, I would like to assure you of our continual commitment to deliver the Edinburgh Tram Network Project in accordance with the terms and conditions of the Contract we have entered.

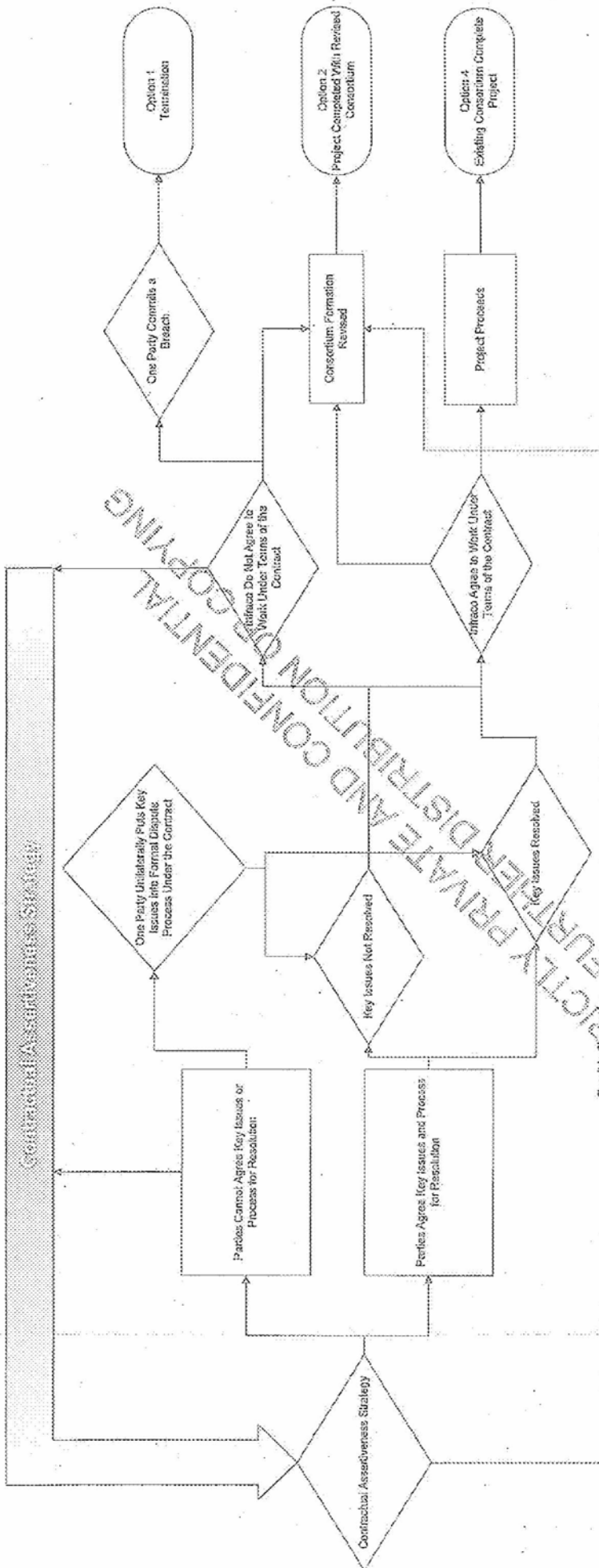
Yours faithfully,


R J Walker

Chairman – Infraco Consortium Board

Pitchfork 2 Route Map

Identify Key Issues Resolve Key Issues Agree New Way of Working Proceed or Not



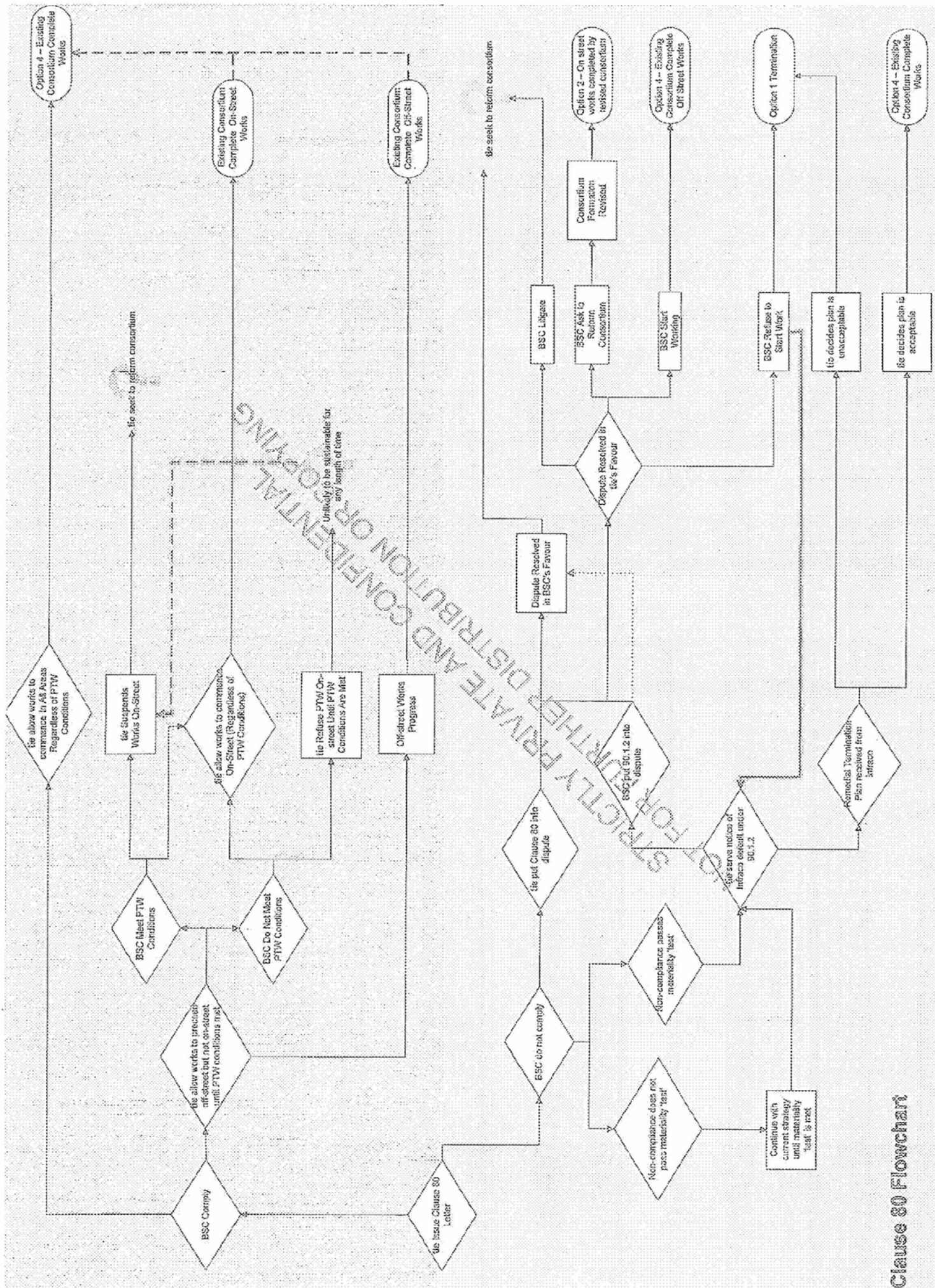
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Possible Shortcuts

Notes

- SAU processes include:
 - Agreement of Key Issues
 - Agreement of process for resolution
 - Legal Advice

Current Position following TPB
10 March 2010



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Clause 80 Flowchart