

On Street Supplemental Agreements

TIE LIMITED

POSITION PAPER

relating to

the agreement between tie Limited

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

Commercial in Confidence
For Internal tie use only

CEC00951714_0001

1. INTRODUCTION

- 1.1 A part of a “mediation marathon” schedule for 29 June – 6 July, tie and BSC have agreed to explore proposals for utilising “Supplemental Agreements” to address further “On Street” locations of Infraco Works.

2. THE PROPOSAL

- 2.1 tie and BSC will review the remaining on street construction works and prepare a proposal (or series of proposals) to address known or potential changes.
- 2.2 The Princes Street Supplemental Agreement may for the basis of this revised proposal.

3. TIE'S POSITION ON THE PROPOSAL

- 3.1 tie will work with BASC to consider which sections from Haymarket to Newhaven may benefit from a “Supplement Agreement”
- 3.2 Our basic approach would be to identify if any section are expected to have little change, in which case, no agreement would be considered necessary.
- 3.3 If changes / compensation events are known / expected then it is anticipated that a Supplemental Agreement will be required.
- 3.4 tie are prepared to “fine tune” or “refine” the Princes St approach and liability balance (including clarification of specific items if necessary).

4. REQUIRED OBJECTIVES OF MEDIATION REFERRAL TO THE INTERNAL RESOLUTION PROCEDURE

- 4.1 Agreement of scope, location and detailed drafting of any proposed in street Supplemental Agreements in addition to Princes St.

5. TIE'S UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE / DISAGREEMENT

- 5.1 tie believe BSC are not content with extending the Princes St Supplemental Agreements on the basis that they are:
- “cost plus”
 - Incorporate all Infraco Scope, not just Civils Works as described in Princes Supplemental Agreement.
 - Agreement any credit back from Milestones in advance of agreement.
 - Relate the agreement of EOT2 (Rev 2) and protect BSC re time.

6. LIST OF SUPPORTING DOCUMENTATION

- 6.1 Princes Street Supplemental Agreement.

**SUPPLEMENTAL
AGREEMENT**

between

TIE LIMITED

and

BILFINGER BERGER UK LIMITED

and

SIEMENS PLC

and

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.

IN RELATION TO PRINCES STREET WORKS

SUPPLEMENTAL AGREEMENT

BETWEEN

- (1) **TIE LIMITED**, a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh, EH1 1YJ ("tie"), which expression shall include its successors, permitted assignees and transferees; and
- (2) **BILFINGER BERGER UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 150 Aldersgate Street, London, EC1A 4EJ, which expression shall include its successors, permitted assignees and transferees; and
- (3) **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey, GU16 8QD, which expression shall include its successors, permitted assignees and transferees; and
- (4) **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.**, a company registered in Spain in the Corporate Register of Guipuzcoa: volume 983, sheet 144, page number SS-329, entry 239 and having its registered office at J.M. Iturrioz 26, 20200 Beasain (Guipuzcoa), Spain ("CAF").

BACKGROUND

- A. tie and Bilfinger Berger UK Limited and Siemens Plc entered into an agreement on a joint and several basis dated 14 May 2008, for the design, construction, testing, commissioning and maintenance of the Edinburgh Tram Network (the "**Infraco Contract**").
- B. Pursuant to a Minute of Variation dated 14 May 2008, CAF became a member of the Infraco (Bilfinger Berger UK Limited and Siemens Plc together with CAF being hereinafter referred to as the "**Infraco**").
- C. Certain issues have arisen between the parties in relation to the ground conditions and the progress of works on Princes Street, Edinburgh.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. Words and expressions shall have the meaning ascribed to them in the Infraco Contract.

"Demonstrable Cost" means the cost to the Infraco of carrying out the Princes Street Works calculated (where applicable) on the basis of the sub-contractor rates appended hereto at Appendix B and otherwise on the basis of such reasonable and necessary cost (direct and indirect) as shall be incurred by the Infraco.

"Princes Street Works" means that part of the Infraco Works that are to be carried out to construct and complete the civil engineering works elements of the Infraco Works in Princes Street to the formation level included in the Construction Works Price within coordinates Section 1C (Chg 1380-1980) and Section 1D (Chg 0 – 280).

2. Notwithstanding the terms of the Infraco Contract, the Parties have agreed that the Infraco's sole entitlement to payment, extension of time or other relief in respect of the Princes Street Works and the impact of the Princes Street Works on the Infraco Works shall be governed by the terms set out in this Supplemental Agreement.

3. The Parties agree that:

- 3.1 All Princes Street Works required to achieve design (or amended design) formation level in the carriageway and tie-in to footways and all Princes Street Works required to build from design (or amended design) formation level to the formation level included in the Construction Works Price (as shown for illustrative purposes at Appendix A hereto) and including for the avoidance of doubt all circumstances which would give rise to a Notified Departure or Compensation Event or a tie Change or Relief Event will be recorded and paid on a Demonstrable Cost basis together with head office overhead and profit percentages, Consortium Preliminaries and, if appropriate, other preliminary elements as referred to in Appendix G of Schedule Part 4 as though such works were a tie Change but for all other purposes in the Infraco Contract the works described in this Clause 3.1 and the said circumstances shall not be treated as a Notified Departure, tie Change, a Compensation Event or a Relief Event.

- 3.2 To the extent that additional cost (or delay) is caused to the carrying out of the remaining Infraco Works as a consequence of events affecting and the circumstances

in which the Princes Street Works are being undertaken, the Infraco shall be entitled to payment of all reasonable additional cost, together with Head Office, overheads profit percentage and Consortium Preliminaries as referred to in Appendix G of Schedule Part 4, (and, for the avoidance of doubt, an extension of time in accordance with Clause 3.4) and tie shall ensure that the tie Representative shall certify such reasonable amounts as shall be incurred monthly in accordance with Clause 67.5.

- 3.3 Each valuation will include a credit to tie for the price already included in the Construction Works Price for all construction activity required for excavation to Infraco Proposals tender formation level (to the extent that such works are included in a valuation).
 - 3.4 The Infraco shall progress the Princes Street Works with due expedition and without delay taking cognisance of the extent and nature of the Princes Street Works and the circumstances in which they are undertaken. The Infraco shall be entitled to an extension of time in respect of any delay in the progress of the Princes Street Works and any direct consequential delay to the Infraco Works howsoever caused save to the extent that any such delay is caused by the Infraco's failure to progress the Princes Street Works in accordance with this Clause 3.4. or any other material breach by the Infraco of the Infraco Contract or this Supplemental Agreement and tie shall award such extension of time as if the delay had been caused by a tie Change to which Clause 80 applied.
 - 3.5 The project management panel shall monitor implementation of the Infraco Works as a model for momentum on progressing the Infraco Works.
4. The Parties agree that for the process of recording, establishing and agreeing demonstrable cost plus expenditure pursuant to Clause 3.1 shall be as set out in Appendix C to this Supplemental Agreement.
 5. The Infraco shall commence construction activity for the Princes Street Works on Monday 23 March 2009 based on the activity listing in Appendix D and shall submit a construction programme to demonstrate the intended progress of the Princes Street Works within 7 days.
 6. The Infraco Contract shall continue in full force and effect and shall not be amended by this Supplemental Agreement, except in so far as its application to the Princes Street Works as set out in this Supplemental Agreement and each Party preserves its rights and remedies in relation to any existing breach of the Infraco Contract (whether known or not) and

notwithstanding breached provisions may have been amended by this Supplemental Agreement.

7. The Parties agree that any dispute, difference or unresolved claim between the Parties in connection with or arising from this Supplemental Agreement shall be dealt with in accordance with the provisions set out in Schedule Part 9 of the Infraco Contract (*Dispute Resolution Procedure*).

8. The Infracore shall undertake its obligations under this Supplemental Agreement on a joint and several basis.

IN WITNESS WHEREOF these presents consisting of this and the preceding 4 pages are executed as follows:

EXECUTED for and on behalf of **TIE LIMITED** at Edinburgh on
29 MAY 2009 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

[Redacted]
I S Mackay
[Redacted]
STEVEN BELL
CITYPARK ES HAZELBURGH TERR
EDINBURGH.

EXECUTED for and on behalf of **BILFINGER BERGER UK LIMITED** at Edinburgh on
29 MAY 2009 by:

Authorised Signatory

Full Name

Authorised Signatory

Full Name

[Redacted]
Richard James Warren
[Redacted]
MARTIN FÖRDER

EXECUTED for and on behalf of **SIEMENS PLC** at Edinburgh on
29 MAY 2009 by:

Authorised Signatory

Full Name

Authorised Signatory

Full Name

[Redacted]
Reinhold Brückmann
[Redacted]
Alfred Brandenburger

EXECUTED for and on behalf of **CAF** at
Edinburgh on

29 MAY 2009 by:

Authorised Signatory

Full Name

Authorised Signatory

Full Name



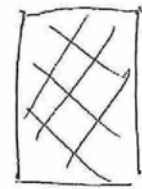
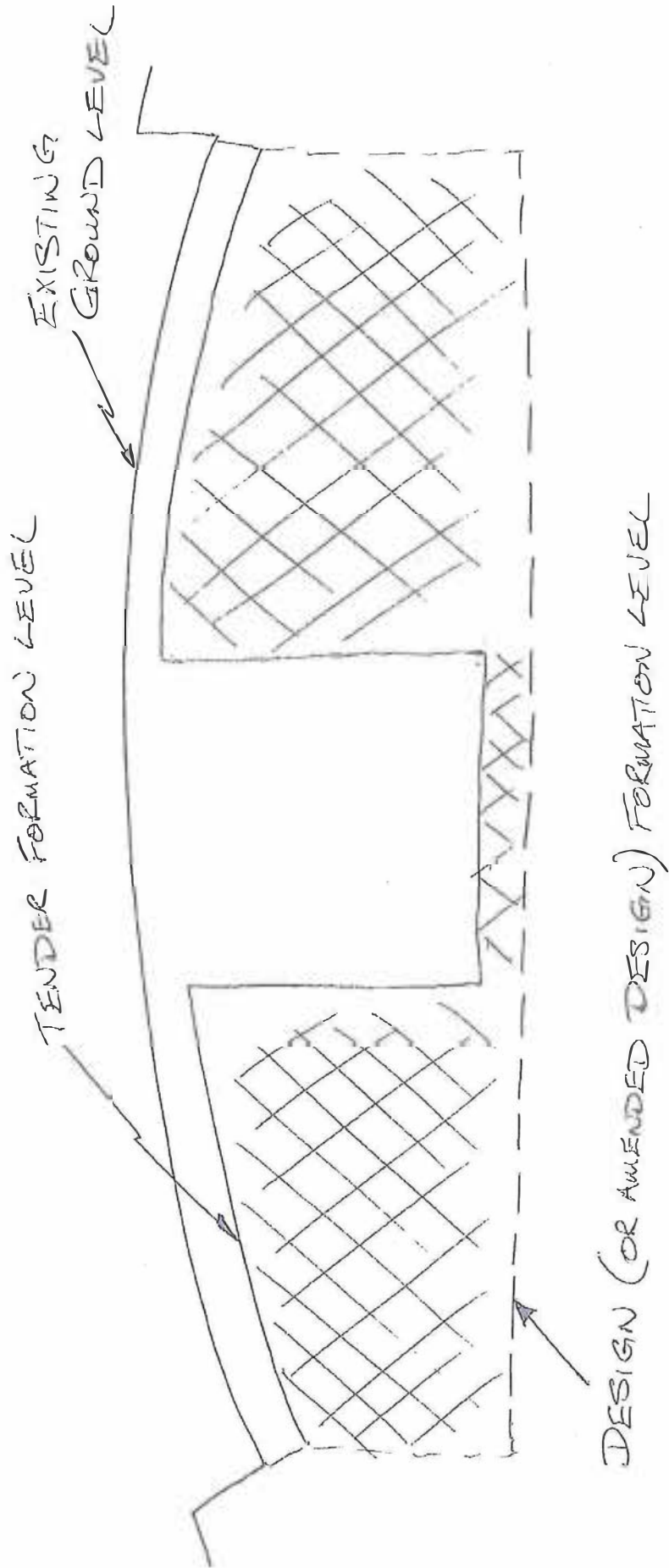
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APPENDIX A

APPENDIX A



HATCHED AREA BASED ON ESTIMATE BASIS
IN ACCORDANCE WITH THE CONTRACT

APPENDIX B

APPENDIX B



SIEMENS



Bilfinger Berger-Siemens-CAF Consortium

Edinburgh Tram Network

Item	Description	Qty	Unit	Rate	Amount
	SUB-CONTRACTOR SCHEDULE OF RATES				
	for use in the carrying out of "Princes Street Works" within Section 1C (chg 1380-1980) and Section 1D (Ch 0 to 280)				
	Staffing				
	Contracts Manager:		hr	£52.35	
	Project Manager:		hr	£46.68	
	Quantity Surveyor:		hr	£28.28	
	Site Agent:		hr	£36.48	
	Engineer/Surveyor:		hr	£29.79	
	General Foreman:		hr	£27.22	
	Labour				
	Labour skilled level 2:		hr	£18.52	
	Labour skilled level 3:		hr	£18.75	
	Ganger skilled level 2:		hr	£20.21	
	Working Foreman:		hr	£22.06	
	Labour Non Productive Overtime				
	Saturday am and Weekdays				
	Labour skilled level 2:		hr	£4.05	
	Labour skilled level 3:		hr	£4.08	
	Ganger skilled level 2:		hr	£4.23	
	Working Foreman:		hr	£4.48	
	Saturday pm and Sundays all day				
	Labour skilled level 2:		hr	£8.76	
	Labour skilled level 3:		hr	£8.86	
	Ganger skilled level 2:		hr	£9.21	
	Working Foreman:		hr	£9.45	
	Other Resources				
	Plant			Cost +12.5%	
	Materials / Consumables			Cost +12.5%	
	Subcontractors			Cost +12.5%	

Notes:-

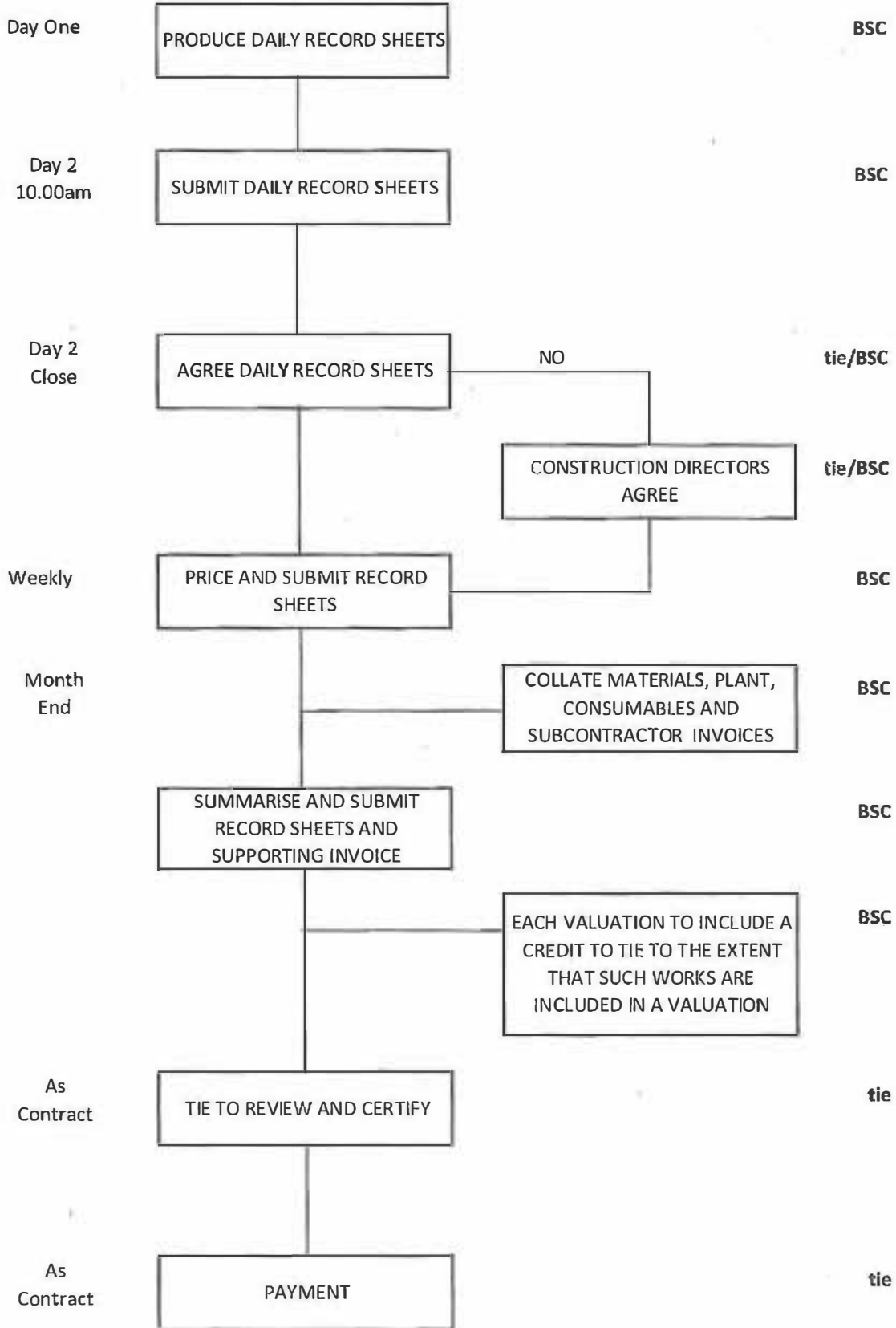
- 1 Labour Rates are All inclusive Rates applicable to End of December 2009 and make allowance for the National Wage increase expected June 2009
- 2 Staff and Labour Rates include for Overheads and Profit.
- 3 Invoices for Plant, Materials and Subcontractors will be subject to an addition of 12.5% to cover Overheads and Profit
- 4 Insurance Excesses are included within the 12.5% addition for overheads and profit
- 5 Saturday AM overtime = 08:00 - 12:00hrs
- 6 Weekday Overtime = Hours worked pre 08:00hrs and post 16:30hrs
- 7 Standard Working Week Mon- Thurs 08:00-16:30hrs Fri 08:00-15:30hrs

APPENDIX C

APPENDIX C

Process for recording, collating and agreement of resource

ACTION



Appendix C

Notes;

1. Daily Record Sheets to be produced by BSC on agreed proforma and submitted daily (by 10.00am the day after the work is done). Daily Record Sheets to record actual resources employed including labour, plant, staff and other Prelim Resources.
2. **tie** / BSC to agree Daily Record Sheets by close of play the day after the work is done.
3. If **tie**/ BSC cannot agree Daily Record Sheets at site level then any such records to be escalated to respective Construction Directors for agreement. Such agreement should be reached by the Monday following the week that the work is done.
4. BSC to price and submit Daily Record Sheets for labour on a weekly basis using agreed rates by the end of the subsequent week.
5. Material, Plant, Consumables and subcontractor invoices to be submitted to **tie** on a monthly basis such as to be included in the Period End Application.
6. Summary of priced and submitted Daily Record Sheets together with any outstanding priced Daily Record Sheets for the period to be submitted to **tie** in the Period End Application.
7. BSC to calculate credit to **tie** for measured works for which payment is claimed in respect of relevant activity.
8. **tie** to review submitted information and if agreed certify in accordance with Contract.
9. **tie** to pay in accordance with Contract

APPENDIX D

APPENDIX D

Edinburgh Tram Network

1 week Construction Programme - Princes St



ID	Task Name	Duration	Start	Finish	% Complete	Mon 23 Mar	Tue 24 Mar	Wed 25 Mar	Thu 26 Mar	Fri 27 Mar
1	ETN Princes St	5 days	Mon 23/03/09	Fri 27/03/09	0%					
2	Section 1D Mackenzie	5 days	Mon 23/03/09	Fri 27/03/09	0%					
3	Princes St	5 days	Mon 23/03/09	Fri 27/03/09	0%					
4	Mobilisation	5 days	Mon 23/03/09	Fri 27/03/09	0%					
5	Erect Welfare Units	3 days	Mon 23/03/09	Wed 25/03/09	0%					
6	Erect Offices	2 days	Thu 26/03/09	Fri 27/03/09	0%			6		
7	Site Clearance	5 days	Mon 23/03/09	Fri 27/03/09	0%					
8	Remove Existing Furniture	5 days	Mon 23/03/09	Fri 27/03/09	0%					
9	Trial Pits	4 days	Mon 23/03/09	Thu 26/03/09	0%					
10	Expose Existing Services	4 days	Mon 23/03/09	Thu 26/03/09	0%					
11	Expose Sewer Connections	2 days	Mon 23/03/09	Tue 24/03/09	0%					
12	Trackwork	3 days	Wed 25/03/09	Fri 27/03/09	0%					
13	Remove Existing Blacktop	3 days	Wed 25/03/09	Fri 27/03/09	0%			13		
14	Roadworks	3 days	Wed 25/03/09	Fri 27/03/09	0%					
15	Remove Existing Blacktop	3 days	Wed 25/03/09	Fri 27/03/09	0%			15		

Notes

- Task
- Milestone
- External Tasks
- Split
- Summary
- External Milestone
- Progress
- Project Summary
- Deadline

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DLA INTERNAL MEDIATION BRIEFING PAPER

ISSUE - PRECEDENCE OF SCHEDULE PART 4

<p>Issue in Dispute</p>	<p>Infraco are of the opinion that <i>Schedule Part 4 (Pricing)</i> to the Infraco Contract takes priority over the rest of the Infraco Contract and, in particular, the Infraco Contract Conditions</p>
<p>Contract References</p>	<p><i>Clause(s) 4.2, 4.3 and Schedule Part 4 (Pricing)</i> of the Infraco Contract</p> <p><i>Clause 4.3</i> "<i>Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing).</i>"</p>
<p>tie Legal Position</p>	<p><i>Clause 4.2</i> deals with the priorities of parts of the Infraco Contract in the event of ambiguity or discrepancy. The main body of the Agreement takes priority over the Schedule and the Employer's Requirements take priority over the Infraco Proposals. <i>Clause 4.3</i>, however, provides that nothing in the Agreement shall prejudice Infraco's right to claim "<i>additional relief or payment pursuant to Schedule Part 4 (Pricing).</i>" This provision affects all provisions in the main Agreement which would otherwise limit or extinguish claims under <i>Schedule Part 4</i>.</p> <p>The payment provisions in <i>Schedule Part 4</i> require to be read discretely, and Infraco's entitlement to payment thereunder are not defeated or limited by the provisions of the main body of the Infraco Contract.</p> <p>What <i>Clause 4.3</i> does is to refer all questions relating to additional relief or payment to <i>Schedule Part 4</i>. <i>Schedule Part 4</i>, with all its conditions and qualifications, regulates Infraco's entitlement to additional relief or payment.</p> <p><i>Schedule Part 4</i> does circumscribe relevant provisions in the main body of the Agreement, i.e. those which do have the effect of limiting Infraco's entitlement under <i>Schedule Part 4</i> but any relevant claims would be subject to the provisions within <i>Schedule Part 4</i> which themselves circumscribe that entitlement – being Infraco breach, Change in Law or Infraco Change. This takes the focus back to the main agreement to look for breaches. It being the case that differences from the Base Case Assumptions are not Notified Departures if they result from breach of contract on the part of the Infraco, an Infraco Change or a Change in Law.</p>

APPENDIX B

PROVISIONAL SUMS AND THE MECHANISM FOR THEIR ADJUSTMENT

1.0 Summary of Provisional Sums

1.1 The following tables summarises the Provisional Sums included within the Infraco Works:

1.2 Table 1 notes the Defined Provisional Sums for which Infraco has deemed to have made a provisional allowance for programming and planning. Preliminaries for Defined Provisional Sums has not been priced by Infraco and the appropriate Preliminaries required to carry out the Defined Provisional Sums will be valued in accordance with the spreadsheet contained in Appendix F herein.

1.3 Table 2 notes the Undefined Provisional Sums for which Infraco has not deemed to have made allowance for programming, planning and pricing Preliminaries.

2.0 Table 1 -- Defined Provisional Sums

Item	Description of Provision Sum	trigger date	provisional duration	£
1	Pumped surface water outfall at A8 underpass (by depot)	01 June 08	6 months	£100,000
2	Scottish Power connections to the Depot and Ingliston Park & Ride	not applicable	Depot 2 weeks (Feb 09) IPR 2 weeks (Nov 09)	£750,000
3	Relocation of Ancient Monuments – this relates to those monuments noted on the route [SDS drawings ULE 90130-01-HRL 0003B, 6B, 7B, 10B, 12B, 13B, 14B, 15B & 24B refer] – it does not include cleaning and/or restoration	20 Business Day after BBS raise any queries in respect of issued information	Haymarket War Memorial 4 weeks (Mid Nov 08 – Mid Dec 08)	£53,700
4	Additional cost of Network Rail compliant ballast	20 Business Day after BBS provide spec.	26 months (Oct 08 – Nov 10)	£300,000
5	Extra over for revised alignment to Picardy Place, York Place and London Road junctions (see also next item)	01 January 09	23 months (March 09 – Jan 11)	£3,340,324
6	Extra over for major utility diversions Picardy Place, York Place and London Road junctions	01 January 09	23 months (March 09 – Jan 11)	£3,000,000
7	Extra over for shell grip at junctions	01 August 08	29 months (Aug 08 – Jan 11)	£319,343
Carried forward				£7,863,367

Item	Description of Provision Sum	trigger date	duration	£
	Brought forward			£7,863,367
8	Allowance for Scottish Power connections to new street lights and new traffic signals	not applicable	29 months (Aug 08 – Jan 11)	£115,287
9	Allowance for demolition of existing Leith Walk substation (if required) [SDS drawings ULE 90130-01-SUB- 00023 rev 2, 00046 rev 1,00047 rev 1 and 00051 rev 1 refer]	20 Business Day after BBS raise any queries in respect of issued information	3 months (Aug 08 – Jan 11)	£55,662
10	Urban Traffic Controls [UTC] associated with the delivery of the alignment	01 August 08	29 months (Aug 08 – Jan 11)	£2,500,000
11	Scottish Power connections to Phase 1a sub-stations (8nr x £50,000)	not applicable	21 months(Nov 08 – July 10)	£400,000
12	Various Forth Ports requirements including the revised alignment of track at Casino Square, relocated tramstop, junction amendments and removal of 'kink' in alignment from Constitution Street, footpath on south side of Tower Place Bridge and Victoria Dock Bridge	01 October 08	25 months (Jan 09 – Jan 11)	£150,000
13	Forth Ports requirements at Ocean Terminal amendments	01 October 08	3 months (Aug 09 – Oct 09)	£350,000
	Total			£11,434,316

3.0 Table 2 – Undefined Provisional Sums

Item	Description of Provision Sum	Trigger date	£
1	Accommodation Works	not applicable	£1,000,000
2	Allowance for minor utility diversions	01 October 08	£750,000
3	PICOPS / COSS / Possession Protection Staff support when undertaking works adjacent or over the railway – see also 4b) below	not applicable	£755,307
4	Archaeological Officer – impact on productivity	not applicable	£405,755
5	Additional Crew Relief Facilities at Haymarket [SDS drawings ULE 90130-02-STP-000126 REV 1 and 000127 rev 1 refer]	20 Business Day after BBS raise any queries in respect of issued information	£49,950
6	Urban Traffic Controls [UTC] associated with the wider area impacts	01 January 10	£2,500,000
7	Forth Ports requirements for design and construction of by-pass road to adoptable standard	01 October 08	£400,000
8	Forth Ports requirements for Lindsay Road amendments	01 October 08	£1,750,000
9	Royal Bank of Scotland requirement for enhancement of Gogarburn Tramstop	01 October 08	£400,000
Total			£8,011,012

4.0 Basis

- a) Relocation of Ancient Monuments applies to those on the route only. Any works in respect of ancient monuments in George Street are undefined.
- b) Any costs in connection with PICOPS / COSS / Possession Protection Staff as Network Rail possession support when undertaking works adjacent or over the railway in respect of item 3 of Table 2 above shall relate solely to the possessions planned at signature of the Infraco Contract. This possession support will be adjusted in the event that Network Rail varies the requirement for PICOPS / COSS or otherwise amends the possession arrangement. However if the possession is amended or extended due to Infraco over-running then any additional possession support will not be recoverable.

5.0 Requirement to co-operate

5.1 Infraco shall co-operate with **tie** in the provision of design and pricing information required to satisfy the requirements of the Forth Ports Agreement.

5.2 Infraco shall co-operate with **tie** in the provision of pricing information required to satisfy the requirements of the Royal Bank of Scotland Agreement in connection with Gogarburn Tramstop (outline design provided by others).

Evaluation Of Change

TIE LIMITED

POSITION PAPER

relating to

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Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

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1. INTRODUCTION

This paper sets out the Contract provisions (including as amended by the Minute of Variation) and implementation of Clause 80 and Schedule Part 4 in relation to the processes in the valuation of tie Change and the obligations of both parties in relation to the agreement of Estimates and the issue of tie Changes.

2. TIE'S POSITION

Valuation of Changes

- 2.1 Change is valued in accordance with Clause 80 and Schedule Part 4 of the Infraco Contract.
- 2.2 Clause 80 deals with the evaluation of Change. 80.6 sets out the valuation rules upon which to value tie Changes (in order):
 - 2.3 Measured works using rates from Schedule Part 4
 - 2.4 If no directly applicable rate Measured works using rates analogous thereto
 - 2.5 or fair rates and prices
 - 2.6 or the value of resources and labour
- 2.7 Schedule Part 4 (Appendix G) sets out the process for agreement of the value of changes and this is as follows:
 - 2.8 Valuation in accordance with Clause 80.6.1 and 2 for measured works.
 - 2.9 Valuation in accordance with Clause 80.6.3. or 80.6.4 to be on Actual Cost or estimated Actual Cost.
 - 2.10 In respect of a valuation on Actual Cost then head office overheads and profit shall be applied at 10% for Civils and 17% for Systems and track
 - 2.11 Preliminaries shall be added to Actual Cost as follows:
 - 2.12 7.4% for Consortium Preliminaries for elements set out in Appendix F
 - 2.13 17.5% for any other Preliminaries elements in addition to the Consortium Preliminaries (see Minute of Variation).

Minute of Variation

- 2.14 A Minute of Variation was signed on 3 June 2009. This was agreed to incorporate a fixed percentage allowance applicable to all Changes to cover any other Preliminaries elements which in the Infraco Contract were to be valued in accordance with Schedule Part 4 Appendix F.

Provision of Estimates/Agreement of tie Changes

- 2.15 Clause 80 requires Estimates to be provided by Infraco within 18 business days of the issue of a tie notice of Change (or deemed notice of Change in respect of Notified Departures) or deliver a request for a reasonable extension of time.

3. TIE'S COMMENTS AND UNDERSTANDING OF INFRACO'S POSITION ON THE EVALUATION OF CHANGE

Valuation

In general terms Infraco are now following the rules set out in Clause 80.6 although it is Infracos position that where the provisions of Clause 80.6.1 and 2 apply the Schedule of Rates items are only applicable to the particular section of work that the Change occurs and not to other sections of work. Tie disagrees with this and considers that the Schedule of Rates should be applied as stated in the contract i.e that rates for similar work (not necessarily in the section that the potential Change occurs) or rates deduced from the Schedule of Rates for similar work should be used.

Tie has allowed the application of 10% as stated in Appendix G to any evaluation based on actual cost (the Schedule of Rates allows for the addition of 10% for overheads and profit) and to all Change values a further application of 7.4% to cover Consortium Prelims also as stated in Appendix G. This would not appear to be disagreed.

Minute of Variation

Following a mediation process a Minute of Variation was agreed. Tie applies 17.5% to the value of all Changes to cover for any other Preliminaries in lieu of the provisions of the Contract which was to value each Change in accordance with Appendix F. This is to be applied to work based on Actual Cost to cover Prelims. It implies therefore that Prelim items should not be included as actual cost either by BSC or by one of BSC's sub contractors since it is covered by a fixed percentage in this way. BSC are claiming as part of their actual cost build up for Prelim items claimed by their sub contractors stating that this is part of actual cost. It is a cost to BSC but an allowance has been made by way of a fixed percentage to cover such cost. This is one of the main reasons for the Minute of Variation in that individual prelim type costs do not require to be reviewed or scrutinised by tie for each Change. It is important to state what has been bought out by this fixed percentage. It is in lieu of the provisions of the Contract which was to value any other prelim items in accordance with Appendix F. Appendix F (with the exception of the Consortium Preliminaries valued separately) allows for Preliminaries under a) High Level Section Preliminaries and b) Sub Contractor Preliminaries.

BSC are claiming for sub contractor preliminaries as actual cost and again as part of a fixed percentage following the MOV thus defeating the objective of the MOV.

Estimates

BSC has consistently not provided Estimates in time as required by Clause 80.3 nor has a proper request with reasons been given to tie to extend the period. BSC has stated that the Changes are too complex. The delay to the provision of Estimates is beyond the bounds of reasonableness and delays are occurring as a result.

4. LIST OF SUPPORTING DOCUMENTATION

Clause 80

Schedule Part 4 – Appendix F

Schedule Part 4 – Appendix G

Minute Of Variation

80. TIE CHANGES

- 80.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, **tie** Changes shall be dealt with in accordance with this Clause 80 (*tie Changes*). If **tie** requires a **tie** Change, it must serve a **tie** Notice of Change on the Infraco.
- 80.2 A **tie** Notice of Change shall:
- 80.2.1 set out the proposed **tie** Change in sufficient detail to enable the Infraco to calculate and provide the Estimate in accordance with Clause 80.4 below;
 - 80.2.2 subject to Clause 80.3, require the Infraco to provide **tie** within 18 Business Days of receipt of the **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required and;
 - 80.2.3 set out how **tie** wishes to pay (where relevant) for the proposed **tie** Change.
 - 80.2.4 set out any changes which **tie** believe are required to the terms of this Agreement and/or the SDS Contract to give effect to the proposed **tie** Change
- 80.3 If, on receipt of the **tie** Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, then the Infraco shall, within 5 Business Days (during the period prior to issue of the Reliability Certificate) and within 10 Business Days (at any time after issue of the Reliability Certificate) of receipt of such **tie** Notice of Change, deliver to **tie** a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably.
- 80.4 As soon as reasonably practicable, and in any event within 18 Business Days after having received a **tie** Notice of Change (or such longer period as may have been agreed by the Parties, pursuant to Clause 80.3 or as required by Clause 80.11), the Infraco shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the Infraco (acting reasonably) in all cases on:
- 80.4.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed **tie** Change;
 - 80.4.2 any impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network;
 - 80.4.3 any impact on the Programme and any requirement for an extension of time;

- 80.4.4 any Consents, Land Consents and/or Traffic Regulation Orders (and/ or any amendment or revision required to existing Consents, Land Consents and/ or Traffic Regulation Orders) which are required in order to implement or as a result of the implementation of the proposed **tie** Change and any update of the Consents Programme which will be required as a result;
- 80.4.5 any new agreements with third parties which may be required to implement the **tie** Change;
- 80.4.6 any amendment required to the Agreement or the Key Subcontracts as a result of the implementation of the proposed **tie** Change;
- 80.4.7 the proposed method of delivery of the proposed **tie** Change;
- 80.4.8 proposals to mitigate the impact of the proposed **tie** Change;
- 80.4.9 confirmation of the changes to the terms of this Agreement and/or the SDS Contract proposed by **tie** and any further changes the terms of this Agreement and/or the SDS Contract necessary to give effect to the proposed **tie** Change; and
- 80.4.10 any increase or decrease in any sums due to be paid to the Infraco under this Agreement (including the value of any Milestone Payments and the scheduling of such Milestone Payments) in order to implement, and as a direct consequence of implementation of, the **tie** Change, such increase or, decrease to be calculated in accordance with this Clause 80.
- 80.5 Where the **tie** Change, in the opinion of the Infraco acting reasonably, impacts the ability to deliver the Maintenance Services in accordance with Clause 52 (Maintenance) the Estimate delivered pursuant to Clause 80.4 shall include any net increase or decrease in:
- 80.5.1 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on routine maintenance activity:
- 80.5.1.1 the consequential change in labour resources and management time required for each affected maintenance element of the Infraco Works; and
- 80.5.1.2 the consequential change in materials, plant and equipment required; or
- 80.5.2 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on renewals maintenance activity:

80.5.2.1 the scope of required renewals work or services and frequency of renewals;

80.5.2.2 the resulting change in labour resources and management time required for the renewal work; and

80.5.2.3 the resulting change in materials and plant and equipment (if any) used to effect the renewals.

80.6 The valuation of any **tie** Changes made in compliance with this Clause 80 (*tie Changes*) shall be carried out as follows:

80.6.1 by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (*Pricing*) or Schedule Part 7 (*Maintenance Contract Price Analysis*) as the case may be in so far as such rates and prices apply;

80.6.2 if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;

80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (*Pricing*) and Appendix F Schedule Part 7 (*Maintenance Contract Price Analysis*);

80.6.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with Appendix G to Schedule Part 4 (*Pricing*) and Appendix F to Schedule Part 7 (*Maintenance Contract Price Analysis*);

provided that where any **tie** Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.

80.7 The Infraco shall include in the Estimate evidence demonstrating that:

80.7.1 the Infraco has used all reasonable endeavours to minimise (including by the use of competitive quotes where appropriate in the case of construction works and where reasonable in the circumstances that new or additional sub contractors are required to deliver the change in the case of Maintenance Services or where construction works

are undertaken during the maintenance phase) any increase in costs and to maximise any reduction of costs ;

80.7.2 the Infraco has, where required by **tie** and where appropriate and practicable, sought competitive quotes from persons other than the Infraco Parties in pursuance of its obligation under Clause 80.7.1 above;

80.7.3 the Infraco has investigated how to mitigate the impact of the **tie** Change; and

80.7.4 the proposed **tie** Change will, where relevant, be implemented in the most cost effective manner (taking into account the reasonable requirements of Infraco in relation to quality) including showing where reasonably practicable that when any expenditure is incurred, relevant Changes in Law that are reasonably foreseeable at the time of consideration of the specific **tie** Change and which relate to that **tie** Change have been taken into account by the Infraco.

80.8 If the Infraco does not intend to use its own resources to implement any proposed **tie** Change, it shall:

80.8.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and

80.8.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed **tie** Change.

80.9 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change, In each case the Infraco shall subject to Clause 80.11, as soon as practicable, and in any event not more than 15 Business Days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.

80.10 Subject to Clause 80.15, if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.

80.11 If a **tie** Change requires a change in respect of design work to be carried out by the SDS Provider under the SDS Contract or any other change to the SDS Contract, the cost of such change will be valued in accordance with the terms of the SDS Contract and Infraco shall be allowed such time to perform its obligations under this Clause 80 as may reasonably be

required to allow it to obtain information from the SDS Provider under the SDS Contract which Infraco may require in order to prepare an Estimate for such Change and any modifications thereto.

80.12 The Infraco shall not be obliged to implement any proposed **tie** Change where:

80.12.1 **tie** does not have the legal power or capacity to require the implementation of such proposed **tie** Change; or

80.12.2 NOT USED

80.12.3 implementation of such proposed **tie** Change would:

80.12.3.1 be contrary to Law;

80.12.3.2 not be technically feasible;

80.12.3.3 increase the risk of a non-compliance with this Agreement by the Infraco to the extent such risk is not capable of being addressed by relief from obligations given to the Infraco or by amendment to the terms of this Agreement;

80.12.3.4 be outwith the specific competence of the Infraco either in performing the activity required by the **tie** Change or in supervising an the Infraco Party to carry out the activity required by the **tie** Change;

80.12.3.5 where the **tie** Change is instructed after the completion of Section D, require Infraco to carry out work and/or services that are not transport infrastructure and maintenance related to be performed after completion of Section D; or

80.12.3.6 make the provision of the Maintenance Services by the Infraco financially unfeasible.

80.13 Subject to Clause 80.15, as soon as reasonably practicable after the contents of the Estimate have been agreed **tie** may:

80.13.1 issue a **tie** Change Order to Infraco,; or

80.13.2 except where the Estimate relates to a Mandatory **tie** Change, withdraw the **tie** Notice of Change, in which case Infraco shall be entitled to claim the reasonable additional

costs incurred by the Infraco in complying with this Clause 80 in relation to that **tie** Notice of Change including the cost of any abortive works where **tie** has instructed Infraco to commence works prior to the agreement of the Estimate.

Subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a **tie** Change until instructed through receipt of a **tie** Change Order unless otherwise directed by **tie**.

80.14 Subject to Clause 80.15, if **tie** does not issue a **tie** Change Order in accordance with Clause 80.13.1, within 28 Business Days of the contents of the Estimate having been agreed or determined then the **tie** Notice of Change shall be deemed to have been withdrawn except where the Estimate relates to a Mandatory **tie** Change in which case **tie** will be deemed to have issued a **tie** Change Order.

80.15 Where an Estimate has been referred to the Dispute Resolution Procedure for determination, but it is deemed by **tie** (acting reasonably) that the proposed **tie** Change is urgent and/or has a potential significant impact on the Programme, subject to Infraco's right to refuse to carry out a **tie** Change under Clause 80.12 and save where such proposed **tie** Change includes work by the SDS Provider and where the valuation of such work is not agreed, **tie** may instruct Infraco to carry out the proposed **tie** Change prior to the determination or agreement of the Estimate by issuing a **tie** Change Order to that effect.

80.16 Where **tie** issues a **tie** Change Order under Clause 80.15, Infraco shall implement the **tie** Change, and prior to determination of the Estimate shall be entitled to claim Infraco's demonstrable costs in implementing the **tie** Change calculated in accordance with Clause 80.6.

80.17 As soon as reasonably practicable and in any event within 20 Business Days of issue of a **tie** Change Order, or such other period as the Parties may agree acting reasonably, Infraco shall update:-

80.17.1 the Programme in accordance with Clause 60;

80.17.2 Schedule Part 5 (*Milestone Payments*) in relation to Milestone Payments and/or Critical Milestone Payments in accordance with Clause 67.10;

80.17.3 the Maintenance Services Payments in accordance with Clause 68.8;

80.17.4 the Maintenance Services Performance Plan; and

80.17.5 any other previously accepted Deliverable

as may be required in accordance with the agreed Estimate or as may be required to implement the **tie** Change in accordance with this Agreement.

80.18 As soon as reasonably practicable and in any event within 20 Business Days of issue of a **tie** Change Order, or such other period as the Parties may agree acting reasonably, the Parties shall enter into any document to amend the terms and conditions of this Agreement as referred to in the agreed Estimate to which the **tie** Change Order relates.

Restrictions on Entitlements to Relief for tie Change

80.19 The Infraco shall not be entitled to any extension of time, payment or relief in respect of any **tie** Notice of Change affecting the construction of the Infraco Works or the delivery of the Maintenance Services if and to the extent that:

80.19.1 with regard to construction, it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for such **tie** Change, given the information known to Infraco at the time; and

80.19.2 with regard to Infrastructure Maintenance Services, it would have been reasonable to expect the Infraco to have foreseen that a physical deficiency or defect in the Infraco Works would, despite continual planned maintenance, lead to the requirement for a **tie** Change which could have been prevented or materially reduced by earlier intervention by **tie** and Infraco has failed to report such deficiency or defect in the Infraco Works in a timely fashion to **tie**.

80.20 If, having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with those instructions would amount to a **tie** Change, then the Infraco shall comply with the instruction and shall within 20 Business Days of any instructions being received, notify **tie** of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by **tie** of such an Estimate, Clause 80.15 and 80.16 shall be deemed to apply *mutatis mutandis* to the work carried out by Infraco in complying with such instruction. If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a **tie** Change (either Party being entitled to refer the matter to the Dispute Resolution Procedure if the matter has not been agreed within 10 Business Days of the Estimate being received by **tie**) then the provisions of this Clause 80 (*tie* Changes) shall apply to such instructions.

80.21 Any failure by the Infraco to notify **tie** within 20 Business Days of instructions being received that it considers compliance with such instructions from **tie** or **tie's** Representative would

amount to a **tie** Change shall constitute an irrevocable acceptance by the Infraco that any compliance with **tie's** or **tie's** Representative's instructions shall not constitute a **tie** Change under this Agreement.

Third Party Agreements

- 80.22 If **tie** wishes Infraco to perform any of the obligations contained in any third party agreement which are not set out in part A of Schedule Part 13 (*Third Party Agreements*) or to be responsible for ensuring that neither **tie** or CEC will be put in breach of their obligations to third parties other than to the extent that it is responsible by virtue of the operation of Clause 18.17A **tie** shall serve a notice on the Infraco (a "**TPA Change Notice**") which notice shall comply with the requirements of Clause 80.2. Subject to Clause 80.25, the provisions of this Clause 80 shall apply *mutatis mutandis* to any TPA Change Notice served by **tie**.
- 80.23 Following service by **tie** of a TPA Change Notice, the Parties shall negotiate in good faith and acting reasonably to agree the adjustment to the Contract Price, if any, appropriate to compensate Infraco for the Infraco accepting any additional responsibility or risk arising from the TPA Change Notice to the extent not reflected adequately through application of Clause 80.5.

Notified Departures

- 80.24 Where pursuant to paragraph 3.5 of Schedule Part 4 (*Pricing*) or pursuant to Clause 14 (*tie Obligations*), **tie** is deemed to have issued a **tie** Notice of Change as a result of the occurrence of a Notified Departure, the provisions of this Clause 80 (*tie Changes*) other than Clause 80.19 shall apply.

81. INFRACO CHANGES

- 81.1 If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2) the Infraco shall notify **tie** of the reasons for such variation and make proposals for the proposed variation in writing. **tie** shall be free to accept or reject any proposed variation as **tie** thinks fit, (other than where the Infraco Change is necessary for Infraco to comply with a Change in Law which is not a Qualifying Change in Law, in which case **tie** shall accept such proposal or such other proposal as **tie** may reasonable require which does not increase the costs to the Infraco of complying with the relevant Change in Law) and **tie** shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3.

APPENDIX G

PROCESS FOR AGREEMENT OF VALUE OF TIE CHANGES

1.0 Generally

- 1.1 The valuation of any **tie** Changes shall be made in accordance with Clause 80.6
- 1.2 Where Clause 80.6.3 or 80.6.4 applies and to the extent that they apply to a **tie** Change then the valuation shall be on the basis of Actual Cost or estimated Actual Cost.
- 1.3 In respect of a valuation of any work under 1.2 the **tie** Representative shall apply head office overheads and profit percentages to the appropriate elements of Actual Cost as follows:

- | | | |
|-----|-------------------------|-----|
| (a) | Civil Engineering works | 10% |
| (b) | Systems and Track works | 17% |

In all cases where a **tie** Change is being valued in accordance with Clause 80.6, Site related overhead (Preliminaries) shall be valued and added as follows:

7.4% to be added to Actual Cost to cover the Consortium Preliminaries and associated elements as set out in Spreadsheet 1 in Appendix F.

If appropriate to the particular **tie** Change, any other Preliminaries elements, valued in accordance with the Spreadsheet 2 set out in Appendix F.

- 1.4 The amount of the overheads and profit percentage calculated as part of the valuation of Variations shall be added in the case where the valuation results in an addition and shall be deducted where the valuation results in an omission.
- 1.5 Where 1.2 above is the basis of the valuation of **tie** Changes then the following items shall not be included as Actual Costs under the Infraco Contract.
1. Costs not justified by the Infraco's accounts and records.
 2. Costs not payable under the Infraco Contract.
 3. Costs arising from the Infraco's Design errors.
 4. Costs arising in respect of loss or damage except as provided for under the Agreement.
 5. Costs which should have not been paid to a sub-contractor in accordance with the relevant sub-contract.
 6. Costs arising from people who are part of the Head Office Overhead.

DESCRIPTION	Fixed			Time-Related		
	Section A	Section B	Total	Section A	Section B	Total
	£	£	£	£	£	£
PRELIMINARIES AND GENERAL ITEMS						
Contractual Requirements Section A						
Contractor's bond	1,317,094		1,317,094			
All other insurances required by the Contract	1,633,045		1,633,045	1,633,045		1,633,045
Accommodation for the Engineer's and Client's Staff; establish and remove offices	82,510		82,510			
Accommodation for the Engineer's and Client's Staff; maintain and operate offices	321,187		321,187			
Services for Engineer's and Client's Staff; maintain and operate transport vehicles	206,171		206,171			
Equipment for use by the Engineer's and Client's Staff; maintain and operate photographic equipment	19,031		19,031			
Consortium Supervision	2,686,374		2,686,374	2,686,374		2,686,374
Consortium Office Hire	202,048		202,048	202,048		202,048
Consortium Office Maintenance	591,300		591,300	591,300		591,300
Consortium Surveying Instruments Maintenance	25,978		25,978	25,978		25,978
Consortium IT Equipment	304,558		304,558	304,558		304,558
Consortium Testing	609,974		609,974	609,974		609,974
Consortium Establish/Remove Offices	292,758		292,758			
Consortium Establish/Remove Surveying Equipment	18,299		18,299			
Consortium costs incurred during facilitated negotiation phase	2,199,312		2,199,312			
Contractual Requirements - Section B						
Contractor's bond		670,743	670,743			
All other insurances required by the Contract		881,247	881,247		881,247	881,247
Accommodation for the Engineer's and Client's Staff; establish and remove offices		44,321	44,321			
Accommodation for the Engineer's and Client's Staff; maintain and operate offices		172,947	172,947			
Services for Engineer's and Client's Staff; maintain and operate transport vehicles		111,015	111,015			
Equipment for use by the Engineer's and Client's Staff; maintain and operate photographic equipment		10,248	10,248			
Consortium Supervision		1,446,509	1,446,509		1,446,509	1,446,509
Consortium Office Hire		108,795	108,795		108,795	108,795
Consortium Office Maintenance		315,199	315,199		315,199	315,199
Consortium Surveying Instruments Maintenance		13,928	13,928		13,928	13,928
Consortium IT Equipment		164,223	164,223		164,223	164,223
Consortium Testing		328,448	328,448		328,448	328,448
Consortium Establish/Remove Offices		157,638	157,638			
Consortium Establish/Remove Surveying Equipment		9,853	9,853			
Subtotal	10,508,667	4,438,387	14,947,055	4,653,707	3,261,603	7,915,310
METHOD RELATED CHARGES						
High Level Section A Establish Sections & Sites (Fixed)	1,468,821		1,468,821			
High Level Section A Supervision (Time Related)	2,722,909		2,722,909			
High Level Section A Maintain Section Offices (Time Related)	586,161		586,161			
Depot Subcontractor Section A Supervision	1,142,710		1,142,710			
Depot Subcontractor Section A Establish Site Services Welfare etc.	272,581		272,581			
Depot Subcontractor Section A Scaffolding & Misc Plant	717,319		717,319			
Depot Subcontractor Section A Insurance & Bond	243,888		243,888			
Depot Subcontractor Section A Establish and Maintain Compound	54,734		54,734			
Depot Subcontractor Section A Non productive Labour	283,893		283,893			
BB Section A Preliminaries	8,735,461		8,735,461			
SC1 Section A Supervision (Time Related)	2,508,922		2,508,922			
SC1 Section A Preliminaries (Fixed)	1,131,799		1,131,799			
SC1 Section A Preliminaries (Time Related)	2,609,180		2,609,180			
SC1 Section A Insurance & Bond	197,862		197,862			
SC2 Section A Preliminaries (Fixed)	319,460		319,460			
SC2 Section A Preliminaries (Time Related)	1,432,030		1,432,030			
SC2 Section A Provisional Sum for Landowner Compensation Payments for land taken outside wayleave during construction	146,882		146,882			
BB Section B Preliminaries (Fixed)		638,770	638,770			
BB Section B Preliminaries (Time Related)		1,853,813	1,853,813			
SS2 Section B Preliminaries		2,668,333	2,668,333			
SC3 Section B Preliminaries (Fixed)		2,536,623	2,536,623			
SC3 Section B Preliminaries (Time Related)		2,270,208	2,270,208			
SC3 Section B Supervision (Time Related)		2,153,870	2,153,870			
High Level Section B Establish Sections & Sites (Fixed)		801,178	801,178			
High Level Section B Package Supervision		1,485,223	1,485,223			
High Level Section B Maintain Section Offices (Time Related)		584,161	584,161			
Subtotal	22,637,814	16,170,176	37,807,990			
Grand Total (Gross Prelims)	33,146,481	19,608,542	52,755,023	4,653,707	3,261,603	7,915,310
Escalation (pro-rata pro-fee)				-2,045,680	-1,102,280	-3,147,960
Grand Total (Net Prelims)	33,146,481	19,608,542	52,755,023	2,608,027	2,159,323	4,767,350
Construction Cost (= Total Contract Value less Prelims)						63,239,714
Prelims - %						7.4%

Note
The Prelims percentage shown above is to be added to cover all items marked in red as an addition to Actual Cost.

Spreadsheet No 2 - Appendix F Schedule Part 4

DESCRIPTION	Fixed			Time Related					
	Section A £	Section B £	Total BB	Section A £	Section B £	Total BB	Section A £	Section B £	Total BB
PRELIMINARIES AND GENERAL ITEMS									
Contractual Requirements Section A									
Contractor's bond	1,317,084		1,317,084				1,317,084		1,317,084
All other insurance required by the Contract	1,633,046		1,633,046				1,633,046		1,633,046
Accommodation for the Engineer's and Client's Staff, establish and remove offices	82,310		82,310	82,310		82,310			0
Services for Engineer's and Client's Staff, maintain and operate offices	321,187		321,187				321,187		321,187
Equipment for use by the Engineer's and Client's Staff, maintain and operate photographic equipment	206,171		206,171				206,171		206,171
Consortium Supervision	2,686,374		2,686,374				2,686,374		2,686,374
Consortium Office Hire	202,048		202,048				202,048		202,048
Consortium Office Maintenance	591,300		591,300				591,300		591,300
Consortium Surveying Instruments Maintenance	25,978		25,978				25,978		25,978
Consortium IT Equipment	304,966		304,966				304,966		304,966
Consortium Testing	609,974		609,974				609,974		609,974
Consortium Establish/Remove Offices	292,756		292,756	292,756		292,756			0
Consortium Establish/Remove Surveying Equipment	18,299		18,299	18,299		18,299			0
Consortium costs incurred during facilitated negotiation phase	2,198,312		2,198,312	2,198,312		2,198,312			0
Contractual Requirements - Section B									
Contractor's bond		670,743	670,743					670,743	670,743
All other insurance required by the Contract		881,247	881,247					881,247	881,247
Accommodation for the Engineer's and Client's Staff, establish and remove offices		44,321	44,321	44,321		44,321			0
Services for Engineer's and Client's Staff, maintain and operate offices		172,947	172,947				172,947		172,947
Equipment for use by the Engineer's and Client's Staff, maintain and operate photographic equipment		111,015	111,015				111,015		111,015
Consortium Supervision		1,446,509	1,446,509				1,446,509		1,446,509
Consortium Office Hire		108,795	108,795				108,795		108,795
Consortium Office Maintenance		316,392	316,392				316,392		316,392
Consortium Surveying Instruments Maintenance		13,988	13,988				13,988		13,988
Consortium IT Equipment		164,223	164,223				164,223		164,223
Consortium Testing		328,448	328,448				328,448		328,448
Consortium Establish/Remove Offices		157,638	157,638		157,638	157,638			0
Consortium Establish/Remove Surveying Equipment		9,853	9,853		9,853	9,853			0
Subtotal	10,508,861	4,438,247	14,947,108	2,591,611	211,612	2,803,223	7,917,193	4,226,854	12,144,047
METHOD RELATED CHARGES									
High Level Section A Establish Sections & Sites (Fixed)	1,468,821		1,468,821	1,468,821		1,468,821			0
High Level Section A Supervision (Time Related)	2,722,909		2,722,909				2,722,909		2,722,909
High Level Section A Maintain Section Offices (Time Related)	564,161		564,161				564,161		564,161
Depot Subcontractor Section A Supervision	1,147,710		1,147,710				1,147,710		1,147,710
Depot Subcontractor Section A Establish Site Services Welfare etc.	272,581		272,581	272,581		272,581			0
Depot Subcontractor Section A Scaffolding & Misc Plant	717,319		717,319				717,319		717,319
Depot Subcontractor Section A Insurance & Bond	243,888		243,888				243,888		243,888
Depot Subcontractor Section A Establish and Maintain Compound	54,734		54,734	10,947		10,947	43,787		43,787
Depot Subcontractor Section A Non productive Labour	283,693		283,693				283,693		283,693
BB1 Section A Preliminaries	6,735,461		6,735,461	1,347,082		1,347,082	5,388,369		5,388,369
SC1 Section A Supervision (Time Related)	2,508,922		2,508,922				2,508,922		2,508,922
SC1 Section A Preliminaries (Fixed)	1,131,799		1,131,799	1,131,799		1,131,799			0
SC1 Section A Preliminaries (Time Related)	2,889,180		2,889,180				2,889,180		2,889,180
SC1 Section A Insurance & Bond	197,862		197,862				197,862		197,862
SC2 Section A Preliminaries (Fixed)	319,480		319,480	319,480		319,480			0
SC2 Section A Preliminaries (Time Related)	1,432,030		1,432,030				1,432,030		1,432,030
SC2 Section A Provisional Sum for Landowner Compensation Payments for land taken outside wayleave during construction	146,882		146,882	146,882		146,882			0
BB Section B Preliminaries (Fixed)	636,770		636,770				636,770		636,770
SC2 Section B Preliminaries (Time Related)	1,853,813		1,853,813				1,853,813		1,853,813
SC2 Section B Preliminaries (Fixed)	2,294,668		2,294,668	573,657		573,657	2,294,668		2,294,668
SC3 Section B Preliminaries (Fixed)	2,536,623		2,536,623	2,536,623		2,536,623			0
SC3 Section B Preliminaries (Time Related)	2,270,208		2,270,208				2,270,208		2,270,208
SC3 Section B Supervision (Time Related)	2,153,870		2,153,870				2,153,870		2,153,870
High Level Section B Establish Sections & Sites (Fixed)	801,175		801,175	801,175		801,175			0
High Level Section B Packages Supervision	1,485,223		1,485,223				1,485,223		1,485,223
High Level Section B Maintain Section Offices (Time Related)	564,161		564,161				564,161		564,161
Subtotal	22,657,614	16,179,175	38,836,789	4,897,583	4,548,234	9,445,817	17,940,031	10,621,941	28,561,972
Grand Total (Gross Prelims)	33,146,481	19,608,542	52,755,023	7,289,258	4,766,045	12,049,306	25,857,221	14,849,499	40,705,717
Escalation (covering all BB works)	-11,462,775	-6,366,135	-17,828,910	-2,520,785	-1,545,403	-4,066,188	-9,941,990	-4,820,782	-13,762,772
Grand Total (Net Prelims)	21,683,706	13,242,407	34,926,113	4,768,473	3,220,642	7,983,118	16,915,231	10,028,717	26,943,945

Note Above Gross Prelims include 10% head office overhead and profit

MINUTE OF VARIATION

among

- 1) **TIE LIMITED**, a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh, EH1 1YJ ("**TIE**"), which expression shall include its successors, permitted assignees and transferees;
- 2) **BILFINGER BERGER UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 150 Aldersgate Street, London, EC1A 4EJ, which expression shall include its successors, permitted assignees and transferees;
- 3) **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey, GU16 8QD, which expression shall include its successors, permitted assignees and transferees; and
- 4) **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.**, a company registered in Spain in the Corporate Register of Guipuzcoa: volume 983, sheet 144, page number SS-329, entry 239 and having its registered office at J.M. Iturrioz 26, 20200 Beasain (Guipuzcoa), Spain ("**CAF**") which expression shall include its personal representatives, successors, permitted assignees and transferees;

(2), (3) and (4) together acting jointly and severally as "the Infraco"

WHEREAS

(A) **tie**, Bilfinger Berger (UK) Limited and Siemens plc entered into an agreement on 14 May 2008 amended by the Minute of Variation between **tie**, Bilfinger Berger (UK) Limited, Siemens plc and Construcciones Y Auxiliar de Ferrocarriles S.A dated 14 May 2008 (the "**Infraco Contract**");

(B) The Parties have agreed to amend the Infraco Contract as set out in this Minute of Variation;

TIE and the Infraco hereby agree as follows:

1. This document constitutes a variation in writing pursuant to Clause 108 of the Infraco Contract.
2. All other provisions of the Infraco Contract remain in full force and effect as set out therein.
3. The Infraco Contract is hereby amended as follows:

In Schedule Part 4 Appendix G to the Infraco Contract at paragraph 1.3:

24747359-1

After the sentence ending "...Spreadsheet 1 in Appendix F.", the following sentence shall be inserted:

"Further, 17.5% to be added to the Actual Cost to cover any other Preliminaries (in addition to the Consortium Preliminaries) with regard to any tie Change associated with Civil Engineering Works, provided that this calculation shall in no case apply to Systems and Trackworks or claims for other Preliminaries in relation to prolongation costs arising from extensions of time or delay."

The sentence starting "If appropriate to the particular tie Change..." shall be amended to read:

"If appropriate to any particular tie Change which relates to Systems and Trackworks, any other Preliminaries valued in accordance with the Spreadsheet 2 set out in Appendix F."

and there shall be inserted the following sentence:

"If appropriate to any particular tie Change, claims for other Preliminaries elements in relation to prolongation costs arising from extensions of time or delay, valued in accordance with the Spreadsheet 2 set out in Appendix F."

- 4. The Parties undertake and warrant to one another that each signatory to this Minute of Variation has full delegated authority to execute this document.

IN WITNESS WHEREOF these presents consisting of this and the preceding page are executed as follows:

EXECUTED for and on behalf of TIE Limited
at Edinburgh on 3 June 2009

[Redacted] Director/Authorised Signatory

..... STEVEN JOHN BELL Full Name

[Redacted] Witness

..... DENNIS MURRAY Full Name and Address

EXECUTED for and on behalf of Bilfinger Berger (UK) Limited
at Edinburgh on 3 June 2009


[Redacted] Director/Authorised Signatory

..... [Handwritten Signature] Full Name

[Redacted] Director/ Authorised Signatory

..... MARTIN FÖRDER Full Name and Address

EXECUTED for and on behalf of **Siemens plc**
at Edinburgh on 3 June 2009

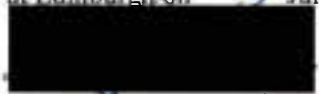
 Director/Authorised Signatory

Alfred Brandenburger Full Name

 Director/ Authorised Signatory

MICHAEL FLYNN Full Name and Address

EXECUTED for and on behalf of **Construcciones Y Auxiliar de Ferrocarriles S.A.**
at Edinburgh on 3 June 2009

 Director/Authorised Signatory

Antonio H. Campos Full Name

 Witness

A. Urriza Full Name and Address

AF/EDIDP/310299/15/UKM/24768114.1

Earthworks Outline

TIE LIMITED

POSITION PAPER

relating to

the agreement between tie Limited

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

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CEC00951714_0047

1. INTRODUCTION

1.1 As part of a “mediation marathon” with BSC, from 29 June – 6 July BSC have raised a concern regarding interpretation of the “Earthworks Outline”.

2. THE DISPUTE / DISAGREEMENT

2.1 Currently unclear why BSC are concerned. This needs to be expressed at the mediation.

3. TIE'S POSITION ON THE DISPUTE / DISAGREEMENT

3.1 tie currently do not understand the concern. Schedule Part 4 clearly defines the Earthworks Outline at Clause 3.6.

3.2 It is cross referenced as Specific Exclusion from the Construction Works Price at Clause 3.3c) and the exclusion then links as a Notified Departure in Clause 3.3.1.

4. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

4.1 Clarity on the concern, and agreement on the application and effect of the relevant elements within Schedule Part 4.

5. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

5.1 Unclear BSC need to lay out their concerns.

6. LIST OF SUPPORTING DOCUMENTATION

6.1 Schedule Part 4, Clauses 3.3, 3.6 in particular.

- 3.1 The Construction Works Price is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with the provisions of this Agreement.
- 3.2.1 It is accepted by ~~tie~~ that certain Pricing Assumptions have been necessary and these are listed and defined in Section 3.4 below. The Parties acknowledge that certain of these Pricing Assumptions may result in the notification of a Notified Departure immediately following execution of this Agreement. This arises as a consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply.
- 3.3 Specified Exclusions from the Construction Works Price are:
- a) Utilities diversions (including both the diversion of Utilities and the diversion of any other utilities) and protective works associated with utilities save for the Defined Provisional Sums for those utilities diversions that are to be undertaken by Infraco.
 - b) Work in connection with the St Andrew Square public realm project beyond the tram works. For the avoidance of doubt Tramstops, trackform, track bed, OHLE, road surface refurbishing, associated systems and link works together with any other work shown on the Base Case Design Information are included.
 - c) Ground conditions that require works that could not be reasonably foreseen by an experienced civil engineering contractor based on the ground conditions reports provided to BBS on 20th and 27th of November and 6th December 2007. Additionally the Constructions Works Price does not include for dealing with replacement of any materials below the earthworks outline or below ground obstructions/voids, soft material or any contaminated materials.
 - d) Bernard Street public realm project as information provided to Infraco on 28th November 2007.
- 3.3.1 In the event that the Infraco is required to carry out any of the Specified Exclusions, this shall be a Notified Departure.
- 3.4 Pricing Assumptions are:
- 1 The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):
 - 1.1 in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information (except in respect of Value Engineering identified in Appendices C or D to this Schedule Part 4);
 - 1.2 be amended from the scope shown on the Base Date Design Information and Infraco Proposals as a consequence of any Third Party Agreement (except in connection with changes in respect of Provisional Sums identified in Appendix B); and

Contract Price and/or Programme in respect of which **tie** will be deemed to have issued a **tie** Notice of Change on the date that such Notified Departure is notified by either Party to the other. For the avoidance of doubt **tie** shall pay to the Infraco, to the extent not taken into account in the Estimate provided pursuant to Clause 80.24.1, any additional loss and expense incurred by the Infraco as a consequence of the delay between the notification of the Notified Departure and the actual date (not the deemed date) that **tie** issues a **tie** Change Order, such payment to be made by **tie** following evaluation, agreement or determination of such additional loss and expense pursuant to Clause 65 (Compensation Events) as if the delay was itself a Compensation Event.

3.6 Earthworks Outline in this Schedule Part 4 means:

3.6.1 the finished earthworks levels and dimensions (prior to topsoiling) for the construction, where specified, of

- (a) carriageway, hard shoulder, hard strip, footway, paved area, central reserve, verge, side slope;
- (b) underside of (i) trackslab, (ii) grasstrack concrete, and (iii) ballast;
- (c) sub-base;
- (d) fill on sub-base material, base and capping;
- (e) contiguous filter material, lightweight aggregate infill;
- (f) surface water channels;
- (g) landscape areas, environmental bunds.

In all cases of filter drains, except narrow filter drains, the Earthworks Outline shall be the top of the filter material.

3.6.2 Where capping or stabilisation to form capping is required by the design in cutting or embankment, the Earthworks Outline shall be as defined in paragraph 3.6.1 i.e. as the top of capping.

3.6.3 Where an embankment is required by the design to be surcharged, the Earthworks Outline shall be defined as in paragraph 3.6.1 and exclude the surcharge.

3.6.4 Where permanent storage or stockpiling of topsoil is required, the Earthworks Outline shall be as defined in paragraph 3.6.1 and exclude stored topsoil.

3.6.5 Where the ground has been subjected to the treatment in respect of ground improvement, mine workings, swallow holes and the like, for the purpose of the definition of Earthworks Outline the existing ground level shall be the level obtained on completion of any such treatment of the areas affected.

Sub-soil Level is defined as the level of the ground after the removal of topsoil.

Surcharge is defined as material placed for the purpose of loading for the periods specified in the design.

4.0 PROVISIONAL SUMS

4.1 Provisional Sums have been allowed for items listed in Appendix B.

Hilton Hotel Car Park

TIE LIMITED

POSITION PAPER

relating to

the agreement between tie Limited

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

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CEC00951714_0053

1. INTRODUCTION

- 1.1 Infraco has notified of a tie Change in respect of the works to the car park at the Hilton Hotel (formerly Stakis). Tie has confirmed that it does not accept that this work is a change

2. THE DISPUTE

- 2.1 Several meetings have been held at various levels to exchange positions on this matter but no agreement has been reached.

3. TIE'S POSITION ON THE DISPUTE

- 3.1 Tie's position is as set out in the attached detailed position paper. In essence tie consider that there is no change since the Hilton Car Park Works are part of the contract workscope by virtue of:
- 3.2 The work is on the BDDI drawings
- 3.3 There is a programme allowance for the work
- 3.4 The work is an obligation as part of the Third Party obligations under the Contract
- 3.5 The Third Part Agreement with Stakis includes this work to be done and attaches a sketch
- 3.6 There is a Schedule of Rates price for the Stakis works
- 3.7 The contract has a definition of Accommodation Works and Accommodation Works Changes and only the changes require an instruction from tie.

4. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

- 4.1 Infracos position is that all Accommodation Works are additional to contract due to the definition and the Provisional Sum is to cover all Accommodation Works.
- 4.2 Ties position is that only tie instructed Accommodation works would constitute a tie change and a draw down on the Provisional Sum. The Provisional Sum is for works so instructed under Clause 83 Accommodation Works Changes. Why would there need to be a definition of Accomodation Works Change and separate Change mechanism for Accommodation Works if all Accommodation Works were to be additional to contract.

5. LIST OF SUPPORTING DOCUMENTATION

- 5.1 Detailed Position Paper

Hilton Hotel Car Park

TIE LIMITED

DETAILED POSITION PAPER

Prepared for DRP

relating to

the agreement between **tie Limited**

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

11 March 2009

1. INTRODUCTION

- 1.1 There is a dispute, difference and/or unresolved claim ("**Dispute**") between **tie** Limited (hereinafter referred to as "**tie**") and the Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles delivery consortium (hereinafter collectively referred to as "**Infraco**") in connection with or arising from the agreement between **tie** and the Infraco in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* (hereinafter referred to as the "**Infraco Contract**").
- 1.2 **tie** requires the Dispute (as further particularised below) to be referred to the Internal Dispute Resolution Procedure in accordance with *paragraph 9 of Schedule Part 9 (Dispute Resolution Procedure)* of the Infraco Contract.

2. THE DISPUTE

- 2.1 The Dispute concerns the issue of whether the Infraco is obliged, pursuant to the Infraco Contract and without further instruction, to proceed with carrying out of works at the Hilton Hotel car park . **tie** considers that the works in question form part of the core Infraco Works . **tie** understands that the Infraco considers that those works are Accommodation Works requiring an instruction as a result of a third party's requirements which would result in a tie Change.
- 2.2 In this Position Paper, **tie** is seeking certain orders and declarations.
- 2.3 Accordingly, any additional declarations, orders or claims for damages or loss which are additional to the redress sought in this Position Paper and any referral to follow hereon fall outwith the scope of the present Dispute, being reserved for future agreement or Adjudication, legal or other proceedings and **tie** does not seek any orders for payment or otherwise in the present Position Paper. **tie** reserves the right to do so.

3. TIE'S POSITION ON THE DISPUTE

- 3.1 The works at the Hilton car park (defined in the Infraco Contract as "*the New Car Park Works*") are fully described in *Section 12 of Schedule Part 13* of the Infraco Contract ("*the Stakis Agreement*"). The scope of the New Car Park Works is shown on the plan annexed at *Appendix 9 to Schedule Part 13*. The Infraco is responsible for obtaining planning permission for these works.
- 3.2 The Infraco were put on notice of the relevant Stakis Agreement and had conducted due diligence on it (legal and technical), several months prior to close of the Infraco Contract. The Infraco have a full copy of the Stakis Agreement which forms part of *Schedule Part 13A*.
- 3.3 The Infraco Contract's approach on this issue is unambiguous. Under *Clause 18.17B*, the Infraco undertakes to carry out all of its obligations under *Schedule Part 13, Section A. Section 12 of Schedule Part 13 A* contains the express stepped-down obligations (at 12.9, 12.10 and 12.11) agreed to by the Infraco and pursuant to which the Infraco is responsible for carrying out the New Car Park Works.

- 3.4 The New Car Park Works are a defined category of works - "*Third Party Obligations*" - under the Infraco Contract. These are core works and constraints and obligations to be performed, to which the Infraco agreed to on 14 May 2008. The price for the New Car Park Works is contractually included as part of the Construction Works Price set out in *Schedule Part 4*.
- 3.5 Schedule Part 4 (and its pricing assumptions) cannot operate to exclude the New Car Park Works from the main scope of the Infraco Works. It could only have relevance if:
- 3.5.1 *Clause 80.22* was being operated because **tie** wanted the Infraco to carry out an obligation owed by the City of Edinburgh Council to Stakis which was not included in *Schedule Part 13 A at Section 12*; or
- 3.5.2 the New Car Park Works - which they are clearly not - were included in *Schedule 13 Section B*, which comprises named minor undertakings which **tie** gave (and of which the Infraco has notice) and the Infraco, in taking measures to ensure it did not cause **tie** or CEC to be in breach of any of these undertakings, the Infraco sought relief/cost (*Clauses 18.17A*) triggered by unusual measures being needed or minor works becoming necessary.
- 3.6 Neither of these two scenarios is the case. The Infraco are simply required to proceed with the New Car Park Works as described and provided for in terms of the Infraco Contract .

4. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

- 4.1 **tie** requires the Infraco to meet the Infraco's contractual obligations in relation to carrying out the New Car Park Works without further instruction and without imposing conditions on doing so which are outwith the Infraco Contract.

5. REQUIRED REDRESS

- 5.1 A declaration that the Infraco are obliged under the Infraco Contract and without further instruction to proceed with the carrying out of New Car Park Works .

6. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

- 6.1 The Infraco appears to confuse Accommodation Works and Third Party Obligations ("*TPOs*"). The former are any works which **tie** may need to instruct and which eventuate post contract award in connection with third party interface generally. TPOs as they are known comprise key third party non-interference and works agreements. These are contained in *Schedule 13 Part A* and which the Infraco had full opportunity to examine and price the scope and execution of those works during the tender phase.
- 6.2 The Infraco asserts that the New Car Park Works are Accommodation Works and require a **tie** Notice of Change. For this to be so, either those works would be alluded to in *Schedule Part 13 B* or would have been unknown. Neither is the case and, in addition, *Clause 83* deals with Accommodation Works for which **tie** would have issued an Accommodation Works Change Order. **tie** has not issued and does not need to issue such an Order.

- 6.3 In addition to the unambiguous approach of the Infraco Contract under *Clause 18.17B* and *Schedule Part 13 A*, it refers the Infraco to:
- 6.3.1 the contractual drawings that detail the New Car Park Works;
 - 6.3.2 the fact that:
 - 6.3.2.1 the New Car Park Works are programmed;
 - 6.3.2.2 the Schedule of Rates contains a rate for the New Car Park Works (in case of any variation to this element of scope of works).
 - 6.3.3 All of which matters contradict and do not support the Infraco's position.

**Value Engineering
Schedule Part 4 – Section 5**

TIE LIMITED

POSITION PAPER

relating to

the agreement between **tie Limited**

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the *Edinburgh Tram (Line Two) Act 2006*

Commercial in Confidence
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1. INTRODUCTION

- 1.1. Schedule Part 4 refers to two sections dealing with value engineering.
- 1.2. Section 5 of Schedule Part 4 is said to deal with 'Value Engineering (VE) that have been taken into firm price' and
- 1.3. Section 6 of Schedule Part 4 is said to deal with 'Further Value Engineering
- 1.4. This position paper only deals with Section 5

2. TIE'S POSITION ON THE DISPUTE

- 2.1 Section 5 of Schedule Part 4 is said to deal with 'Value Engineering (VE) that have been taken into firm price'.
- 2.2 Paragraph 5.1 of Section Part 5 states;
'The Parties have agreed Value Engineering opportunities / savings as noted in Appendix C'
- 2.3 Appendix C of Schedule Part 4 lists 25 items as identified VE savings. The savings are said at paragraph 1 of Appendix C to be
'...agreed identified VE opportunities / savings which are fixed and firm reductions, save for the Key Qualifications'.
- 2.4 Tie maintains that they are entitled to the saving stated in Appendix C where the Key Qualifications are met.
- 2.5 The Key Qualifications are listed and affect the following VE items:

Type	Key Qualifications	VE Items	£
A	Subject to tie issuing an instruction to implement the VE opportunity. tie carries specification/acceptance risk and cost of additional pump	1, 24	393,526.00
B	Subject to tie issuing an instruction to implement the VE opportunity.	2, 3, 4, 5, 6, 8,	477,080.00
C	Design to cost but compliant with current technical/design info	7	2,200,000.00

D	Level of saving is subject to adjustment of quantity of this item based on the final design	9, 10, 11,18	1,000,000.00
E	Subject to approval of NEL / CEC, , (Third Party) and subject to designing to cost	12,	1,470,000.00
F	Subject to approval of NEL / CEC, Network Rail, (Third Party)	13, 15,19, 20 & 21	2,160,000.00
G	Subject to being able to design to cost	14, 16, 17,	1,250,000.00
H	Subject to BBS / tie agreeing savings in resources and facilities items from BBS and tie costs.	22	500,000.00
I	Subject to property owners' claims	23	50,000.00
J	subject to tie issuing an instruction to implement the related Unidentified Provisional Sum at Item 6 in Table 2	25	464,400.00
Total			£9,965,006.00

Categories of 'Key Qualifications' and their implication on the contract sum

- 2.6 **Type A - *Subject to tie issuing an instruction to implement the VE opportunity. tie carries specification/acceptance risk and cost of additional pump***
- 2.6.1 Under this type of VE, subject to tie issuing their instruction / change order the saving value is agreed. There should be no dispute over the value of £393,526.00
- 2.7 **Type B - *Subject to tie issuing an instruction to implement the VE opportunity***
- 2.7.1 Under this type of VE, subject to tie issuing their instruction the saving value is agreed. There should be no dispute over the value of £477,080.00
- 2.8 **Type C - *Design to cost but compliant with current technical/design info***
- 2.8.1 This category relates to VE number 7 only. The Appendix states that the changes are to be driven by the proximity to BAA runway and EARL decision (assumption made that EARL is Edinburgh Airport Ltd).

- 2.8.2 The VE lists certain areas available to the Infraco to re-design to obtain the stated saving of £2,200,000.
 - 2.8.3 Tie considers that the obligation is upon the Infraco to fully identify and achieve the stated saving value. However, prior to implementing the VE, the Infraco, pursuant to paragraph 5.7 is required to provide a detailed Estimate to tie setting out what the net savings are, including the design costs.
 - 2.8.4 On receipt of the estimate and within 10 business days, tie may accept or reject the re-design / Estimate and issue a instruction / tie change order.
 - 2.8.5 The VE does not to proceed until tie issues the instruction
- 2.9 **Type D - Level of saving is subject to adjustment of quantity of this item based on the final design**
- 2.9.1 This VE deals with such items as, the quantity of material recovery, kerbs, drainage, which are instructed out of the contract by tie.
 - 2.9.2 A tie change must be issued before the design / works commence (clause 80) however the saving can only be fully determined by the final account re-measurement.
- 2.10 **Type E - *Subject to approval of NEL / CEC/ Network Rail and subject to designing to cost***
- 2.10.1 This VE relates to third party approval and to designing to cost.
 - 2.10.2 The VE savings is for design changes to Edinburgh Park Viaduct. The VE requires the Infraco to re-design to obtain the stated saving of £1,470,000.
 - 2.10.3 Tie considers the obligation is upon the Infraco to fully identify and achieve the stated saving. However, prior to implementing the VE, the Infraco, pursuant to paragraph 5.7 is to provide a detailed Estimate to tie setting out what the net savings are, including the design costs, for tie to obtain third party consent
 - 2.10.4 Tie must obtain the approval of the third parties before a tie change order is issued.
- 2.11 **Type F - *Subject to approval of NEL / CEC, Network Rail, (Third Party)***
- 2.11.1 The values attached to the VE are fixed and agreed. To implement the savings tie simply has to obtain third party approval of the design changes.

2.11.2 On obtaining third party consent tie issues an instruction for the works to proceed.

2.11.3 There should be no dispute over the total saving of £2,160,000.00

2.12 **Type G - Subject to being able to design to cost**

2.12.1 Appendix C lists three items which fall into this category. Valued at a potential saving of £1,250,000: item 14, being the A8 underpass, item 16 being the Water of Leith initiatives and item 17 being the eight maintenance walkways.

2.12.2 The obligation is upon the Infraco to fully identify and achieve the stated savings. Prior to implementing the VE, the Infraco, pursuant to paragraph 5.7 is to provide a detailed Estimate to tie setting out what the net savings are, including the design costs.

2.12.3 Thereafter, tie may accept or reject the re-design / Estimate.

2.12.4 The VE(s) do not to proceed until tie issues the instruction

2.13 **Type H - Subject to BBS / tie agreeing savings in resources and facilities items from BBS and tie costs.**

2.13.1 This VE is subject to agreement between BBS and tie

2.14 **Type I - Subject to property owners' claims**

2.14.1 This VE is subject to claims made by owners during the course of the project.

2.14.2 No final value can be determined until completion of the works

2.15 **Type J - Subject to tie issuing an instruction to implement the related Unidentified Provisional Sum at Item 6 in Table 2**

2.15.1 An agreed saving of £464,400 on the proviso that tie issue instructions on the Undefined Provisional sum at item 6 table 2 – ‘Urban Traffic Controls associated with the wider area impacts’

2.16 Programme / Timing of tie Instructions

2.16.1 Paragraph 5.3 states that where a VE requires an instruction by tie, tie shall issue such an instruction sufficiently ahead of the programme to allow the VE opportunity to be realised.

2.16.2 Paragraph 5.7 states where the VE is an opportunity subject to 'design to cost' the Infraco shall deliver to tie an estimate setting out the net cost / saving in sufficient time not to affect the programme. Tie has 10 days from the issue of the estimate to confirm a tie instruction.

3. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

3.1 To agree that the savings in the Appendix C are secured

4. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

4.1 The Infraco are not prepared to progress VE where in their opinion tie issued a late tie instruction / change order implementing a VE. Tie denies that the change orders were issued late. Tie considers that the instructions were issued in sufficient time relative to the progress of the design and site works actually being achieved.

4.2 The Infraco rely upon paragraphs 5.3 and 5.3.3 of Schedule Part 4 which state

'Infraco shall implement a Value Engineering opportunity provided that...

5.3.3 any Consents required for the implementation of the Value Engineering opportunity are obtained and designs Issued for Construction by the date set out in the Programme

4.3 Notwithstanding the timing of the instruction, the Infraco refuse to incorporate the re-design into their works even although the works have not been started

5. LIST OF SUPPORTING DOCUMENTATION

5.1 Schedule Part 4 -- Section 5

exceed £5,000,000 but, for the avoidance of doubt, such percentage shall only be applied to the amount in excess of £5,000,000.

5.0 VALUE ENGINEERING (VE) THAT HAS BEEN TAKEN INTO FIRM PRICE

- 5.1 The Parties have agreed Value Engineering opportunities / savings as noted in Appendix C.
- 5.2.1 Subject to the provisions applying to Value Engineering opportunities which are Design to Cost these VE opportunities / savings are not simply targets but are fixed and firm reductions which are reflected in the Contract Price as at the date of this Agreement.
- 5.3 Infraco shall implement a Value Engineering opportunity provided that:
- 5.3.1 where the implementation of the Value Engineering opportunity requires instruction by **tie**, **tie** have issued such instruction (which shall be a **tie** Change) sufficiently ahead of the Programme to allow the Value Engineering opportunity to be realised;
 - 5.3.2 the Value Engineering opportunity is technically feasible;
 - 5.3.3 any Consents required for the implementation of the Value Engineering opportunity are obtained and designs Issued for Construction by the date set out in the Programme; and
 - 5.3.4 any other Key Qualification applying to the Value Engineering opportunity have been achieved.
- 5.4 NOT USED.
- 5.5 To the extent that a Value Engineering opportunity is implemented:
- 5.5.1 the Employer's Requirements and Infraco Proposals shall be amended to take into account the changes to the Infraco Works as a result of such implementation;
- 5.6 To the extent that a Value Engineering opportunity is not implemented:
- 5.6.1 Infraco shall carry out the Infraco Works without the amendment to the Employer's Requirements and Infraco Proposals which would have been made had the Value Engineering opportunity been implemented; and
 - 5.6.2 Infraco and **tie** shall agree amendments to the Schedule Part 5 (*Milestone Payments*) to increase the Contract Price by the saving applying to the Value Engineering opportunity set out in Appendix C and Infraco shall be entitled to include in its next Application for Payment and **tie** shall pay to Infraco the design costs incurred by Infraco in considering the Value Engineering opportunity up to a maximum amount of £25,000 per Value Engineering opportunity.
- 5.7 Where a Key Condition to achieving a Value Engineering opportunity is "Design to Cost":
- 5.7.1 before implementing the Value Engineering opportunity and sufficiently ahead of the Programme so as not to prejudice the delivery of the Value Engineering opportunity Infraco shall deliver to **tie** an Estimate setting out the net cost or saving of implementing the Value Engineering opportunity (including design costs); and

- 5.7.2 **tie** shall confirm within 10 Business Days of receipt of the Estimate if **tie** wishes Infraco to proceed with the Value Engineering opportunity.
- 5.7.3 If **tie** confirms that it wishes Infraco to proceed with the Value Engineering opportunity,
- (a) the Employer's Requirements and Infraco Proposals shall be amended to take into account the changes to the Infraco Works as a result of such implementation; and
- (b) Infraco and **tie** shall agree amendments to the Schedule Part 5 (Milestone Schedule) to amend the Contract Price by the difference (if any) between the saving applying to the Value Engineering opportunity set out in Appendix C and the actual saving set out in the Estimate provided to **tie** in accordance with paragraph 5.7.1 and Infraco shall be entitled to claim in its next Application for Payment and **tie** shall pay to Infraco the design costs incurred by Infraco in considering the Value Engineering opportunity up to a maximum amount of £25,000 per Value Engineering opportunity.
- 5.7.4 If **tie** confirms that it does not wish Infraco to proceed with the Value Engineering opportunity paragraph 5.6 shall apply. **tie** shall be deemed not to wish Infraco to proceed with a Value Engineering opportunity which is design to cost if it fails to respond to an Estimate in accordance with paragraph 5.7.2;
- 5.7.5 Infraco shall use reasonable endeavours to achieve the savings for each Value Engineering opportunity.

6.0 FURTHER VALUE ENGINEERING (VE)

- 6.1 Further Value Engineering opportunities / savings as noted in Appendix D
- 6.2 This further VE represents that which either one or both Parties is unable to commit to at this stage and will still be considered as a potential target. There are two sub-categories, those with an estimated saving carried to the summary and those as an unspecified item.
- 6.3 These will be adjusted by applying the provisions of Clause 80 (*tie Changes*). For the avoidance of doubt, no VE that has already be considered by the Parties or that may subsequently be proposed by **tie** will be considered as a shared saving under Clause 81.3 (*Infraco Changes*).

7.0 UTILITIES DIVERSIONS TO BE CARRIED OUT BY INFRACO

- 7.1 Although **tie** has let the MUDFA Contract (Multiple Utilities Diversion Framework Arrangement) to carry out the diversion of utility apparatus in the path of the proposed tram route prior to Infraco Works, it will be necessary for some of these works to be delivered by Infraco for the reasons such as:
- they may be unrecorded and not discovered until the Infraco Works are commenced
 - they may be discovered during the MUDFA Works but left to avoid a programme overlap or other technical reason
 - they may be intrinsically linked to the Infraco Works

Evaluation of EOT 1(tie Change No 1)

TIE LIMITED

POSITION PAPER

relating to

the agreement between tie Limited

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the *Edinburgh Tram (Line Two) Act 2006*

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CEC00951714_0067

1. INTRODUCTION

- 1.1 An Extension of time of 7 weeks and 3days has been awarded to BSC as a result of the design programme slippage from v26 to v31. This is a Notified Departure and a tie Change under the terms of the Contract.
- 1.2 It has not been possible to agree the evaluation of the tie Change. Several meetings have been held separately with Bilfinger Berger and Siemens to agree a valuation.

2. THE DISPUTE

- 2.1 Although a claim has been consolidated by Infraco following separate meetings and a draft response document has been provided to both Infraco members and no further response has been made it is clear that there are areas of difference in our respective evaluations of the Change. The various disagreements as assumed at present can be categorised as:
 - 2.2 Non proven effect of the change on various items such as Bonds
 - 2.3 Double counting of certain items such as Insurances and testing
 - 2.4 Evaluation of escalation
 - 2.5 Separate application by Siemens of actual cost in relation to Consortium Prelim items
 - 2.6 Lack of cause and effect analysis

3. TIE'S POSITION ON THE DISPUTE

- 3.1 Tie's detailed response to the separately applied for claims by Bilfinger Berger and Siemens is attached. Tie's evaluation is currently £1,823,149.25 against an application by Infraco at (£3,190,422 + £3,298,375) £6,488,797 Sterling plus 558,679.00 Euros.

4. LIST OF SUPPORTING DOCUMENTATION

- 4.1 Draft Response to Bilfinger Berger submission
- 4.2 Draft Response to Siemens submission

tie Change No 1- update 15/06/09

Design Programme delay v26/v31

tie Commentary on Siemens submission

Introduction

Bilfinger Berger and Siemens have each separately presented claims in respect of additional costs relating to the delayed design programme from v26 to v31 which is the subject of a tie Change in the Infraco Contract. The following is recorded.

1. tie Change Order Number 1 was issued to cover the change from V26 to V31 design programme i.e. the Extension of Time claim (EOT) – overall delay 7weeks and three days
2. By a letter dated the 19 February 2009, reference 25.1.201/HN/1644; the Infraco issued their Estimate and quantification for Change Order Number 1. The Infraco value Change Order Number 1 at (£3,190,422 + £3,298,375) £6,488,797 Sterling plus 558, 679.00 Euros.
3. Comments have been returned to Bilfinger Berger in relation to the claim which followed through the process set out in Schedule Part 4 Appendix G of the Infraco Contract.
4. This is a review of the separately provided Siemens valuation of tie Change Order No 1

Rates to be applied to the Preliminaries and General Items

Clause 80.6.1 states that the valuation rates and prices for similar works are to be valued and rated per Appendix F to Schedule Part 4. Clause 80.6.2 states that if the rates in Appendix F to Schedule Part 4 do not apply then the value is obtained by rates deduced from Appendix F.

The Spreadsheet No 2 in Appendix F is the summary of the Quantities and Rates identified in Appendix A2 of Schedule Part 4 (They are referred to as the Consortium Prelims). The said Appendix is in the form of a Bill of Quantities in the standard format of a unit quantity times a rate to give a line total. The said line total is subsequently brought to the Spreadsheet no 2 as a lump sum. Accordingly the rates to be used for extensions of time are the rates stated in the Appendix A2 Construction Works Price Analysis as they are the rates which can be deduced from the Spreadsheet No 2 of Appendix F.

Method of calculation to be adopted in valuing the Preliminaries and General Items

Spreadsheet No 2 in Appendix F sets out the collection and summation of the amounts detailed in Appendix A2 of Schedule Part 4 (Pricing), which deals with Preliminaries and General items comprising part of the Construction Works Price Analysis.

Appendix A2 is laid out in the manner of a preliminaries section of a bill of quantities, where preliminaries and general items are described, together with a unit - being either a 'sum' allowance or 'wk' (weekly) allowance, i.e. a fixed allowance or a time-related charge respectively for each item.

Spreadsheet 2 at Appendix F collects, summarises and categorises those preliminaries and general items into:

a 'fixed allowance' or a 'time-related' charge in respect of preliminaries and general items; and

a 'fixed' allowance or a 'time-related' charge in respect of method related charges.

Both Appendix A2 and Appendix F of Schedule Part 4 (Pricing) were produced by the Infraco and incorporated into the Infraco Contract.

The Valuation of Change Order Number 1

Reference is made to the Infraco's letter 19 February 2009 (ref;25.1.201/HN/1644) wherein the Infraco estimate Extension of Time Preliminaries and General Items separately for each Infraco Member. The Infraco has valued the Bilfinger Berger's Preliminaries and General Items at £3,190,422, Siemens at £3,298,375 and CAF at 558,679 Euros.

Tie has valued the submission at £1,823,149.25 for the total consortium prelims. following the valuation rules in the Infraco Contract.

The Infraco Contract is between tie Ltd and the Infraco. Whilst each member of the Infraco is referred to as an Infraco Member the valuation rules of clause 80.6 does not distinguish a separate pricing policy or mechanism for each of the Infraco Members. Therefore the rules of valuation for pricing tie Change Orders are to be in accordance with Clause 80.6 and applied to the Infraco as one unit and not separately to each member.

The value of the Preliminaries and General Items is ascertained in accordance with clause 80.6. Clauses 80.6.1 and 80.6.2 state that the measurements and valuation shall be at rates and prices contained in Appendix F to Schedule Part 4 or rates deduced therefrom. Section 8 of Schedule Part 4 clarifies that;

'Rates for certain items have been established for determining the value of tie Changes as noted in Appendix F'

Based on the rates deduced from the Appendix F Spreadsheet tie values the Infraco Preliminaries and general Items at £1,823,149.25.

Commentary on the Siemens submission

Systems Project Management/Systems Operating Costs

Siemens have claimed, under this heading, that core Project staff have been prolonged on site beyond the programmed end date as a result of the overall Project extension of time of 38 working days caused by the design programme slippage from v26 to v31. Siemens has insisted that the core team used by them in the Consortium Office should be extended by the full 38 business days which is the full delay impact to Infracore as a result of the delayed design programme. Tie accepts that core Consortium staff would be required for the longer period of 38 days however as noted elsewhere tie has valued the Preliminaries in accordance with Schedule Part 4.

The Consortium Preliminaries and other preliminaries valued in accordance with the Contract and included in the sum above should cover the core Siemens Consortium team and Siemens has not provided any detail as to why they are claiming for core team members over and above that which is referred to in the Schedule Part 4 provisions. Siemens are claiming for all core team members at rates they have indexed to the end of the Contract. Siemens claim that these rates are based on Actual Cost and that is their entitlement.

Tie has two queries on this approach

- 1) Which, if any, Siemens staff are additional to the Consortium Preliminaries already claimed and allowed by tie elsewhere
- 2) Where do the indexed rates come from and why are they not pro rated to the rates and prices in the Appendix F as required by Schedule Part 4.

Sub Sections of Management (Electrification; Signals/communication; depot workshop equipment and trackwork project management)

Siemens have not provided any details of the claims for extension of time for each of the sub sections of Management such as:

Electrification

Signals/Communication

Depot Workshop Equipment

Trackwork Project Management

Siemens has claimed pro rata extensions to all resources in these sub sections of work without demonstration of a link to the effect that the delayed design programme may have on the individual sub sections of programme. No delay effect is calculated or demonstrated using programme analysis. Also, is there no substantiation of rates/allowances derived from the Appendix F as required by the valuation rules in the Contract. There are three queries

- 1) Siemens need to demonstrate the effect of the Change on the resources claimed.
- 2) Siemens need to demonstrate that the resources claimed are additional to the Preliminaries claimed and valued elsewhere following the Schedule Part 4 evaluation.
- 3) Siemens need to demonstrate the indexed rates claimed with reference to the rates and prices in Appendix F.

BAM

Siemens has presented a claim on behalf of the BAM portion of the works. Upon request Siemens has provided some programme information to support the BAM claims and these are commented on below.

There are 5 parts to the BAM Claim

Extended Staff Costs

Additional Resource Costs

Extended Design Costs

Future increased Costs

Head Office Overheads

BAM has not demonstrated why there are extended Project Management Costs for 5.8 weeks and as explained at meetings the duration of the BAM construction programme on site remains the same from V26 to V31 therefore there should be no extended on site Project Management costs or rates for BAM. V31 was known about from contract award stage on 14 May 2008 and the time shift should have been planned.

BAM claim for additional resources is not fully demonstrated. It is claimed that the programme is re-sequenced but there is no calculation to show that the claimed labour, plant and supervision are required for longer periods. Some activities have prolonged and others have shortened but BAM requires to demonstrate the reasons why there are resource extensions of each of the prolonged subsections also taking into account those subsections that have reduced in duration.

Extended Design Costs is again not demonstrated. The V31 Design Programme is later than V26 but it is not clear why the persons responsible for the BAM portion of the design are required for a longer period. It is not automatic that a delayed detailed SDS Design delivery means that BAM design team are proportionally affected as is suggested.

Future increased Costs are anticipated as a result of the programme shift and this would appear to be a valid head of claim given that this work is to be carried out later than originally programmed. However as the BAM sub contract was placed early (one of the stipulations of the 20% advance payment) it was expected that this would enable early placement of the orders necessary for BAM to procure the major materials, goods and services required for the project. This would therefore minimise

any risk of escalating costs for BAM. The delay to the design programme would not necessarily affect the procurement of bulk materials and therefore more information is required to establish the extent if any of additional cost arising directly from this event. Notwithstanding any increased costs must be demonstrable costs.

The conclusion is that the BAM's claim requires to demonstrate a cause and effect and link to the effect the tie Change had on BAM and the resources claimed,

Cost of Money

Siemens has presented a claim for finance costs and escalation and these are commented on below.

Finance costs. There is no explanation as to why any financing costs are incurred as a direct result of the v31 programme. If the programme has slipped then the spend profile will also slip and be commensurate with the recovery to match the delay. The contract does not allow for recovery of finance costs.

Escalation. The tie comments are similar to that in the BAM commentary above. Escalation costs may be incurred but need to be demonstrated and further particulars are required to show the effect of the procurement of early materials, goods and services. It is also noted that the claims above for project management and labour costs have been escalated to reflect rates in 2011 yet escalation is further claimed here.

It is also noted that Escalation is included in the Appendix F rates and prices that should be used to value Preliminaries.

Generally

A programming exercise is required to properly assess the detailed effect of the various claims.

Conclusion

As detailed in Section 7 above, tie values the Preliminaries and General Items associated with tie Change Order 1 at £1,823,149.25

It is for Siemens and the Consortium to demonstrate where the resources claimed in connection with the V26 V31 design slippage are additional to the Head Office Overheads and the Preliminaries valued by tie in accordance with Schedule Part 4. Any additional resources should be identified established and valued in accordance with Clause 80.4 which may be on an Actual Cost basis if appropriate.

However by reference to The Infracore letter of the 19 February 2009 reference is made by the letter to the individual Infracore Member's Preliminaries and General Items cost estimates.

As explained above there is only one Agreement in place with the Infraco. The Infraco's Preliminaries and General Items are set out in the Spreadsheet No 2 at Appendix F. The said Spreadsheet includes the Contractual Requirements for Section A & B and all the method related charges. The Spreadsheet further breaks down the Contractual Requirements for Section A & B and the method related charges into the Contractor's bond and insurances, the accommodation method related charges for the Engineer and the Client, the Consortium method related charges for supervision and accommodation and the specific method related charges for the works sub-sections and subcontractors.

The Construction Programme is extended as a result of the V31 design programme by 7.6 weeks. During the extended period the works to be carried out are in similar circumstances to the scope of the works included in the Agreement. Clause 80.6 dictates that the Change Order is measured and valued at rates and prices as Appendix F or rates deduced therefrom. The Appendix F Schedule identifies and describes the 'Consortium' Preliminaries and General Items. Change Order 1 has applied the rates for the Consortium deduced from Appendix F at full value rates. Accordingly the value of the Consortium has been ascertained in full at £1,823,149.25

Siemens seek an extension of time value of £3,298,375 with no establishment or substantiation as to the effect that the v31 design programme may have on Siemens work. As stated above the Consortium Preliminaries has been valued in accordance with the Contract and Siemens has not justified that further Prelims should be added. Siemens claim is presumably based upon estimated Actual Cost and does not refer to the Consortium Preliminaries. In any event the following principles have not been substantiated, evidenced and / or vouched as being the estimated 'Actual Cost' from Siemens.

That an overall 7.6 week extension brought out by V31 design programme is applied to all elements of the Siemens portion of the works.

That all staff are site based and not part of the head office charge or the Consortium Prelims

That the rates charged by Siemens are actual cost. We note that it was accepted by tie and Siemens that we could use an independant professional to validate the actual cost base

That reference is not made to the Site Staff organogram

That the subcontractors costs are incurred costs based upon an unsubstantiated 5.8 week extension of their work

That the plant / operating costs are actual costs

That additional labour, plant and supervision costs are actual and or will be incurred as a result of the v31 design programme extension

That escalation costs are extra costs brought about by the v31 design programme extension.

The information provided by the Infracore by the letter dated the 19 February 2009 fails to substantiate, evidence and vouch the costs pursuant to Appendix G of Schedule Part 4.

CAF

CAF seek an extension of time value of 558,679 Euros. The said value is an assumption of values with no evidence in support of the values claimed. This will require to be further developed with the options offered. It will be necessary to also establish that additional costs are as a result of the v31 design programme delay

Response to Prolongation Estimate in respect of INTC No 01

1. Background

- 1.1 There is common agreement that the design programme V26 upon which the Construction Programme is based has been superseded by design programme V31 at contract award.
- 1.2 The Infraco say the ramifications of V26 to V31 version of the design programme is that;
 - 1.2.1 Section A (Depot) is 5.8 weeks prolonged
 - 1.2.2 Section B (Test Track) is 9.8 weeks prolonged
 - 1.2.3 Section C (Testing & Commissioning) is 7.6 weeks prolonged
 - 1.2.4 Section D (Revenue Commencement Date) is a credit of 0.2 weeks
- 1.3 tie Change Order Number 1 was issued to cover the change from V26 to V31 design programme i.e. the Extension of Time claim (EOT)
- 1.4 By a letter dated the 19 February 2009, reference 25.1.201/HN/1644; the Infraco issued their Estimate and quantification for Change Order Number 1. The Infraco value Change Order Number 1 at (£3,190,422 + £3,298,375) £6,488,797 Sterling plus 558, 679.00 Euros.
- 1.5 This letter formalised the Infraco Consortium position in relation to the Estimate however this letter follows on from a series of correspondence, emails and meetings between tie and separately Bilfinger Berger and Siemens over a period since first submission of the Estimate on 12th June 2008. tie had raised several queries to both Infraco Members in attempts to understand and agree the original Estimate and essentially the same queries are still valid and are addressed below. In fact the Estimate has been amended from the original Estimate set out in letter of 12th June 2008 of £4,420,743 to the current Estimate of £6,488,797 + 558679 Euros.
- 1.6 For the reasons explained in detail within this response tie value Change Order 1 at £1,823,149.25

2. Rates to be applied to the Preliminaries and General Items

- 2.1 Clause 80.6.1 states that the valuation rates and prices for similar works are to be valued and rated per Appendix F to Schedule Part 4. Clause 80.6.2 states that if the rates in Appendix F to Schedule Part 4 do not apply then the value is obtained by rates deduced from Appendix F.
- 2.2 The Spreadsheet No 2 in Appendix F is the summary of the Quantities and Rates identified in Appendix A2 of Schedule Part 4. The said Appendix is in the form of a Bill of Quantities in the standard format of a unit quantity times a rate to give a line total. The said line total is subsequently brought to the Spreadsheet no 2 as a lump sum. Accordingly the rates to be used for

extensions of time are the rates stated in the Appendix A2 Construction Works Price Analysis as they are the rates which can be deduced from the Spreadsheet No 2 of Appendix F.

3. Method of calculation to be adopted in valuing the Preliminaries and General Items

- 3.1 Spreadsheet No 2 in Appendix F sets out the collection and summation of the amounts detailed in Appendix A2 of Schedule Part 4 (Pricing), which deals with Preliminaries and General items comprising part of the Construction Works Price Analysis.
- 3.2 Appendix A2 is laid out in the manner of a preliminaries section of a bill of quantities, where preliminaries and general items are described, together with a unit - being either a 'sum' allowance or 'wk' (weekly) allowance, i.e. a fixed allowance or a time-related charge respectively for each item.
- 3.3 Spreadsheet 2 at Appendix F collects, summarises and categorises those preliminaries and general items into:
 - 3.3.1 a 'fixed allowance' or a 'time-related' charge in respect of preliminaries and general items; and
 - 3.3.2 a 'fixed' allowance or a 'time-related' charge in respect of method related charges.
- 3.4 Both Appendix A2 and Appendix F of Schedule Part 4 (Pricing) were produced by the Infraco and incorporated into the Infraco Contract. Notwithstanding the actual terms used by the Infraco to define the Preliminaries and General Items, they are priced in a method related manner.

4. The Valuation of Change Order Number 1

- 4.1 The value of the Preliminaries and General Items is ascertained in accordance with clause 80.6. Clauses 80.6.1 and 80.6.2 state that the measurements and valuation shall be at rates and prices contained in Appendix F to Schedule Part 4 or rates deduced therefrom. Section 8 of Schedule Part 4 clarifies that;

'Rates for certain items have been established for determining the value of tie Changes as noted in Appendix F'
- 4.2 Based on the rates deduced from the Appendix F Spreadsheet tie values the Infraco Preliminaries and general Items at £1,823,149.25 as explained in detail as follows

<u>App 2 Rate Ref</u>	<u>Prolongation Estimate - V26 to V31</u>		<u>Included in Spread Sheet 2 Appendix F</u>	<u>Delay in Weeks</u>	<u>Weekly Rate</u>	<u>Delay Value £</u>	<u>Comments</u>
	Section A (Depot)						
	Contract Prelims						
P27	Depot Subcontractor Section A Supervision	Sum	1,147,709.95	5.8	12,106.65	70,218.51	Appendix A2 states the item as a sum, the spreadsheet states the item as time related. Duration not provided for in spreadsheet, accept duration per V26. Pro Rata £1,147,709 by 94.8 weeks. Rate £12,106.64
P27	Depot Subcontractor Section A Establish Site Services Welfare etc.	Sum	1,468,820.91	5.8		0.00	Not a time related item
P27	Depot Subcontractor Section A Scaffolding & Misc Plant	Sum	717,318.72	5.8		0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time-related. No evidence to say that the plant is pro rata to the duration period. Scaffolding is priced lump sum for erection and dismantle. No reasons provided to say why all plant is time related. Valued at nil
P27	Depot Subcontractor Section A Insurance & Bond	Sum	243,888.60	5.8		0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time-related. No evidence to say that the bond is pro rata to the duration period. No reasons or evidence provided to say why the bond time related. Possible double recovery. Valued at nil
P27	Depot Subcontractor Section A Establish and Maintain Compound	Sum	54,734.29	5.8	461.89	2,678.96	Accept that part of the item is time related. Spreadsheet 2 identifies £43,787 as being time related. Duration per V26 is 94.8 weeks pro rata rate is £43,787 / 94.8weeks = £461.89
P27	Depot Subcontractor Section A Non productive Labour	Sum	283,893.23	5.8	2,994.65	17,368.97	Appendix 2 states the item to be as a sum. Spreadsheet states it as a time related item. Accept that the labour is in attendance and is time related. Pro rata rate over V26's 94.8 weeks. Weekly rate is £283,893.23 / 94.8 week = £2,994.65
	Section C (Testing and Commissioning) - 17 January 2011 (Airport to Haymarket)						
P27	BB High Level - Section A (Establish Sections & Sites)			5.80		0.00	Not a time related item

P27	BB High Level - Section A (Supervision)	Sum	2,722,909.00	5.80	20,945.45	121,483.61	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply duration of 169 weeks as per section offices duration Appendix A. Pro rata rat £2,722,909.01/130 weeks
P27	BB High Level Section A- Maintain section offices	rate	3,338.23			0.00	Appendix A says that the item is time related. The spreadsheet refers to the item as a time related. The quantity is measured in Appendix A at 169 wks. The revised time is 135.8 weeks. No double recovery per clause 121 of the Agreement. Priced at Nil
P27	BB - Section A (5C (depot to 5B), 5B)	Sum	6,735,461.39	5.20	43,176.00	224,515.36	Appendix 2 states the item to be as a sum. Spreadsheet states it as part time related item. No duration provided in Appendix 2. Pro rata with V26 duration. £5,388,369 /124.8 weeks = £43,176.03
P27	Section A (2A, 5A)	Sum	2,508,921.74	8.20	19,880.52	163,020.26	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply V26 duration of 126.2 weeks. Pro rata rat £2,508,922 / 126.2 weeks= £19,880.52 per wk
P27	Section A (2A, 5A)	Sum	1,131,799.42	8.20			Not a time related item
P27	Section A (2A, 5A)	Sum	2,689,179.73	8.20	21,308.88	174,732.82	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply V26 duration of 126.2 weeks. Pro rata rat £2,689,180 / 126.2 weeks= £21308.88 per wk
P27	Section A (2A, 5A) Insurance / Bond	Sum	197,862.46	8.20		0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time related. No evidence to say that the bond is prorata to the duration period. No reasons or evidence provided to say why the bond is time related. Possible double recovery. Valued at nil
P27	Section A (5C (depot to sect 7), 7)	Sum	319,460.04	14.40		0.00	Not a time related item
P27	Section A (5C (depot to sect 7), 7)		1,432,030.43	14.40	14,855.08	213,913.15	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply V26 duration of 96.4 weeks. Pro rata rat £1,432,030 / 96.4 weeks= £14,855.08 per wk

p28	Section A (5C (depot to sect 7), 7)	Sum	146,882.09	14.40		0.00	Not a time related item
				Sub Total			
	(Haymarket to Newhaven)			Prolongation			
P39	BB High Level - Section B Establish Sections & Sites	Sum	801,175.04	7.2			Not a time related item
P39	BB High Level - Section B Package Supervision		1,485,223.10	7.2	11,558.16	83,218.75	Appendix A says that the item is a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply V26 duration of 128.5 weeks. Pro rata rat £1,485,223 / 128.5 weeks= £11,558.16 per wk
P39	BB High Level - Section B Maintain Section - Time Related	Rate	3,338.23	7.2	0.00	0.00	Appendix A says that the item is time related. The spreadsheet refers to the item as a time related. The quantity is measured in the BQ at 169 wks. The revised time is 128.4 weeks. No double recovery per clause 121 of the Agreement. Priced at Nil
P39	BB - Section B (1B) Preliminaries fixed	Sum	636,770.13	0.0		0.00	Not a time related item
P39	BB - Section B (1B) Preliminaries Time Related	Sum	1,853,812.54	0.0	0.00	0.00	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. The Infracost say that there is not EOT associated with this item
P39	Section B (1C, 1D) - Preliminaries	Sum	2,868,332.94	3.2	26,075.75	83,442.40	Appendix A says that the item is a sum. The spreadsheet splits the sum into fixed and time related. Accept that part of the item is time related. Spreadsheet 2 identifies £2,294,666 as being time related. Duration per V26 is 88 weeks pro rata rate is £2,294,666 / 88weeks = £26,075.75
P39	Section B (1A) Preliminaries Fixed	Sum	2,536,622.51	9.8		0.00	Not a time related item
	Section B (1A)			9.8	23,260.33	227,951.23	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply V26 duration of 97.6 weeks. Pro rata rat £2,270,208/97.6 weeks= £23,260.33 per wk
P39	Section B (1A)			9.8	22,068.34	216,269.73	Appendix A says that the item is time related but has priced it as a sum. The spreadsheet refers to the item as a time related. Accept the item as time related. No duration provided in the appendix. Apply V26 duration of 97.6 weeks. Pro rata rat £2,153,870/97.6 weeks= £22,068.34 per wk

	Consortium Prelim Costs						
P16	Contractor's bond	Sum	1,317,094.00	7.6	0.00	0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time related. No evidence to say that the bond is pro rata to the duration period. No reasons or evidence provided to say why the bond time related. Possible double recovery. Valued at nil
P16	All other insurance required by the Contract	Sum	1,633,048.00	7.6	0.00	0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time-related. No evidence to say that the bond is pro rata to the duration period. No reasons or evidence provided to say why the bond time related. Possible double recovery – covered by 7.4% calculation for changes. Valued at nil
P16	Accommodation for the Engineer's and Client's Staff; establish and remove offices	Sum	82,310.00	7.6	0.00	0.00	Not Time Related
P16	Accommodation for the Engineer's and Client's Staff; maintain and operate offices	Rate		7.6	1,900.51	0	Accommodation was delayed in coming to site and Change No 18 covers this.
P17	Services for Engineer's and Client's Staff; maintain and operate transport vehicles			7.6	1,219.95	9,271.62	Rate as Appendix 2 £1,219.95
p19	Equipment for use by the Engineer's and Client's Staff; maintain and operate photographic equipment			7.6	112.61	855.84	Rate as Appendix 2 £112.61
P26	Consortium Supervision			7.6	15,895.71	120,807.40	Rate as Appendix 2 £15,895.71. Recovery also through value of changes – to be reconciled
P26	Consortium Office Hire			7.6	1,195.55	0	Accommodation was delayed in coming to site and Change No 18 covers this.
P26	Consortium Office Maintenance			7.6	3,498.82	0	ditto
P26	Consortium Surveying Instruments Maintenance			7.6	153.71	1,168.20	Rate as Appendix 2 £153.71
P26	Consortium IT Equipment			7.6	1,804.65	13,715.34	Rate as Appendix 2 £1,804.65
P26	Consortium Testing			7.6		0.00	Appendix As states the item to be time related. Spreadsheet states the item to be time related. No substantiation as to why the testing would increase on a EOT without increasing the quantity. Possible double counting, clause 121 of Agreement due to this item being included in value of Changes. Item
					0.00		

							is valued at nil
P26	Consortium Establish/Remove Offices			7.6	0.00	0.00	Not Time Related
P26	Consortium Establish/Remove Surveying Equipment			7.6	0.00	0.00	Not Time Related
P26	Consortium costs Incurred during facilitated negotiation phase					0.00	Not Time Related
						0.00	
	Contractual Requirements - Section B					0.00	
P28	Contractor's bond	Sum	670,742.81	7.6		0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time-related. No evidence to say that the bond is pro rata to the duration period. No reasons or evidence provided to say why the bond time related. Possible double recovery. Valued at nil
P28	All other insurance required by the Contract	Sum	881,247.16	7.6		0.00	Appendix A2 states the item as a sum, the spreadsheet states the item as time-related. No evidence to say that the bond is pro rata to the duration period. No reasons or evidence provided to say why the bond time related. Possible double recovery. Valued at nil
P28	Accommodation for the Engineer's and Client's Staff; establish and remove offices	Sum	44,320.72	7.6		0.00	Not time related
P29	Accommodation for the Engineer's and Client's Staff; maintain and operate offices	Sum	172,946.73	7.6	1,023.35	0	Accommodation arrived on site late. Change No 18 covers this.
P29	Services for Engineer's and Client's Staff; maintain and operate transport vehicles		111,015.29	7.6	656.90	4,992.44	Appendix A2 rate
P31	Equipment for use by the Engineer's and Client's Staff; maintain and operate photographic equipment		10,247.64	7.6	60.64	460.86	Appendix A2 rate
P38	Consortium Supervision		1,446,509.32	7.6	8,559.23	65,050.15	Appendix A2 rate

P38	Consortium Office Hire		108,795.18	7.6	643.76	0	Accommodation arrived late. Change No 18 covers this
P38	Consortium Office Maintenance		318,392.37	7.6	1,883.98	0	Accommodation arrived late. Change No 18 covers this.
P38	Consortium Surveying Instruments Maintenance		13,988.06	7.6	82.77	629.05	Appendix A2 rate
P38	Consortium IT Equipment		164,223.33	7.6	971.74	7,385.22	Appendix A2 rate
P38	Consortium Testing		328,447.64	0	0.00	0.00	Appendix As states the item to be time related. Spreadsheet states the item to be time related. No substantiation as to why the testing would increase on a EOT without increasing the quantity. Possible double counting, clause 121 of Agreement. Item is valued at nil
P38	Consortium Establish/Remove Offices		157,637.77	0	0.00	0.00	Not time related
P38	Consortium Establish/Remove Surveying Equipment		9,853.43	0	0.00	0.00	Not time related
	Total					1,823,149.25	

- 4.3 The value of £1,823,149.25 which value is also inclusive of all recovery for escalation as explained above by reference to Section 1 and Section 8 of Schedule Part 4. The rates included in the Appendix A2 Construction Works Price Analysis and Appendix F are inclusive rates substantiating the fixed value of the lump sums in the Appendix F Spread sheet. Accordingly the escalation value is included within the Infracore rates by the application of the Appendix A2 rates applied to the time-related items within the extended period.

Agreement / Entitlement EOT 2

TIE LIMITED

POSITION PAPER

relating to

the agreement between **tie Limited**

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

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1. INTRODUCTION

- 1.1 The Tram project programme has experienced slippage against its original contract programme (Rev 0) and the Rev 1 programme which was agreed as a result of design movement at contract award.
- 1.2 The Infraco contractor has notified slippage to the sectional completion dates by means of the 4 weekly progress reports and these reports have identified the generic reasons for delays. However, the Infraco Contractor has not:
- Identified in these reports delays caused by BSC;
 - Provided substantiation of these delays or provided an impact of such delay event ed in these reports or otherwise;
 - Submitted revised programmes under Clause 60.3 for these changes to programme on an ongoing basis for **tie**'s acceptance;
 - Provided details of steps taken to mitigate such delays or given proposals to accelerate;
- 1.3 Discussions have been ongoing between **tie** & BSc since last October to agree a re-baselined programme and allocated and attribution of delays to date. In May 2009, BSC delivered 2 programmes:
- Entitlement programme – provided to show BSC's view of the forecast programme at 31st March 2009 with no mitigation measures
 - Revision 2 programme – provided to show BSC's view of the forecast programme with some minor mitigation measures included
- 1.4 The sectional completion dates for each of these programmes is shown, along with the **tie** and BSC's current forecast, in the table below.

	Rev 0	Rev 1	Live (tie)	Live (BSC)	Entitlement	Proposed Rev 2
Section A	25/03/10	1/6/10	12/4/11	24/03/11	15/06/11	23/06/11
Section B	23/04/10	1/7/10	6/6/11	31/05/11	18/07/11	16/08/11
Section C	17/01/11	10/3/11	28/02/12	29/02/12	24/07/12	05/04/12
Section D	16/7/11	6/9/11	26/08/12	27/08/12	20/01/13	02/10/12

- 1.4 **tie** responded to both the entitlement and Rev 2 programme under Clause 60.4.3 of the Infraco Contract seeking additional information against which the programmes could be substantiated. A number of meetings have been held with the respective

parties to discuss the programmes and **tie**'s responses but there is still no agreement on relief/entitlement due.

THE DISPUTE

2.1 **tie** and BSC both have different views on the relief/extension of time that should be granted to BSC for programme delays to date. Furthermore, both parties have different views on the approach that should be taken to calculating such relief/extension of time.

TIE'S POSITION ON THE DISPUTE

3.1 **tie** recognises that there are a number of causes of delay for which it is responsible. But **tie** also believes that many of the programme delays to dates have been caused by the Infraco Contractor and that a fair assessment of relief/extension of time should consider both classes of delays and impacts on the overall programme.

3.2 **tie** has undertaken a detailed analysis of delays to date and identified the cause of the delay and made an assessment on the responsibility for that delay. This is attached as Appendix 1.

3.3 Furthermore, **tie** believes that Infraco have not taken reasonable steps to mitigate delays as required under the Infraco Contract. Additionally **tie** believes that the Infraco Contractor and has stood by a number of core principles which have compounded delay impact. These include:

- An unwillingness to commence work in any section where "exclusive" access has not been available to them;
- An unwillingness to commence any work associated with a change unless the estimate for such change has been agreed, and
- An unwillingness to revise "preferential" programme logic which have no physical or construction purpose in an attempt to mitigate apparent delay impact.

3.4 The Infraco Contract includes mechanisms for agreeing extension of time/relief from performance obligations. These mechanisms are Clause 64 Relief Events, Clause 65 Compensation events and Clause 80 **tie** Changes. This involves Infraco identifying any impact on the programme as a result of such event or change. To date Infraco has provided very little substantiation for the delays to date which have been submitted as Compensation Events or as Changes. **tie** would have preferred to have dealt with each event on its own merits and granted EOT/relief for each event as it was submitted and substantiated by Infraco. This is how the contract is designed to operate.

3.5 However, the position is now that Infraco have submitted a Rev 2 programme which indicates that it believes relief/EOT should be granted to October 2012 for Sectional D completion and other revised Section A, B & C dates. This appears (based on discussions held with BSC) to be based on :

- A global approach to delays being taken by Infraco (no individual substantiation provided);
- A view that there are 4 critical paths in this programme for which the accountability for delays all rests with **tie**;
- Little mitigation being implemented by Infraco;
- No progress to date being taken account of in this programme;
- Additional construction durations being imported to the Rev 2 programme which drive out the critical path - **tie** do not agree with these durations and Infraco have been unable to substantiate them;
- No account has been taken of delays causes by Infraco to date which cause further resource constraints in the future which then drives out the critical path and Sectional Completion Dates, and
- Hard logic constraints (preferential logic) being used in the programme which artificially drive out the OFRS dates which **tie** believes there are no physical or construction or commercial reason why they should not be revised – **tie** do not believe that Infraco’s strict adherence to superseded programme logic can be justified in the assessment of entitlement to relief/extension of time.

4. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

4.1 **tie** aims to achieve the following by referring this dispute to the internal resolution procedure:

- Agreement on whether the Infraco’s strict adherence to superseded programme logic can be justified in the assessment of entitlement to relief/extension of time;
- Agreement on how additional durations which are expected by Infraco should be substantiated by and agreed by **tie** before being imported into a programme upon which relief/extension of time is being sought;
- Agreement that Infraco could have undertaken mitigation measures such as starting work in sections without “exclusive” access which would have provided programme improvements;
- Agreement that delays caused by Infraco have led to resource constraints downstream which is now driving out the OFRS date;
- Agreement that Infraco should, as per the contract, substantiate programme impacts in line with clauses 64, 65 & 80, and
- Reach agreement on a reasonable assessment of relief/extension of time for Revision 2 given that the individual substantiation has not been provided.

5. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

5.1 tie understands that Infraco's approach to relief/entitlement is to take the critical path and identify the delays responsible for this critical path and use this to prove relief/extension of time.

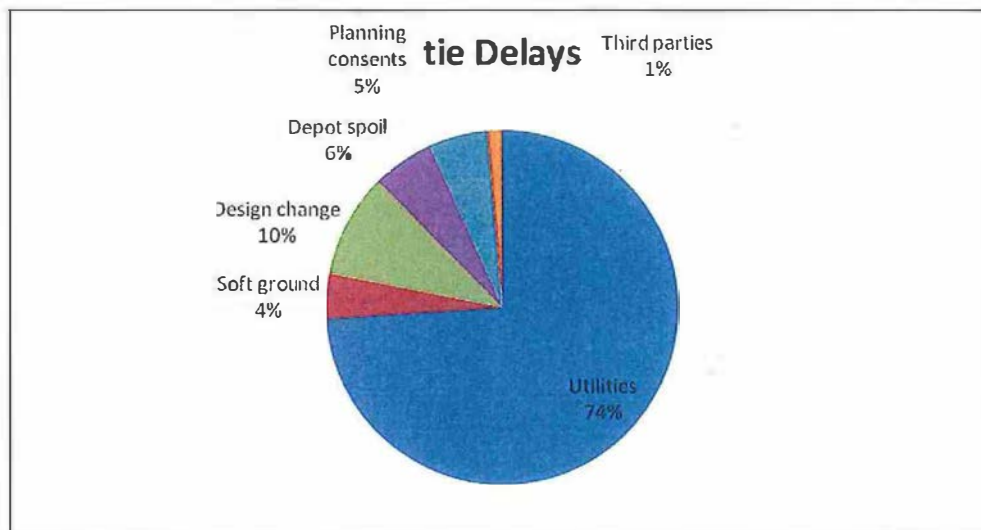
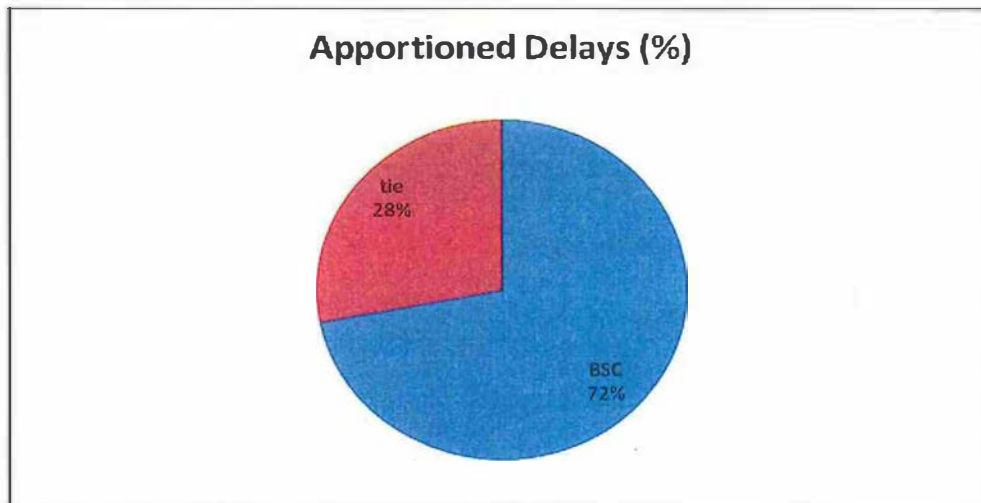
5.2 tie understands that it is Infraco's position that the number of delay events make it too complex to identify impacts to inform Change and Compensation Event notifications.5.3

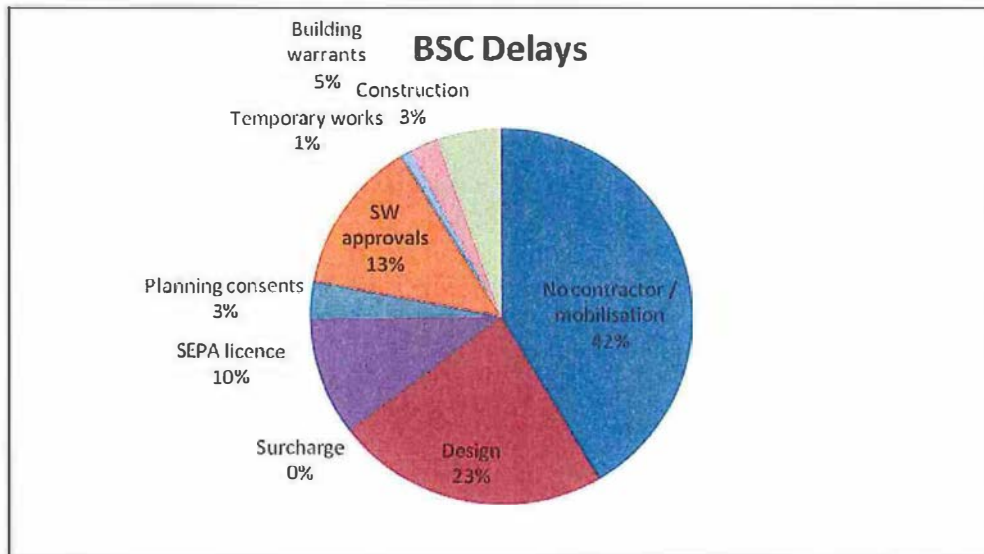
6. LIST OF SUPPORTING DOCUMENTATION

- Appendix 1 – tie's Assessment of Delay

Appendix 1

Details of **tie**'s assessment of delays





Misalignments between Infraco Proposals and SDS Design

TIE LIMITED

POSITION PAPER

relating to

the agreement between tie Limited

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

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1. INTRODUCTION

- 1.1 As part of a “mediation marathon” scheduled for 29 June – 6 July, BSC have raised a perceived difference in interpretation of the “misalignment” process to regularise the differences between Infraco Proposals and the SDS design.

2. THE DISPUTE / DISAGREEMENT

- 2.1 BSC believe that they are entitled to recover any additional construction costs arising from a misalignment. tie do not agree.

3. TIE'S POSITION ON THE DISPUTE / DISAGREEMENT

- 3.1 tie consider that Clauses 4.7 and 4.8 of the Novation Agreement clearly obligates tie to pay for additional SDS works which may result from the conclusions set out and recorded in the respective Development Workshops. Such Change Orders have already been issued.
- 3.2 tie consider that BSC may have entitlement to recover construction costs if the misalignment workshop output amends the pricing assumption in Schedule Part 4 Clauses 3.4 and 3.5. This mechanism is the appropriate route to address any legitimate entitlement.

4. REQUIRED OBJECTIVES OF THE MEDIATION

- 4.1 Agreement on the process and any entitlement principles associated with Misalignment Workshops.

5. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE/ DISAGREEMENT

- 5.1 tie understands that BSC consider that all potential consequences of a misalignment should be identified, evaluated and paid for by tie, irrespective of whether they formal part of the Infraco Proposals or not.

6. LIST OF SUPPORTING DOCUMENTATION

- 6.1 Novation Agreement -- Clauses 4.7 and 4.8
- 6.2 Infraco Contract: Schedule Part Four -- Clauses 3.4 and 3.5

Writing), Clause 110 (*No Partnership or Agency*), Clause 111 (*Notice*), Clause 112 (*Invalid Terms*), Clause 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*), the obligations of the Parties under this Agreement shall be suspensively conditional upon the occurrence of the Commencement Date.

3.2 **tie** may by notice in writing to the Infraco waive any or all of the Conditions Precedent.

3.3 On the date that all of the Conditions Precedent (with the exception of any Conditions Precedent that have been expressly waived by **tie** in writing) have, in **tie's** opinion (acting reasonably) been satisfied, **tie** shall issue the CP Certificate.

3.4 The Infraco shall use its reasonable endeavours to satisfy or procure the satisfaction of the Conditions Precedent as soon as reasonably possible after the Effective Date.

3.5 In the event that the Commencement Date has not occurred by the date falling 3 months after the Effective Date (or such later date as may be agreed in writing between the Parties), **tie** may terminate this Agreement with immediate effect following the service of a notice to that effect on the the Infraco, and in which event, all provisions of this Agreement (other than Part 1 (*Preliminary Matters*), Clause 77 (*Indemnity By Infraco, Liability and Sole Remedy*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*), Clause 106 (*Entire Agreement*), 108 (*Variations to be in Writing*), 110 (*No Partnership or Agency*), 111 (*Notices*), 112 (*Invalid Terms*), 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*)), shall cease to have effect and such termination shall be without prejudice to any accrued rights or obligations as at that date.

4. PRIORITY OF CONTRACT DOCUMENTS

4.1 NOT USED

4.2 In the event of any ambiguity or discrepancy between any provisions in the main body of this Agreement and those in any Part of the Schedule, or between the provisions of any Schedules, **tie's** Representative shall state in writing which provision shall take priority, which shall be deemed to be instructions issued pursuant to Clause 34.1. Provided always that, unless expressly stated otherwise by **tie's** Representative the main body of the Agreement shall always take priority and the following order of priority will apply to Schedule Part 2 (*Employer's Requirements*) and Schedule Part 30 (*Infraco's Proposals*):

4.2.1 the Employer's Requirements; over

4.2.2 the Infraco's Proposals.

4.4 The liability of the SDS Provider to the Infraco pursuant to the SDS Agreement shall not be affected by the Infraco's assumption of liability for design to **tie** pursuant to the Infraco Contract.

4.5 The SDS Provider acknowledges that the Infraco has and shall continue to rely upon all Services carried out by the SDS Provider.

4.6 **tie** warrants that it has received a report from the SDS Provider (annexed at Part B of Appendix Part 7) setting out the misalignments between the Deliverables completed prior to the date of this Agreement and the Employer's Requirements and that it has issued initial instructions (in the form of the letter annexed at Part A of Appendix Part 7) to the SDS Provider in relation to addressing all such misalignments. Upon completion of the work entailed to resolve the misalignments, the SDS Provider confirms to **tie** and the Infraco that such Deliverables shall be consistent with the Employer's Requirements.

4.7 As soon as reasonably practicable, the Parties shall commence and expeditiously conduct a series of meetings to determine the development of the Infraco Proposals and any consequential amendment to the Deliverables (the "**Development Workshops**"). The matters to be determined at the Development Workshops shall be those set out in the report annexed at Part C of Appendix Part 7 (the "**Misalignment Report**"), together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4 to be dealt with in the following order of priority and objective unless otherwise agreed:

- 1 Roads and associated drainage and vertical alignment with the objective of minimising the extent of full depth reconstruction for roads thus minimising cost and construction programme duration
- 2 Structures value engineering, including track fixings to structures with the objective of enabling BBS to realise the Value Engineering savings for the structures identified in Schedules 4 and 30 of the Infraco Contract (Pricing and Infraco Proposals respectively)
- 3 OLE Design with the objective of identifying and agreeing the actions, responsibilities and programme to enable Infraco to implement their proposals for OLE as identified in the Infraco Proposals
- 4 Trackform with the objective of completing an integrated design to enable BBS to implement their proposals for trackform

provided that in circumstances where compliance with the Employer's Requirements is dependant upon further design development to be undertaken by the Client (and which is out with the Services provided by SDS), the SDS Provider's obligation pursuant to this Clauses 4.2.2(d) shall be limited to having produced or producing designs and Deliverables that are capable of allowing Infraco to develop a design which is compliant with the Employer's Requirements.

- (e) save in respect of any Consents which are the responsibility of **tie** in terms of Clause 19 of the Infraco Contract, the Consents listed at Appendix Part 2 (*Consents Programme*) are all the Design Stage Consents which are required to enable the Edinburgh Tram Network to be procured, constructed, installed, tested and commissioned, and thereafter operated and maintained in accordance with the Infraco Contract;
- (f) it has received no Client Notice of Change or any other instruction from **tie** to vary any term of the SDS Agreement (whether pursuant to Clause 15 and 29.2 of the SDS Agreement or otherwise) and, subject to Clause 9.1 below, it has agreed no variation, alteration of the SDS Agreement; and
- (g) no Change in Law has come into effect or is anticipated to come into effect which would have a material adverse impact on the Deliverables completed or to be completed pursuant to the SDS Agreement

The SDS Provider warrants and undertakes to the Infraco that it shall be liable for any loss or damage suffered or incurred by the Infraco arising out of any negligent act, default or breach by the SDS Provider in the performance of its obligations under the SDS Agreement prior to the date of this Agreement. The SDS Provider shall be liable for such loss or damage notwithstanding that such loss or damage would not have been suffered or incurred by **tie** (or suffered or incurred to the same extent by **tie**) or is different to or arises on a different basis to any loss or damage which would have been suffered or incurred by **tie**.

- 4.3 The SDS Provider undertakes and warrants to the Infraco that its design is consistent with and delivers the Edinburgh Tram Network runtime set out in the Employers' Requirements , which runtime supersedes that set out in the SDS Agreement.

5. Sub-station buildings with the objective of resolving the misalignment between Infraco Proposals and SDS Design with the minimum of changes to accommodate the Infraco Proposals for substations.

The following to be reviewed at the end of the Development Workshop to identify any issues arising from the above items:

1. Earthworks
2. Landscaping
3. OLE Foundations
4. Alignment
5. Site Clearance
6. Tramstops
7. all other items in the Misalignment Report together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4.

At the Development Workshop, the Parties shall also develop a strategy for co-operation between the SDS Provider and the Infraco to manage design development and the necessary interface between the Infraco's design and the design developed by the SDS Provider.

4.8

The product of the Development Workshops shall be a report signed by each of the Parties to detail the conclusions in respect of each matter and the payments to be made to the SDS provider in respect of the work to be carried out by the SDS Provider as a result of the conclusions set out in the report. Any consequential **tie** Change Orders or instructions shall be appended to such report as and when the same are issued. **tie** shall pay the SDS Provider for the work required for the Development Workshop on an hourly rate basis in accordance with the hourly rates set out in Appendix Part 8 and the SDS Provider agrees that the Infraco shall not be liable to make such payments to the SDS Provider. For the avoidance of doubt, the Infraco and **tie** agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in this report will be a Mandatory **tie** Change under the Infraco Contract, and a Client Change under the SDS Agreement.

BDDI - IFC

TIE LIMITED

POSITION PAPER

relating to

the agreement between **tie Limited**

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

1. INTRODUCTION

1.1 The dispute between BDDI and IFC is that **tie** believes it is a contract requirement for BSC to complete design to

2. THE DISPUTE

2.1 There are differences between BDDI drawings and the IFC issues.

2.2 Infraco consider that any changes however minor are to be a **tie** Change and **tie** requires to pay.

2.3 **tie's** position is that Infraco are only entitled to a **tie** Change if the design is amended beyond normal development and completion of the design or it **tie** (or a third party) changes the design.

3. TIE'S POSITION ON THE DISPUTE

3.1 **tie's** position is that if a design has been amended then BSE require to provide the detailed reasons for such amendment in order to demonstrate that the design change is

3.1.1. As a result of any amendments beyond normal development and completion of design.

3.1.2 Not an Infraco breach (or a breach of its designer)

3.1.3 Not a Infraco change

4. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

4.1 Objective is for BSC to acknowledge this requirement to advise **tie** as to why and Change has occurred, to agree a proper Estimate for any additional works and to issue the necessary **tie** Change to allow the work to progress.

5. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

5.1 Infraco do not consider that they require to provide details as to the reasons for any design amendments and that Infraco are not responsible for the delay in the production of IFC drawings or any amended designs contained in the IFC drawings.

6. LIST OF SUPPORTING DOCUMENTATION

6.1

Off street issues: RRRW, Gogarburn Bridge, Carrickknowe
Bridge, and Depot

TIE LIMITED

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relating to

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1. INTRODUCTION

- 1.1 At the following structures Russell Road Retaining Wall, Carrickknowe Bridge, Gogarburn Bridge and Gogar Depot, tie and BSC have been in detailed discussions re the changes that have occurred within the design and the valuation of the change

2. THE DISPUTE

2.1 Russell Road

- Limit of LOD
- Change in pile shape and number of piles

2.2 Carrickknowe

- Normal design and development issues within the structure

2.3 Gogarburn

- Design and Development issues
- Additional piling works

2.4 Depot

- Design and Development issues
- Base Date Design issues

3. TIE'S POSITION ON THE DISPUTE

- 3.1 At all of the above structures tie believe the works to be normal Design and Development. However, BSC claim it is a change outwith Design and Development because they are changes from Base Date Design to IFC.
- 3.2 In both principal and valuation tie has sought to close the differential gap and as submitted proposals to BSC for their consideration, Appendix A.

4. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

- 4.1 To commence works and provide contract interpretation of normal Design and Development.

5. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

- 5.1 BSC's position is all changes in Design are changes that require to be instructed through the change process.
- 5.2 BSC's position is that they do not have to inform tie why the change has taken place.

6. LIST OF SUPPORTING DOCUMENTATION

6.1 BDDI IFC Table of Deliverables 20090612 – Appendix A

BSC / tie Summary of actions from Meetings 10 & 11 June 2009

INTC	Description	Estimated Value BSC Excluding % Uplifts	Estimated Value Tie Excluding % Uplifts	Variance tie-BSC	BSC Comments	Action / Owner	Action to be taken	tie's Comments
	Structure Change (permanent works)	£989,721.18	£0.00	£-989,721.18	shape & form Change - structure moved 2.7m, deeper excavation, ret block wall etc	tie	tie accept in principle & reviewing amount.	tie/BSC TBA
	Temporary Works Change	£1,757,771.00	£0.00	£-1,757,771.00	shape & form Change - Sheet piling now required due to design changes	tie	tie accept in principle & reviewing amount. Meeting with Network Rail/tie/BSC to be convened to optimise temporary design (economical solution)	tie/BSC TBA
	2 Hilton Car Park	£76,238.21	£0.00	£-76,238.21	No agreement on Change	tie / BSC	BSC's position is that it is Accommodation Works and needs Instruction - tie disagree	BSC's responsibility
	Haymarket Viaduct							
	Design Estimate only for Additional Retaining Wall	£12,926.00	£0.00	£-12,926.00	tie agree in principle, no TCO issued	tie	tie to issue TCO	tie instruction issued for £12k
	Construction Estimate (BDDI to IFC) to be submitted				No agreement yet			tie/BSC
	Propping Estimate to be submitted				No agreement yet			tie/BSC
	Cycle provision to be agreed in Principle	£6,500.00	£0.00	£-6,500.00	No agreement yet			tie/BSC
212	Section 2 - Road Drainage Change				Estimate to be submitted and will be in the order of 500K.	BSC		tie/BSC
	Section 2 - Track Drainage Change				BSC still to raise and provide Estimate to tie	BSC		tie/BSC
	212 Total	£878,083.71	£0.00	£-878,083.71				
203A	Foundations	38,256.33	£0.00	£-38,256.33	shape, form & specification Change - tie accept a change to certain elements due to steelwork changes	tie	tie reviewing amount	tie's proposal is £38k
203B	Structural Steelwork	216,471.47	£0.00	£-216,471.47	shape, form & specification Change - tie accept a change to certain elements	tie	tie reviewing amount	tie's proposal is £216,471k
203C	Hard Landscaping	155,139.59	£0.00	£-155,139.59	shape, form & specification Change - tie accept a change to certain elements	BSC/tie	BSC to review additional drawings provided by tie, tie reviewing amount based on duplicate "different" drawings	tie/BSC TBC
203D	Substation Building	15,375.79	£0.00	£-15,375.79	shape, form & specification Change - tie believe that BSC should have made allowance at BDDI. Tie provided a separate BDDI drawing showing troughs in slab	BSC	BSC to review additional drawing provided by tie	BSC's responsibility
203E	New Chamber	109,931.27	£0.00	£-109,931.27	shape, form & specification Change - tie believe that BSC should have made allowance at BDDI design principle Change - no soil nailing at BDDI (whole depot moved north)	BSC	BSC to review additional drawings provided by tie tie review overall future requirement to eliminate soil nailing	BSC's responsibility
203F	Soil Nailing and Soil Reinforcement Works	£342,909.26	£0.00	£-342,909.26		tie		Remove
	A0 Underpass							
	North Side Utilities Diversion				Agreed except for the support of the utilities which was assumed not to be required. The support is now required and BSC to provide an estimate for this work.	BSC/tie	tie to review and issue revised TCO to deal with support	tie/BSC
	South Side Utilities Diversion				BT and Gas Lines are being diverted under the MUDFA contract.	Note	Not BSC Scope of Work	tie/BSC
	BT Utilities Diversion (road reserve) encased 6 and 12 pair cables				No estimate provided yet.	BSC		tie/BSC
	Piles BDDI to IFC length increased - Estimate to be provided				design principle Change - similar to RRRW	BSC		tie/BSC
	SUMMARY	£5,798,640.05	£850,895.19	£-4,947,744.86				

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