

PROJECT NOTICE

SUPPORTING DOCUMENTATION / EVIDENCE PARAGRAPHS TO SUPPORT DRAFT REMEDIAL TERMINATION NOTICE

THIS DOCUMENT CONTAINS A WORK-IN-PROGRESS SET OF SUPPORTING DOCUMENTATION AND 'EVIDENCE' FROM TIE TO SUPPORT PROJECT NOTICE.

THE SEQUENCE OF THIS DOCUMENT ALIGNS WITH THE DRAFT REMEDIAL TERMINATION NOTICE (DATED 4.6.2010, REFERENCE: AF/JLG/310299/15/UKM/30167038.1).

UNDER SOME BREACH HEADINGS THE SUPPORTING DOCUMENTATION / EVIDENCE HAS BEEN PROVIDED AS A NARRATIVE, IN OTHERS IT HAS BEEN PROVIDED AS A LIST OF BULLET POINTS. THE CONTENTS OF THIS DOCUMENT IS SUPPORTED BY A SET OF HARD COPY DOCUMENTATION (IN THE HANDS OF DLAP AND TIE).

[NOTE: THIS DOCUMENT DOES NOT YET REFLECT ALL THE COMMENTS WHICH HAVE BEEN RECEIVED FROM TIE (AS THE FOCUS IS CURRENTLY ON THE MATERIAL BREACHES AT THE FRONT END OF THE DOCUMENT)]

[ANDREW - SUGGEST THIS DOCUMENT IS NOT CIRCULATED AT THIS STAGE, AS IT CONTAINS NOTES FOR US TOO]

1. CLAUSE 34.1 AND CLAUSE 80.13 - INFRACO BREACH OF OBLIGATIONS TO COMPLY WITH INSTRUCTIONS AND TO PROGRESS THE WORKS

1.1 The Infraco has breached its obligation under Clause 34.1 of the Infraco Contract to comply with and adhere strictly to instructions given by tie and tie's Representative in relation to the construction and completion of the Infraco Works in accordance with the Infraco Contract.

1.2 tie has given clear written instructions in relation to commencing, continuing with and/or progressing the Infraco Works. tie has given clear written instructions in relation to the provision of Deliverables (pertinent information and documentation) which is critical for satisfying requirements such as Design assurance, works programming and sequencing, Best Value delivery, safety and performance security in relation to the Infraco's responsibilities under the Infraco Contract.

1.3 The Infraco has failed to comply with tie's instructions, has ignored the instructions, or has responded with a contractually flawed argument as to why it will not comply with the instruction.

1.4 The Infraco's breach of its obligation to comply with the client's instructions, and the Infraco's actions and lack of action, directly materially and adversely affects the carrying out and completion of the Infraco Works and amount to an unauthorised suspension of the progress of the Infraco Works for more than 15 Business Days.

1.5 Example: Permit to Commence Works - Section 1d (On-Street Works at Haymarket)

1.5.1 The Infraco has failed to comply with tie's express instruction delivered on 8 April 2010 to provide tie with the necessary Deliverables in order that tie may consider issuing a Permit to Commence Works in accordance with the Infraco Contract for Section 1d (on-street works at Haymarket). This breach has been previously notified to the Infraco by tie and a response has been pressed for. As at the date of this Remediable Termination Notice, the Infraco has not provided these Deliverables.

1.5.2 tie's instructions were given in accordance with the terms of the Infraco Contract. Providing these Deliverables in compliance with the instruction would not place the Infraco in breach of any term of the Infraco Contract.

1.5.3 This failure to comply with the instruction and the failure to provide the information prevents tie from issuing a Permit to Commence Works. The Infraco's refusal to comply with the instruction and the failure to provide the information means that the Infraco Works are not being progressed with due expedition, constituting breach by way of adverse effect on the carrying out and completion of the Infraco Works.

1.5.4 [Infraco Reply letter 5980, dated 10 June 2010]

1.6 Example: Section 5A

1.6.1 tie letter dated 9 June 2010 (ref: INF CORR 5269/DM - tie has instructed the Infraco to proceed with the Works [DLAP: we don't have a copy of this letter - have requested from Susan]

1.6.2 Infraco letter dated 26 May 2010 (ref:25.1.201/MRH/5793) - ***

1.7 Example: Section 7 and Depot Works

1.7.1 **tie** letter dated 4 June 2010 (ref: INF CORR 5272/DM and 5273/DM - **tie** has instructed the Infraco to proceed with the Works [DLAP: *we don't have a copy of this letter*]

1.7.2 [Infraco letter ref 5978, dated 10 June 2010]

1.8 Example: Section 1A - Tower Place Bridge

1.8.1 [couple of letters in file (7 May 2010) - asked tie for update as to whether these are examples or not]

1.9 Example: Section 1A - Retaining Wall at Lindsay Road

1.9.1 couple of letters in file (7 May 2010) - asked tie for update as to whether these are examples or not

Further information

The items which **tie** requested re Section 1d include:

- Complete and approved integrated construction drawings issued as IFC;
- The Residual Risk Register;
- The Infraco's Risk assessment;
- A Method Statement/Works Package Plan;
- Health & Safety Plan;
- A programme; and
- Details of the Infraco's resource and logistics plan and programme.

tie instructed the Infraco for this information on 8 April 2010 (letter ref: INF CORR 4736). The Infraco responded by letter dated 29 April 2010 (ref: 5564) making a clear declaration that it was not (at that time) agreeing to comply with **tie**'s instruction. Around 40 Business Days passed and the Infraco still did not comply with this instruction. Therefore, **tie** wrote to the Infraco on 24 May 2010 (letter ref: 5133) notifying the Infraco of this breach. As at the date of this Remedial Termination Notice, the Infraco had continued to fail to provide the Deliverables asked for by **tie** on 8 April 2010.

Insofar as this information may be regarded as "further information", the Infraco is obliged to submit it in accordance with Clause 5.1 of Part A of Schedule Part 14 (Design Review Procedure), which was explained to the Infraco by **tie** in **tie**'s letter of 24 May 2010.

Supporting Documentation

- set of correspondence on this topic from 12 February 2010 - 24 May 2010 (including letters named above)

- 1.10 The Infraco has breached its obligation to comply with tie's instructions to commence work in respect of tie Changes before being in receipt of a tie Change Order where tie has directed the Infraco to commence that work in accordance with Clause 80.13.**
- 1.11 The Infraco has refused repeatedly to proceed with tie's direction to commence work which is subject to an Infraco Notice of tie Change ("INTC"), other than in circumstances of Clause 80.15 (where the matter is referred to DRP).
- 1.12 The Infraco has refused repeatedly to proceed with such directions in cases where the INTC does not affect the scope or nature of the works. The Infraco has failed to comply with directions to commence works in cases where the INTC is not disputed. The Infraco has failed to comply with directions to commence works in cases where tie is awaiting an Estimate from the Infraco or where the Estimate has been significantly overvalued or where the Estimate has not yet been agreed (see below at section ***).
- 1.13 tie recognises that, on 21 May 2010 (letter ref: 25.1.201/KDR/5763), the Infraco referred to DRP one of the Notified Departures in relation to which it is refusing to comply with tie's direction to commence work, including the question whether or not tie is entitled to issue to the Infraco an instruction under clause 80.13 or 34.1 to commence, carry out or complete the works which are subject to a disputed element of the INTC in question (INTC 109, in relation to the introduction of permanent/sacrificial sheet piling). This question will be determined in due course, but, in any case, it does not affect the position with regard to the Infraco's failure to comply with tie's instructions and directions to commence works where the INTC is not disputed.
- 1.14 The Infraco's insistence on refusing to commence work without agreement of the valuation of the work required by reason of a claimed INTC is not consistent with the Infraco's obligations under the Infraco Contract.
- 1.15 The Infraco's arguments on this point have changed throughout the course of the Infraco Contract. Originally, the Infraco recognised that tie was entitled to make a direction to the Infraco to proceed with works prior to a Change Order being issued. For example, in earlier correspondence (e.g. Infraco letter 25.1.201/MRH/675, dated 14 October 2008 and Infraco letter 25.1.201/MRH/864, dated 6 November 2008), the Infraco stated "As required by Clause 80.13 of the Infraco Contract we shall not commence work in respect of this tie Change until instructed through receipt of a tie Change Order unless you direct us otherwise", recognising the ability under Clause 80.13 for tie to direct the Infraco to commence work.
- 1.16 In the Infraco's letter of 3 March 2010 (ref: 03032010.1), the Infraco stated that it is not ignoring instructions under Clause 80, but adds that "in doing so" (i.e. ignoring instructions) the Infraco is not in breach of Clause 80 as the Infraco is "forbidden" to act on tie's instruction to proceed with alleged changes prior to there being a finalised tie Change Order. This is disingenuous. The Infraco is not "forbidden" by tie to proceed with these works (quite the contrary: tie is pressing the Infraco to proceed with works under those very instructions and confirming that it will not prejudice the Infraco's rights to payment under the Infraco Contract). The Infraco is not "forbidden" by the terms of the Infraco Contract.
- 1.17 On the basis of the facts, dialogue and supporting documentation, tie has formed the conclusion that the Infraco is deliberately refusing to comply with tie's instructions in order to support financial claims and to avoid the Infraco's responsibilities. This ignores the conventional contractual mechanisms through which a client is entitled to direct his

contractor, is obstructive and undermines the foundations of the contractual relationship and partnership between the parties.

1.18 The Infraco's obdurate and continued refusal to comply with **tie's** instructions, directions, requests (without reason or entitlement) means that the Infraco Works are not being progressed. This is materially and adversely affecting the carrying out and completion of the Infraco Works.

1.19 Example: Works at Depot

[NOTE: tie is identifying key up-to-date examples of the Infraco not following instructions/refusing to commence works]

1.19.1 **[tie** has instructed the Infraco to carry out certain works (listed below) with due expedition in accordance with Clauses 34.1 and 80.13 of the Infraco Contract (letters of 19 March 2010 (ref: ***); 2 April 2010 (ref: ***); and 22 April 2010 (ref: ***).]

1.19.2 [Insert information about Works to be carried out]

1.19.3 As at the date of this Remediable Termination Notice, the Infraco has not commenced these works, contrary to **tie's** express instructions. This non-compliance with instructions means that the works are not being progressed. This has a material and adverse effect on the carrying out and completion of the Infraco Works.

1.19.4 [*Infraco letter 5978 dated 10 June 2010 - sent through by Julie Smith*]

1.20 Example: Section B (Off-street works)

1.20.1 **tie** has instructed the Infraco to carry out certain works (listed below) with due expedition in accordance with Clauses 34.1 and 80.13 of the Infraco Contract (letters of 19 March 2010 (ref: INF CORR 4487) and 7 May 2010 (ref: INF CORR 4976)). These works were required by **tie** to be carried out without further delay such as to maintain progress to allow completion of Section B of the Infraco Works by the Planned Completion Date and facilitate testing and commissioning.

1.20.2 ***[Insert information about Works to be carried out]***

1.20.3 As at the date of this Remediable Termination Notice, the Infraco has not commenced these works, contrary to **tie's** express instructions. This non-compliance with instructions means that the works are not being progressed. This has a material and adverse effect on the carrying out and completion of the Infraco Works.

Further information

tie has regularly requested and instructed that the Infraco proceeds the works with due expedition and accepts the spirit of Clause 80.16 of the Infraco Contract that the Infraco is entitled to claim its demonstrable costs in implementing the **tie** Change in accordance with Clause 80.6 prior to determination of the Estimate). However, the Infraco has persisted in asserting that Clause 80 does not permit the Infraco to commence work in respect of a **tie** Change (including a Notified Departure)

until instructed through receipt of a **tie** Change Order for each INTC, or after the **tie** Change has been referred to DRP.

Aside from the contractual argument on the basis of clause 80.13, coupled with clause 34.1, it is plainly absurd to interpret the Infraco Contract to bar **tie** (the Client) from instructing otherwise. It makes no commercial sense for the Infraco to be entitled to frustrate the progress of the work where the only debate is about who will bear the ultimate cost of the work in question and there is no controversy about the nature or the scope of the work. The message has consistently been given to the Infraco that the Infraco's entitlement to make recovery for that work, in the event that it transpires that **tie** should be responsible for its cost and time consequences, would be preserved.

Supporting Documentation

List from **tie** of locations where 80.13 instructions have been issued and no commencement of physical works to date: [DLAP Note: Have asked to confirm that details about these works would be available if need be]

Balgreen road
Sewer lining at water of Leith Bridge
South Gyle access bridge (east abutment)
Demolish structures 97 & 102 near Roseburn Street
Roseburn street viaduct
Russell Road Bridge
Water of Leith Bridge
Demolition and re-alterations at Leith Walk Bus Depot
Protection of live utilities at Russell Road Bridge
Section 5B & 5C Drainage
Trackform design at Leith walk Railway Bridge

Change in position letters

2. **CLAUSES 60 AND 61 - INFRACO'S FAILURE TO PROGRAMME AND ACHIEVE CONTRACTED RATE OF PROGRESS**
- 2.1 **The Infraco has breached its obligation under Clause 60.1 of the Infraco Contract to progress the Infraco Works with due expedition and in a timely and efficient manner without delay.**
- 2.2 **The Infraco has breached its obligation under Clause 60.1 of the Infraco Contract to achieve timeous delivery and completion of the Infraco Works and its other obligations under the Infraco Contract.**
- 2.3 From the outset of the Infraco Contract, the Infraco has shown no willingness to progress the Infraco Works with due expedition and in a manner commensurate with an experienced properly resourced contractor as required under the Infraco Contract. The Infraco continues not to progress the Infraco Works with due expedition and in a timely and efficient manner without delay. The delivery of the Infraco Works is seriously delayed. The Infraco's breach of clause 60.1 applies to failings including: late or non production of the Design; lack of progress for off-street and on-street works; non-compliance with **tie**'s instructions to provide information or progress works; late, or lack of, appointment of Key Sub-Contractors; non-compliance with contractual timescales for **tie** Changes. All these delinquencies have clear and material adverse effect on the carrying out and completion of the Infraco Works.
- 2.4 **tie** recognises that there has been delay caused by delays to the diversion of utilities. **tie** has offered an extension of time, which is subject to correspondence and discussion under separate cover. However, the Infraco's breach of its obligations is independent of, and over and above, any delay caused by the diversion of utilities. After 25 months, only [z %] of the Infraco Works have been completed, a rate of progress which is [x%] per month as opposed to the contracted rate of [y%] per month.
- 2.5 **Example: No completed integrated and assured Design [DLAP Note: although clear that this is a fact, we have no supporting documentation on file, apart from some contract letters of description - emailed Susan 10 June to let her know]**
 - 2.5.1 As at the date of this Remediable Termination Notice, the Infraco has not completed an integrated and assured design. This is a fundamental failure going to the root of the delivery of the Infraco Works. The Infraco has not offered any explanation for the substantial delay in completing the Design.
 - 2.5.2 Production of an integrated and assured Design is the core responsibility of the Infraco under the Infraco Contract. The Infraco is responsible for the SDS Provider under the Infraco Contract and the novation arrangements. Clause 11.3 of the Infraco Contract obliges the Infraco to procure that the SDS Provider carries out and completes the SDS Services in accordance with the SDS Agreement. Clause 11.4 of the Infraco Contract obliges the Infraco to carry out all required management activities to manage the performance of the SDS Services. The Infraco is wholly liable for the performance of the SDS Services under the Infraco Contract (subject to any express limitations or rights in the Infraco Contract). The Infraco must ensure the entirety of the completed Design is legally available to **tie** and has not done so.
 - 2.5.3 The Infraco is responsible for any Infraco Design (any Design used by the Infraco for which the SDS Provider is not responsible for producing pursuant to the SDS

Agreement) which forms part of the design solution. The trackslab and foundation design is an element of the Design which the Infraco (Siemens element of the consortium) is producing. As at the date of this Remediable Termination Notice there is no integrated design solution for on-street trackworks. The Infraco has not put into place a plan to improve the delivery of the design. There is no demonstration to **tie** that the Infraco has reached a formal understanding with the SDS Provider in order to present an integrated design solution. There is no cogent and updated Design Programme.

2.5.4 There have been delays caused by the Infraco (Siemens element of the Infraco consortium) being late in providing design solutions for those parts of the Infraco Works which were excluded from the SDS Provider's responsibility. There have been delays caused by failure of the Infraco Parties to provide design information for integration purposes. There have been delays caused by the Infraco failing to obtain approval from Approval Bodies.

2.5.5 If the Infraco alleges that the SDS Provider has fully complied with its duties and obligations pursuant to the SDS Agreement in order to support compliance with clauses 11.3 and 11.4 of the Infraco Contract (compliance with which **tie** denies), it is axiomatic that the design related deficiencies and failures which have occurred and continue to occur must be caused by Infraco breaches and failures.

2.5.6 The current position and the lack of integrated design solution is a clear breach of the Infraco's obligations to progress the Infraco Works with due expedition and in a timely and efficient manner without delay, irrespective of whether or not the source of the delay flows from breaches by the SDS Provider or the Infraco. The lack of integrated design solution is materially and adversely affecting the carrying out and completion of the Infraco Works.

2.6 The Infraco has breached its obligations pursuant to Clause 61.1 to comply with tie's instructions to increase rate of progress.

2.7 It is recognised that there are significant delays to the delivery of the Edinburgh Tram Network. **tie** has instructed the Infraco by a series of letters through the course of the Infraco Contract to increase rate of progress for the Infraco Works. The Infraco has failed to comply with these instructions. Compliance with such instruction would not put the Infraco in breach of its obligations under the Infraco Contract. The Infraco has refused to satisfy the instructions to increase rate of progress and has not taken any meaningful measures to prevent further delay to the Infraco Works. The Infraco's breach materially and adversely affects the carrying out and completion of the Infraco Works and compounds the delay and adverse consequences for **tie**.

Further information and Supporting Documentation

Example: Russell Road and Baird Drive Retaining Walls

DLAP Note: tie advised this example as drafted is weak - this wording comes from one of the contract letters as a prompt - issue was about temporary works design and the time it took for the Infraco to come up with this. Worth a discussion with Colin Neil.

[You now assert that the design you have developed for the various sections of Retaining Walls between Russell Road and Baird Drive requires such longer construction period that it would have, in any event, caused the Planned Completion Dates to be substantially delayed. Clearly you have not

taken account of the requirement to develop design solutions and validate these sufficiently early to achieve the Planned Completion Dates. - to be updated following discussion with Colin Neil].

Example: Rate of Progress

[tie to provide stats re rate of progress and access to Site - included in evidence folder - DLAP Note these are not quite as stark as they may first appear?]

There are also letters on increase rate of progress - see folder. These date back to 2009 and cover various sections - Hilton car park, carricknowe,

There are also letters/stats in relation to BSC not pursuing changes timeously - this stems from Siemens 33, which was an initiative proposed by Siemens to try to target 33 Key areas which were subject to change and to get them going - the evidence shows that it made little difference to the rate of progress and often actions were with the Infraco.

The Infraco has failed to update the Programme and comply with the Programme requirements in accordance with the Employer's Requirements. Compliance with these Programme requirements is essential in order for tie to have visibility of the works which the Infraco is carrying out, the programme, any slippage and mitigation measures and any confidence and any form of certainty around the completion of the Infraco Works.

[DLAP: there are a number of letters in relation to Programme Rev 3 and tie's rejection of the Infraco's proposal, as it did not address the matters which tie required it to cover, in relation to omissions etc

There is also correspondence in relation to the discussions on Rev 2 and the lack of mitigation

Finally, the draft Acutus Report contains info in relation to lack of mitigation - copy in folder at section 2]

The Infraco has failed to deliver a mitigated Programme for tie's acceptance.

After months of discussion between the parties, Infraco submitted several, of what is purported to be mitigated, programmes for acceptance by tie under Clause 60 of the Infraco Programme. None of these have been able of acceptance by tie under Clause 60.4. This is due to flaws in the fundamental programme logic, lack of mitigation and lack accelerative measures which could have been agreed by tie for incorporation into the programme.

[Jo to check against tie's comments on ERs Programme section, which were update by Tom Hickman - copies in relevant section of folder]: The Infraco has continuously failed to comply with the following sections of the Employer's Requirements (this is a non-exhaustive list): sections 12.1.2 (Progress Reporting); section 12.2 (Programme Management); section 12.8.1 (Document Standards & Control); section 39.3 (Basis of Programme) and section 39.5 (Mandatory Codes).

On 10 July 2009 (ref: INF CORR 1758/MJ), tie wrote to the Infraco specifically in relation to the Princes Street two week Look-Ahead programme and progress update, but also stating that, as at that date, no submissions had been made by the Infraco to comply with section 12.1.2 (Progress Reporting), section 12.2 (Programme Management) and section 12.8.1 (Document Standards & Control). The Infraco was asked to rectify this as a matter of urgency.

On 29 July 2009 (ref: INF CORR 1860/MJ), **tie** again wrote to the Infraco, as the Infraco had not replied to this letter (ref: 1758). Once again **tie** recorded the Infraco's failure to comply with the Employer's Requirements.]

Failure to discharge design programme obligations - again, well documented and known, but we don't have much evidence at the moment. Couple of letters and Audit Report would probably give some further details.

3. CLAUSE 11 - INFRACO FAILURE TO DELIVER THE SDS SERVICES AND MANAGE THE SDS PROVIDER

3.1 The Infraco has breached its obligation pursuant to Clause 11.3 of the Infraco Contract to procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement.

3.2 The Infraco has breached its contractual obligation to procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. The SDS Provider has not carried out and completed the SDS Services in accordance with the SDS Agreement. The fact that there is no complete, integrated and buildable design two years into the Infraco Contract (and five years after the appointment of the SDS Provider) is irrefutable evidence of this.

[DLAP NOTE : This is well known fact but we need to look at the evidence for this - we have a couple of contract letters (although I don't have the signed versions) have asked tie to think about via email on 10 June]

3.3 What has been designed by the SDS Provider has habitually been delivered late. As at the date of this Remediable Termination Notice, [xxxx]IFCs remain outstanding. On the v31 Design Programme, all IFCs were due to be issued and completed by 21 [5] January 2009. On the v58 Design Programme, the date for delivery of the last IFC has slipped until 17 November 2010. The delivery of the design has been delayed by twenty months. There is evidence of extensive and continuous updating by the SDS Provider (without Infraco intervention or control) of later delivery dates for IFCs.

3.4 The SDS Provider has regularly delivered poor quality design and design which is not fit for purpose. There is evidence of disjointed delivery of design.

3.5 The SDS Provider's design often does not represent Best Value as required under the SDS Agreement and Infraco Contract. For example, the Design evolution from Russell Road to Balgreen Road and Haymarket Viaduct.

3.6 It is clear to tie through a combination and accumulation of examples, dialogue with the Infraco and the SDS Provider, meetings, audits and correspondence that the Infraco has breached its obligations to manage the SDS Provider, as well as the SDS Provider breaching its own contractual obligations. This means that tie still does not have a fully integrated design solution; the Infraco Works have been significantly delayed as a result of the late design and the design has not been prepared with the requisite level of skill and application of expertise required for a project such as the Edinburgh Tram Network.. In addition, tie does not benefit from a best value design. The Infraco's breach in this regard therefore materially and adversely affects the carrying out and completion of the Infraco Works.

3.7 The Infraco has breached its obligation pursuant to Clause 11.4 of the Infraco Contract to carry out the required management activities in order to manage the performance of the SDS Services effectively.

3.8 The Infraco has failed to carry out the required management activities in order to manage the performance of the SDS Services effectively. The SDS Provider has failed to provide the SDS Services in accordance with the SDS Agreement. The Infraco has failed in its duties to procure that the SDS Provider does so. The Infraco was unable to satisfy tie through a series of audits conducted during January and February 2010 that it is complying with this

obligation. The Infraco has failed to apply the provisions of the SDS Agreement which it adapted to its advantage at novation. The Infraco's approach to design management has been passive and it has provided no evidence of it enforcing the contractual mechanisms available to it under the SDS Agreement. The Infraco has taken no steps to improve delivery of the SDS Services. The Infraco has not demonstrated that it has taken any steps to manage progress of the SDS Services, which is necessary to facilitate the Infraco Works. The Infraco has degraded the responsibility the SDS Provider owes to **tie**.

- 3.9 The Infraco's continual lack of management of the SDS Services is a fundamental breach of the Infraco Contract, which has a direct, material and adverse effect on the carrying out and completion of the Infraco Works.

Further information

Example: Late Delivery of Design

In relation to the 112 IFC packages contained within v31 of the Design Delivery Programme and Rev 1 of the Programme, the SDS Provider delivered IFCs late on 53 occasions from the date of commencement of the Infraco Contract; 37 of these late IFC packages relate to Phase 1a of the Edinburgh Tram Network which the Infraco is contracted to construct. Significantly, this has included late delivery of IFCs for all roads, street lighting, drainage and landscaping packages; for Tram Stops throughout Section 1; and for drainage at the Depot.

*Following the initial release of IFC packages by the SDS Provider, the Infraco has notified **tie** of over 250 Compensation Events in relation to the late issue of IFC Drawings in each case either for the re-issue of drawings that have previously been IFC or for drawings that were not included in the original IFC packages. The Infraco has been consistently unable or unwilling to provide explanations of why these drawings have been reissued or added to the Design Deliverables and has not give advance warning that these drawings would be IFC. This also demonstrates a lack of ongoing management of the SDS Provider.*

Example: Poor quality design

SDS Provider has regularly delivered poor quality design and design which is not fit for purpose.

[Jo to substantiate with information from Continual and Repeated Errors section (see section 6 re General Obligations)]

CEC Design Letters - there is a big pack of design letters in the folder which looks pretty useful - lots of technical probs with the design through 2009 and 2010 on everything from roads to structures - may end up being minor errors but cumulative effect and picture?

[Record of Review forms - tie to obtain]

Example: Not best value design

*The SDS Agreement provides that the SDS Provider shall assist **tie** in ensuring that best value has been secured in the performance of the Services. The Services which have been provided by the SDS Provider do not satisfy this contractual commitment.*

As a representative example of design and actions on the part of the SDS Provider which illustrate that the SDS Provider has not complied with its obligations, we list the following (this is a non-exhaustive list):

- **Roads/Trackform** - We have had much communication between us on the subject of the design solution for trackslab and its foundation (the current design for which is not acceptable to us). Without re-stating this communication in this section, it is common ground that this proposal does not represent a "best value" solution.— **From tie : In addition the track form that is proposed for the on street works is used elsewhere in Europe without the requirement of a reinforced ground improvement layer. The requirement for void spanning could be contained within the rheda city system (i.e. 1500 mm sleepers spacing).**
- **From tie:** As discussed, under Item 42 Track Design. I wasn't party to any discussion/correspondence as per the SDS statement, so won't comment. We should focus on the SDS designed requirement for Void Spanning in the on-street design. We carried out an audit, which clearly identified there is no legislative, industry standard, code of practice or such requirement for this design. SDS justified the design as "being based on "good engineering judgement". Note that the audit report concerned has been issued to BSC and we await their comment on this issue along with other matters arising from the audit,
- [insert other examples of 'not best value']
- **Haymarket Viaduct**

[from tie—"as observed by a number of people the reinforcement detail on the deck of Haymarket viaduct appears to be in "over engineered" even to the point that vibration of the concrete was difficult"

Example: Scottish Water - failure to manage design process

From tie : The SDS Agreement provides that the SDS Provider shall obtain and maintain in effect all Consents which may be required for the construction, installation, commissioning, completion and opening of the Edinburgh Tram. This includes consents from Scottish Water for connections to Scottish Water's drainage network. The Infraco was slow to manage the SDS Provider in securing these Consents. The SDS Provider did not take the necessary steps to secure these consents timeously and between May 2008 and the end of July 2008 the Infraco did not take active involvement in resolving this issue whilst tie clearly fulfilled its obligations to the Infraco by raising the importance of these Consents at the highest levels within Scottish Water. In fact the Infraco behaved throughout that period as if it had no responsibilities in relation to the securing of these consents and wrote to tie on 8 September 2008 alleging that tie had failed to procure the necessary consents from Scottish Water. This demonstrated a fundamental failing on the Infraco's part to understand and act on its contractual obligations to tie in relation to Scottish Water consents . The failure of the Infraco to manage the SDS Provider in this matter led to substantial delays in the submission and securing of Scottish Water consents.

Example: [Princes Street] Drainage Design

[tie to substantiate]

Example: Balgreen Road

From tie: In the case of the Balgreen Road Network Rail Access Bridge the SDS Provider did not request access to Network Rail property for surveys in good time to complete the design in line with

the v31 programme. As a result surveys were not carried out until after the date on which the SDS Provider had been due to submit the design to Network Rail for approval. Concerns identified by the ground investigation were notified to **tie** and CEC in November 2008 whereas the detailed technical design had been programmed to be submitted for submission to Network Rail and CEC for approval on 16 October 2008. There was a clear failure to plan the design adequately by the SDS Provider and no evidence has been presented by the Infraco that the Infraco was managing this situation to avoid and then mitigate the delay in securing access to the site for ground investigation works.

[management activities]

The Infraco was given the opportunity to demonstrate its compliance with this obligation, through a series of audits conducted during January and February 2010. **tie** sought information in respect of the specific topics: Structures (A8 Underpass, Baird Drive Retaining Wall, Depot Access Bridge and Bankhead Road Retaining Wall), Roads, OLE and Trackform.

tie provided the Infraco a copy of an Audit Report on the [*** date 2010] which highlighted the key concerns and findings. - **DLAP** copy of audit report is in the folder Infraco have advised that they shall be responding to this audit by w/e 11 June 2010.

Comment from **tie**: With respect to the Audit carried out on design in four particular areas, the main findings of the audit were:

- 1) Little evidence that the Infraco properly managed the design process in a timely manner
- 2) Lack of evidence that the Infraco paid serious attention to Best Value design solutions.

Particular areas of concern were with roads design, which took an excessive period of time to complete, the designed requirement for Void Spanning. It is also worth noting that BSC refused to provide information requested as part of this audit, and that this is the subject of current correspondence.

The Infraco has provided no evidence of it enforcing the contractual mechanisms available to it under the SDS Agreement. For example, the Infraco has not applied Liquidated Damages for the late delivery of IFC design as the Infraco would have been entitled to do. [*** What are the facts about this?]

Track design - The Infraco has degraded the responsibility the SDS Provider owes to **tie**. For example, an SDS representative recently refuted the responsibility for design of the track under explanation that the manner in which the Infraco has managed and are managing the design (to the extent that the Infraco has) has rendered the SDS Provider "not the designer – only the design provider". **tie** has stated on many occasions from *** to *** that the Infraco has clear contractual obligations in relation to the completion of the SDS Services in accordance with the SDS Agreement, the management of the SDS Provider, and the delivery of a competent and contractually satisfactory design.

4. **CLAUSE 80 - CHANGE PROCEDURE**

- 4.1 **The Infraco has breached its obligation to comply with the contractual Change mechanism contained in Clause 80 of the Infraco Contract in cases (a) where tie has required a tie Change and (b) where the Infraco itself has notified a tie Change ("INTC").**
- 4.2 The Infraco has persisted in refusing to comply with the contractual mechanism included in the Infraco Contract to regulate Permitted Variations. The Infraco has demonstrated a systematic intention to abuse the application of Clause 80 and to fail to meet the contractual obligations to give contractually compliant and timeous Estimates. This tie Change process is conventional and is of the essence for the proper operation and discharge of both parties' obligations.
- 4.3 INTCs are automatically notified to tie in the form of a standard letter. As at the date of this Remediable Termination Notice, there have been 689 INTCs notified by the Infraco. 117 of these INTCs have subsequently been withdrawn, deleted or superseded. Out of the remaining 572 INTC, around 130 notifications allege "design change" without explanation. The Infraco routinely submits an INTC stating that a Notified Departure has occurred. The Infraco steadfastly refuses to provide any explanation or proper reasons for the occurrence of the Notified Departure. This lack of transparency and visibility and intentional non-compliance with requests from tie for information (in order for tie to understand the Notified Departure) is very detrimental to the tie Change process, leading to delay, cost and, in some cases, the need for tie to refer INTCs to DRP, simply to gain an understanding of the Infraco's position.
- 4.4 The Infraco's breach of the obligations in respect of tie Changes is causing serious delay to works which are subject to tie Changes and means that tie has a lack of control, visibility and certainty over the tie Change process. This has a material and adverse effect on the carrying out and completion of the Infraco Works.
- 4.5 **The Infraco has breached its obligation to comply with time limits contained in Clause 80 with regard to the provision of Estimates or deliver to tie a request for a reasonable extended period of time in which to submit the Estimate.**
- 4.6 As at the date of the Remediable Termination Notice, there are 572 INTCs, which are subject to the tie Change mechanism in Clause 80.
- 4.7 Of the 572 INTCs for which an Estimate is due, only 62 Estimates have been submitted by the Infraco within the prescribed contractual time limit.
- 4.8 The Infraco's standard letter notifying tie of the INTC automatically contains a request for an extension to the period of time for delivering an Estimate, without any explanation nor quantification. The Infraco refuses to provide additional clarification when requested by tie.
- 4.9 Where an extended period is agreed, the Infraco has failed to submit Estimates within the agreed extended period(s) and many Estimates have been submitted by the Infraco materially late (up to 526 days late and at an average of 100 days late).
- 4.10 As at the date of this Remediable Termination Notice, the Infraco has submitted 287 Estimates (out of 572 INTCs). This means that just under 300 Estimates remain outstanding.

- 4.11 This breach by non-compliance with the time limits for the submission of Estimates specified in the Infraco Contract leads to delay caused by the Infraco and uncertainty over programme and commitment to the **tie** Change, all of which has a material and adverse on the carrying out and completion of the Infraco Works.
- 4.12 The Infraco has repeatedly breached its obligation to submit contractually competent Estimates in accordance with Clause 80.4.**
- 4.13 Clauses 80.4.1 to 80.4.10 of the Infraco Contract lists the matters on which the Infraco must provide its opinion (acting reasonably) in all cases where the Infraco delivers an Estimate to **tie**.
- 4.14 As at the date of this Remediable Termination Notice the Infraco delivered 287 Estimates to **tie**. None of these contained the Infraco's opinion on all of these matters. 100% of the Estimates submitted by the Infraco are therefore non-compliant.
- 4.15 Out of the 287 (non-compliant) Estimates which have been submitted by the Infraco, the Estimates generally only address the Infraco's opinion to Clause 80.4.10 (increase or decrease in the sums due to be paid to the Infraco as a direct consequence of the implementation of the **tie** Change).
- 4.16 The non-provision of contractually competent Estimates has a serious, material and detrimental effect on the carrying out and completion of the Infraco Works, as it undermines the trust and confidence in which **tie**, as client, has in the Infraco as contractor; it leads to serious questions about the Infraco's motivation and commitment for carrying out the Infraco Works; it frustrates the **tie** Change process and exhausts management and staff time it is contrary to the spirit of Project Partnering and the interests of delivering the Edinburgh Tram Project; it generates unnecessary cost, fails to mitigate the impact of the variation and interferes with **tie's** performance of its duties as client.
- 4.17 In providing an Estimate to tie, the Infraco has repeatedly breached its obligations under Clause 80.7 to use its reasonable endeavours to minimise any increase in costs and maximise any reduction of costs and to demonstrate that it has investigated how to mitigate the impact of any tie Change and implement the tie Change in the most cost effective manner.**
- 4.18 The Infraco has breached its obligation under Clause 6.3.1 to approach all Permitted Variations on a collaborative and Open Book Basis.**
- 4.19 The Infraco has breached its obligation under Clause 6.3.6 to take all reasonable steps to manage, minimise and mitigate all costs.**
- 4.20 The Infraco has not used its reasonable endeavours to minimise costs and mitigate the impact of **tie** Changes for **tie** and implement **tie** Changes in the most cost effective manner. The Infraco has not demonstrated that it has taken steps to mitigate costs and obtain Best Value for **tie** with regard to **tie** Changes. The Infraco has always evinced, and continues to evince, a non-collaborative and exploitative approach to the **tie** Change process and the submission of Estimates, which is diametrically opposed to its contractual duty. The Infraco persists in submitting significantly over-valued and intentionally inflated Estimates for every INTC and has done for over two years.
- 4.21 As at the date of the Remediable Termination Notice, the issued **tie** Change Orders in respect of INTCs show an average agreed value of 56% less than the original Estimate. This

is a substantial reduction, which illustrates that the Estimates are considerably over-valued by the Infraco to start with. This behaviour is exploitative and interferes with the **tie** Change process.

4.22 To arrive at the ultimate agreed value requires considerable **tie** and adviser resource and time and expense, which is time-intensive, wearing and contrary to Project Partnering and the innovation of the Infraco Contract and clearly not offering best value to **tie** and its funders. The resulting protracted agreement of Estimates causes delay to Infraco Works. This incurs significant expense for **tie**. Contrary to the terms of the Infraco Contract and **tie's** directions, the Infraco refuses to progress works which are subject to an INTC. Given that the Infraco is habitually late in providing Estimates and the Estimates are not contractually competent and are inflated in value, this adds significant time and cost to the **tie** Change process (through no fault of **tie's**), which further compounds delay. The Infraco's general approach to the **tie** Change mechanism materially and adversely impacts the delivery of the Infraco Works and the delivery of the Edinburgh Tram Project. The Infraco's approach to each Estimate materially and adversely affects the carrying out and completion of the Infraco Works.

4.23 Example: Over-valuation of Estimates

Change Notice No	Original Estimate (£k)	Agreed Value (£k)
INTC 1	7049	3524
INTC 85	1291	484
INTC 104	3832	915
INTC 91	405	52
INTC 203G	73	2
INTC 230	595	(-260)*

**Determined by Adjudication*

Further information

The Infraco's letter dated 11 December 2008 (ref: 25.1.201/MRH/1134) sets out a systematic intention to fail to meet the contractual obligations to give full and timeous Estimates.

*Example of INTC ***[April Fool's] being passed straight on to **tie** (with the same standard form letter that the Infraco requires extra time due to the complexity of the INTC), without any consideration.*

[The Infraco has failed to value the tie Change in accordance with the requirements of Clause 80.6]

[tie to confirm if this is a breach]

Various 80.13 instructions - see section 1 for info too.

Correspondence on DRP on 80.13 included.

Change Stats - tables and correspondence.

Over valuation and incomplete estimates

tie text on Permitted Variations and open and collaborative basis:

Infraco submitted many notices of change informing tie that in their opinion Notified Departures had occurred consequently becoming Mandatory tie Changes. Despite being frequently asked to provide timeous Estimates and to provide proper reasons/ evidence for the occurrence of a Notified Departure Infraco steadfastly refused to provide this information saying that they did not require to do so . This resulted in the protracted agreement of Estimates and some being referred to DRP simply to gain an understanding of the Infraco position. In addition the Estimates when received have been largely overvalued by Infraco thus increasing the time taken to agree Estimates and to issue Change Orders. To illustrate this the current statistics are that the value of agreed Change Orders raised to date are circa 56% of the original Estimate values submitted.

Examples of both time to complete estimates and failure to demonstrate the occurrence of Notified Departures can be found in two change requests that resulted in DRP actions.

Firstly Russell Road Retaining Wall where a notice of change was submitted on 14th October 2008 and an Estimate submitted on 14th May 2009 (seven months later). There are several items of correspondence on this matter of lateness of submission of Estimate but generally Infraco has ignored the provisions of Clause 80.3 stating in their letter of 12th December 2008 that '...there is no obligation placed upon us to identify why an extension of time may be required nor are we required to provide an expected date for submission of an Estimate' and go on to say that '...except in respect of very simple changes, Estimates cannot be provided within 18 Business Days of receipt of tie Notices of Change'

This is clearly disregards the Contract requirement to act reasonably.

In relation to the provision of reasons/evidence that a Notified Departure had occurred on Russell Road Retaining Wall tie continued to request as late as 10th march 2009 (tie letter INF CORR 821) for general information relating to the change and in particular the basis for it. This was not provided until meetings were held in late March 2009 some 6 months after notice.

Similarly on Carricknowe Bridge the notice of change was submitted on 19th September 2008 and an Estimate submitted on 7th May 2009 (8 months later). Infraco attempted to justify their position on the lateness of the submission by outlining in their letter of 11th December 2008 a process that takes a minimum of 21 weeks (105 Business Days) from notice to Estimate. The letter ignores the contractual obligation to provide within 18 business days or to request on individual merit reasons an extension. The process demonstrates that they have set up to fail in their obligations and to therefore generally and openly disregard them. This disregard for the timing of submissions of Estimates has resulted in delays for which Infraco should be responsible.

In addition it was not until 12th May 2009 that some form of demonstration was provided in support of the assertion that the Notified Departure had occurred.

5. **CLAUSE 65 - COMPENSATION EVENTS**

5.1 **The Infraco has breached its obligations under Clause 65 of the Infraco Contract in relation to Compensation Events.**

5.2 The Infraco's repeated and persistent failure to comply with its contractual obligations in relation to Compensation Events (despite significant correspondence and discussion on the matter and express instructions from **tie**) seriously affects **tie**'s ability to comply with **tie**'s obligations in respect of assessing any extension of time, additional costs or additional relief to which the Infraco may be entitled. This prejudices **tie**'s relationship and commitments with funders and stakeholders. This, in turn, jeopardises the delivery of the Infraco Works and the Edinburgh Tram Project. The Infraco's breach in respect of Compensation Events leads **tie** to draw the conclusion that the Infraco is deliberately seeking not to respect the proper operation of the Infraco Contract and is deliberately refusing to produce any timely assessment relating to individual facts and circumstances in order to assert global claims where these are not justifiable because the underlying facts can be and should have been coherently analysed for individual submissions. This breach materially and adversely affects the carrying out and completion of the Infraco Works.

5.3 **The Infraco is submitting claims for Compensation Events where there is no evidence that a Compensation Event: (a) is the direct cause of a delay in achievement of the issue of a Certificate of Sectional Completion; (b) directly and adversely affects Infraco's ability to perform any of its obligations under the Infraco Contract; and/or (c) causes the Infraco to incur costs beyond such costs which were reasonably anticipated to be incurred by the Infraco but for the occurrence of the Compensation Event. This is a breach of the Infraco's obligations under Clause 65.1.**

5.4 **The Infraco repeatedly breaches its obligations pursuant to Clause 65.2 of the Infraco Contract to: (a) submit a Compensation Event Notice with full details of the nature of the Compensation Event, the date of occurrence and its likely duration within 20 Business Days of it becoming aware of the Compensation Event; and (b) for each Compensation Event claimed, provide full details of the extension of time and relief required and/or any costs claimed as required under Clause 65.2.2 or, in the event that it is not possible to provide this information, a statement to this effect with reasons, together with interim written particulars of the items referred to at Clause 65.2.2 insofar as such items are available and continue to update us when further details become available.**

5.5 The Infraco has persisted in refusing to comply with a clear contractual mechanism included in the Infraco Contract in relation to regulate Compensation Events. The Infraco has demonstrated a systematic intention to abuse the application of this clause and to fail to meet its contractual obligations to give contractually compliant and timeous particulars about each Compensation Event. Compensation Events are largely automatically notified to **tie** in the form of a standard letter. The Infraco does not subsequently give written particulars.

5.6 The Infraco has refused on a blanket basis to provide **tie** with meaningful estimates of the likely effect of delay upon Programme and adverse effects on the performance of the Infraco's obligations; details of the Infraco's costs and losses (excluding Indirect Losses); mitigation measures adopted and, if unsuccessful, the reasons why; and any acceleration or other measures which the Infraco could take to mitigate effects of delay or non-performance and associated cost estimates. This information (some, if not all, for each

Compensation Event) is (were the Infraco acting as and considering matters as a properly qualified and competent contractor) identifiable, within the Infraco's knowledge and control and independent of the Programme and the actual start date for the works in question. There are no reasons or excuse for the Infraco failing to provide **tie** with some level of transparency regarding the alleged Compensation Events which the Infraco is claiming, as required by the Infraco Contract.

- 5.7 Where the Infraco might not be able to provide full details of the Compensation Event, the Infraco is nonetheless not providing **tie** with interim particulars until such time that the full details become available. **tie** is denied comfort or visibility that the Infraco is doing anything to mitigate cost and/or delay to the Edinburgh Tram Project arising from an alleged Compensation Event claim. This is contrary to a collaborative working relationship which the Infraco Contract envisages and to which the parties have committed and is a breach of Infraco's commitment to avoid unnecessary dispute and to mitigate costs.
- 5.8 **The Infraco has repeatedly breached its obligation under Clause 65.2.3 of the Infraco Contract to demonstrate to tie's reasonable satisfaction that the Infraco could not reasonably have avoided the Compensation Event by steps which they might reasonably be expected to have taken and that the Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs and that the Infraco is using reasonable endeavours to perform its obligations under the Infraco Contract.**
- 5.9 **The Infraco repeatedly breaches its obligation pursuant to Clause 65.2A1 of the Infraco Contract to provide the additional information requested by tie in respect of Compensation Events.**
- 5.10 **The Infraco has breached its obligation pursuant to clause 65.10 to inform tie at the earliest opportunity of delays arising from events other than Compensation Events.**
- 5.11 The Infraco has consistently failed to inform **tie** at the earliest opportunity of circumstances other than those entitling the Infraco to an extension of time or relief under clause 65 of the Infraco Contract which cause delay to the Infraco Works and has failed to give an estimate of the likely effect upon the Programme or at the Infraco's own expense take such acceleration measures as are necessary to achieve the requirements of the Programme.
- 5.12 From the period from 8 February 2010 to 24 May 2010, **tie** became aware of 64 instances of circumstances which may delay the Infraco Works other than Compensation Events. In none of the instances did the Infraco notify **tie**. In none of the instances did the Infraco give an estimate of the likely effect of the delay on the Programme to **tie**. In none of the instances did the Infraco take measures to inhibit or recover delay.
- 5.13 **The Infraco breaches its obligation under Clause 65.11 to continue with the completion of the Infraco Works notwithstanding the occurrence of a Compensation Event.**
- 5.14 The cumulative effect of the Infraco's attitude and actions and lack of action in respect of Compensation Events entirely undermines the contractual provisions in relation to Compensation Events which protect visibility, transparency and **tie**'s understanding of any entitlement of the Infraco to an extension of time or money, which enables **tie** to evaluate such a claim for Compensation Events. The Infraco's non-compliance with these contractual provisions brings with it cost and time consequences, as it prohibits an understanding of the effect of a valid Compensation Event on programme and budget and it prohibits **tie** from evaluating whether or not an occurrence is a Compensation Event in the first place. This

erodes confidence in the Infraco's willingness and motivation to deliver the Infraco Works. This erodes **tie**'s confidence that the Infraco is taking any steps to minimise costs for **tie** and support **tie**'s best value commitments and deliver the Edinburgh Tram Project.

The Infraco's breach of its obligations in relation to Compensation Events therefore has a compounding adverse and material effect on the carrying out and completion of the Infraco Works.

Supporting Documentation

[tie provided Stats on Comp Events - in folder]

letters re delay between notification of ND and issue of tie Change

Lots of letters on 65.10 re delay which is not Comp Events

Failure to advise of delays arising from events other than Compensation Events.

tie has been writing to the Infraco to advise the Infraco of these circumstances and requesting information from the Infraco. Generally the Infraco has responded by stating that the Infraco Works have not been delayed by the circumstances detailed in the letter and the Infraco is therefore not obliged to inform tie under Clause 65.10. This is a blatant disregard for the provisions of Clause 65.10. In addition, if the Infraco were behaving as a competent and professional contractor, the Infraco would be informing the client of such delays or affect on programme in accordance with the contract terms and managing the programme and mitigating the effects of any delay.

6. CLAUSE 6 - BREACH OF THE INFRACO'S GENERAL OBLIGATIONS

6.1 The Infraco has breached its obligation pursuant to Clause 6.1 of the Infraco Contract to work in mutual co-operation with tie.

6.2 The requirement to work in partnership is paramount on a project of the size of Edinburgh Tram Network being executed in the public realm. The Infraco Contract is an innovative bespoke contract (rather than a standard DBFO contract), to which the project partnering provisions (such as Clause 6) are key. The Infraco has never demonstrated that it has understood or respects its responsibility in this regard.

6.3 From the outset of the Infraco Contract (14 May 2008), the Infraco has failed to work in mutual co-operation with tie. The Infraco's continually obstructive and delinquent attitude towards the performance of its obligations, as a whole, has entirely undermined the scheme of the Infraco Contract, such that the Infraco's contractual commitments are diluted. This situation, created by the Infraco's conduct, has and continues to materially and adversely affect the carrying out and completion the Infraco Works.

6.4 Example: 'Coverdale' Partnering Workshops (May - September 2008)

6.4.1 The Infraco demonstrated lack of engagement, late cancellation and non-attendance at the Workshops arranged by tie for May 2008 (and ultimately held in September 2008) to facilitate a collaborative partnering environment at the commencement of the Infraco Contract.

6.5 Example: Infraco Proposals/SDS Design Alignment Workshops (June 2008)

6.5.1 The Infraco cancelled at short notice (twice) the initial Alignment Workshops arranged by tie for June 2008. [DLAP: see comments from tie below]

6.6 Example: [More recent]

6.6.1 [tie suggestion to include a more recent example]

6.7 The Infraco has breached its obligation pursuant to Clause 6.1 of the Infraco Contract to apply its expertise to carry out and complete the Infraco Works.

6.8 There are numerous and repeated examples across the Site and in the administration of the contract where the Infraco has failed to apply its expertise to carry out and complete the Infraco Works. Under competitive process, the Infraco was appointed as a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity to the Edinburgh Tram Project. These breaches, separately and cumulatively, materially and adversely affect the carrying out and completion of the Infraco Works.

6.9 Example: Failure to Mobilise

6.9.1 From contract signature, tie has been obliged to express repeated concern over the lack of the Infraco's visible progress to recruit staff and appoint Key Sub-Contractors. tie called a meeting for 10 June 2008 (4 weeks after the Infraco Contract was signed), in order to discuss the lack of visibility of the Infraco's Mobilisation progress. At this stage, tie expressed its strong concern over little visible progress on both staff and recruitment and appointment of Key Sub-

Contractors despite 4 weeks passing since contract signature. Over two years later, only one of the Infraco's key subcontractors is employed under an executed formal subcontract as required under the Infraco Contract. This is a breach of the Infraco 's duty to adhere to Good Industry Practice.

6.10 Example: Defects on Princes Street

6.10.1 The importance of Princes Street as a show piece for efficient and high calibre workmanship is obvious. Instead, the Infraco has installed defective and poor quality works on Princes Street, coupled with non-application of expertise to remedy the defects. The Infraco failed to apply its expertise to manage subcontractors effectively even on this discrete section of the Infraco Works.

6.11 Example: Setts on Princes Street

6.11.1 The Infraco failed to produced a competent specification for setts design, despite being key for Princes Street, resulting in avoidable defects on the Princes Street section. The Infraco has subsequently failed to resolve the issue with **tie**.

6.12 Example: Traffic Regulation Orders ("TROs")

6.12.1 Delay and expense has been occasioned by the incompetence and errors from the Infraco, requiring rectification work by **tie**, CEC and legal advisers.

6.13 Example: Gogar landfill

SDS options report (9th October 2007) highlighted requirement to change from Rheda City Green track to ballasted track in area of Gogar Landfill (with exception of tight radius approach to Gogarburn Bridge). This was backed up by AIP issued by BSC on 19th May 2008. IFC drawings for geotechnical solution issued on 18th December 2008. BSC confirm intention at design workshop on 4th February 2010 that they intend to change the tight radius bend track to ballast from Rheda City C. BSC took 21 months from contract award to reach this conclusion. As a result they delayed issuing an Estimate for these works from 18th December 2008 when the IFC drawings were available to 26th February 2010.

6.14 Example: Bus Trackers on Princes Street

6.14.1 The Infraco has failed to install tracker poles because it has lost free issue equipment and materials and has failed to advise **tie** correctly about the replacements.

[see below]

6.15 Example: Temporary Works - Baird Drive (W8)

6.15.1 [DLAP to insert statement]

6.16 Example: Track and Roads Construction

6.16.1 [tie to provide statement - see above ?]

6.17 Example: Contaminated Land at Carricknowe (Infraco Notice of tie Change ("INTC") 188)

6.17.1 The Infraco demonstrated a lack of engagement and lack of expertise and delivered an excessive Estimate, such that tie required to instruct works (excavating and stockpiling material) to be carried out by a third party.

6.18 Example: Continual and Repeated Material Errors

6.18.1 Continually and repeatedly, tie identifies errors with the Infraco's Deliverables, such errors which should not be made by a properly qualified and competent professional contractor. For example, Gogarburn Bridge, A8 Underpass and Abortive Works at Edinburgh Park Bridge and Depot Access Road. Dealing with and responding to, and assisting the Infraco to correct, these errors (invariably to tie's detriment) has a time, resource and cost implication for tie and the Edinburgh Tram Project. This is a pattern which is evident across the scope of works. This conduct leads tie to conclude that there is a lack of expertise applied to the Project, lack of management, lack of direction, lack of interest and lack of commitment. The effect of these errors is that tie has entirely lost confidence and trust in the Infraco's standard of work and professionalism. Nor can tie rely on the information or programme information submitted by the Infraco, placing tie in a position where it is not able to properly discharge its accountabilities to City of Edinburgh Council, to the Project funders and under the Edinburgh Tram Acts.

6.19 Example: Safety Verification Scheme

6.19.1 The Infraco has consistently failed to deliver the items which it is contractually obliged to deliver, or, at best, has delivered the items materially late, including: the Infraco Test Plan; the FMEA analysis; the System Integration Plan (delivered on 22 March 2010); Design Stage Verification and Validation Plan (delivered on 7 May 2010); Detailed Cause Consequence Analysis; non-agreed Asset Register; and refusal to enter into pre-construction baseline stray current testing.

6.20 **The Infraco has breached its obligation under Clause 6.3.1 of the Infraco Contract to approach Permitted Variations on a collaborative and Open Book Basis.**

6.21 See section *** of this Remediable Termination Notice.

6.22 **The Infraco has breached its obligations under Clause 6.3.2 of the Infraco Contract by failing to use reasonable endeavours to avoid unnecessary disputes and claims.**

6.23 The Infraco's demonstrable intent to seek out impasse and dispute and to seek to frustrate the Infraco Contract terms is not conducive to the carrying out and completion of the Infraco Works. The Infraco's actions in this regard lead to the position that the carrying out and completion of the Infraco Works are materially and adversely affected.

6.24 Examples which support this position include: the Infraco's obstructive behaviour in relation to instructions, audits, provision of Deliverables, inflated Estimates, the volume of INTCs relating to matters which could have been addressed in constructive dialogue and submission of *de minimis* changes, refusal to provide information, refusal to comply with tie requests, extreme interpretation of contractual provisions, including shift in views and the referral of matters to DRP which were under discussion (for example, MUDFA Rev 8).

- 6.25 **The Infraco has breached its obligation under Clause 6.3.4 not to interfere with tie's ability to exercise its rights and to perform its obligations** - including in respect of tie's reporting obligations to CEC, compliance with the Tram Acts, compliance with best value commitments, responding to queries from stakeholders and interface with stakeholders.
- 6.26 **The Infraco has breached its obligations under Clause 6.3.5 of the Infraco Contract by not taking reasonable steps to mitigate foreseeable losses and liabilities of tie and not taking all reasonable steps to manage, minimise and mitigate all costs.**
- 6.27 **Example: Value Engineering not delivered**
- 6.27.1 The Infraco has repeatedly failed to comply and delayed complying with the Value Engineering provisions of the Infraco Contract e.g. Edinburgh Park Viaduct, Roseburn Street Viaduct and Carricknowe Bridge Parapet.

Further information

Example: 'Coverdale' Partnering Workshops

As an early, specific, example of the Infraco's lack of co-operation, tie cites the Infraco's lack of engagement at the 'Coverdale' workshops, which were instigated by tie following Project close to facilitate a collaborative partnering environment, which was considered to be particularly necessary given the nature of the Infraco Contract negotiations and the relationship between the parties in the run up to close.

tie paid for workshop facilitators 'Coverdale' to host a joint event to: look at what the parties mean by "collaborative partnership" and mutual success; look at different and common interests and goals; to build shared trust and success; to develop and work on how we will operate together and maintain effective relationships; to agree how we will avoid and/or resolve disputes; and to begin to develop plans to ensure the success of the project.

The invitation to the Infraco team was initially issued during May 2008. The Infraco advised that [they would be unable to attend].

tie re-arranged the Workshops and amended their format and duration (2 days rather than 3 days) for 10th to 11th July 2008.

tie re-arranged the Workshops again for 4th to 5th September 2008. On 3rd September 2008, 3 of the Infraco team cancelled, stating that they had prior commitments.

Example: Infraco Proposals/SDS Design Alignment Workshops

The Infraco cancelled at short notice [the initial Alignment Workshop in respect of Infraco Proposals

Example: Infraco Proposals/SDS Design Alignment Workshops - the Infraco's last minute cancellation of the initial Alignment Workshops arranged by tie for June 2008.

Comments from tie:

The Infraco cancelled at short notice [the initial Alignment Workshop in respect of Infraco Proposals and SDS Design Alignment] due to take place [in the week commencing 2 June 2008]. This was re-arranged to assist the Infraco to 10 June 2008.

The Infraco again cancelled at very late notice the (re-arranged) Alignment Workshop on 10 June 2008. At this time, and as recorded in the Minutes of a Meeting held on 10 June 2008 to discuss the lack of visibility of the Infraco's Mobilisation progress, tie expressed its dissatisfaction regarding this unacceptable behaviour and stated that any repetition would not be acceptable. tie considered that this was importing risk of further delay in concluding the alignment process and stated that any delay occasioned by the rescheduling of these meetings will be the responsibility of the Infraco.

*The Alignment Workshop was finally held on ***.*

I don't know who has put this statement together, but to my mind, it doesn't seem to have the correct focus on the overall contractual obligations as detailed in the contract and Infraco's performance of that obligation. This note seems to refer to one or two very specific incidents only, which don't really recognise the contractual obligation with respect to this process. The requirement for "Development Workshops" (ie. not "Infraco Proposals/SDS Design Alignment Workshops") is as follows (from Schedule Part 23 of the Infraco Contract):

A whole series of meetings have been carried out. Some of the Development Workshops have been concluded, some have not. Most, if not all, were too late to give BSC any chance to meet the Programme. All of them then had the added delay brought about by the excessive time taken to deliver the BSC Estimates for the SDS re-design works. tie have regularly sought to progress these matters, but for a variety of reasons, Infraco have not done so.

I am currently carrying out an audit under Clause 104, which includes looking at their management of the Development Workshop process. I will be looking to determine what arrangements if any, BSC put in place to ensure that the Development Workshops were carried out in a manner that allowed them to meet the Programme or, if the Development Workshop activity meant that they were unable to commence as per the Programme, what mitigation actions they have taken or proposed.

The Infraco period report now contains a "Mis-Alignment Matrix" at 10.9 giving updates on dates reports are issued and Estimates agreed etc (copy attached). We need to do an exercise to match this progress against the Programme, which will then show the actual delays that have occurred. I will have this exercise carried out as part of my audit works.

I suggest we either

- hold off on this point until the audit is complete during which we will either uncover information demonstrating their failure or, more likely, we will find little supporting information that would demonstrate they tried to manage this process in a manner which met the Programme or, mitigated any potential delay to the programme, or
- Change the emphasis of our claim above, such that we are focussing on the obligation and their subsequent delay against the Programme.

Example: Defects on Princes Street

*[The Infraco carried out the [civils and track Works] on Princes Street during the period from *** to *** 2009]. These Works were defective and ***. These Works were not to the standard one could reasonably expect from a professional and competent Contractor on a Project of this nature. The Infraco did not apply its expertise in ensuring that the Works were satisfactorily executed.*

*The defects on Princes Street included: [please identify which out of the list of Summary Abortive Works from Mike Paterson's email of 12 November 2009 are key and for which the Infraco does not have a valid response.] These were notified to the Infraco by email dated 12 November 2009. The Infraco responded to the email on 15 March 2010 with comments. Out of the 36 points raised the Infraco's response on *** is not [satisfactory / accurate].*

The Infraco has not applied its expertise in remedying the defects.

*The Infraco suggested to [tie's David Burns, Project Manager for Section ***] on [*** 2010] that they would forward to tie a report referring to their recent investigations, monitoring etc of the carriageway surface defects, the problems with the mastic at the track edge and the settlement of manholes / hydrants but on 5 May 2010 they have not forwarded anything to tie. On 16 April 2010, tie issued letter (ref: 4822) to the Infraco chasing, but as at 5 May 2010, the Infraco had not yet responded to the letter.]*

[Example: Setts on Princes Street - the Infraco has produced an incompetent Appendix 7/1 for roads design, which did not include any information on setts design, despite being key for Princes Street and has then failed to achieve any resolution of the issue, resulting in delay and inadequate testing.

Prior to construction work commencing on Princes Street, the City of Edinburgh Council asked BSC to provide a specification which detailed the proposed construction for the proposed sett paved areas.

On the 26 November 2009 Simon Nesbitt e-mailed Andy Conway an update copy of Appendix 11/1 which referred to a separate document, "Specification for Design Tolerances for Natural Stone." This referenced specification was provided to cover the sett paved areas on Princes Street. It includes a palette of surfacing options which are based on the road classifications. Andy Conway e-mailed back later that morning to ask which roads classification and hence road construction was used on Princes Street. To date we have received no response on this specific issue.

It should be noted that on Princes Street setts have been installed on the carriageway and on the central refuge island and we would assume that a different treatment has been used for these areas. It should also be noted that on Princes Street most of the sett paving in the carriageway has been laid on top of the track slab and this is not an option available in the supplied specification. In addition to the carriageway makeup we also have concerns about the methods used to grout these sett paved areas.

As a direct result of the Infraco's inadequacies in this regard, there are some avoidable defects on the Princes Street section due to lack of penetration of the grout (e.g. at the Tram Stop), wrong level of the finished grout level and flooding grout over the finished sett surface.

The Infraco's sub-contractor for the Princes Street section initially did not follow the complete procedures from the supplier of the product (Sikapave) and this resulted in a defective area on the median strip. These defects were all avoidable had the correct supervision and working methods been applied by the Infraco and the necessary supervision and management provided. In short all of these defects were avoidable had Infraco applied the level of expertise which it should have to carry out and complete the Infraco Works.]

Example: Bus Trackers on Princes Street [Comments from PM dated 9 June 2010]

With regard to the Princes Street works, the Infraco did not install tracker poles at six locations, three eastbound and three westbound, as the poles which were supplied by CEC prior to the re-opening of Princes Street went missing following the clearance of the site.

The Infraco carried out a thorough search of all of their stores on 27/01/10 and they advised that they could not find them. The Infraco advised tie verbally on 12/02/10 that they had ordered replacements, and there was a four week delivery window. Tie were advised by Brian Donnelly on 16/02/10 that the tracker poles were not as the Infraco had previously suggested actually on order. The Infraco were were in discussion with the supplier who was attempting to clarify specific issues with CEC, following which an order would be placed. On 18/02 an order had still not been placed and it was agreed that redundant poles could be recycled from George Street.

NIL Future proofing

Summary from tie

Despite TNC being issued on 9th December 2008 and design changes agreed within 20 days of receipt of final Estimate BSC are indicating an IFC drawing issue date 20 months following receipt of instruction (22nd July 2010). In part this is due to the design integration process not identifying the OLE location as one of the primary drivers for the location of the road crossings.

Example: Temporary Works - Baird Drive

[Jo has info - in folder - outline of events]

Example: Track

Tie and Infraco agreed to the use of the Rheda track system for the Edinburgh Tram Network. This was an agreement reached through the preferred bidder process and was intended to deliver a more cost effective solution for the track system. Infraco were responsible for the overall design of the system through the SDS novation agreement and the development workshop process for this subject matter commenced in xxx. The design solution produced to interface this track system into the surrounding road/environment is not cost effective and Infraco has not applied its expertise to manage the design integration for this issue effectively. The material impact of this is that substantial additional costs have been incurred by tie by the provision of an additional re-inforced concrete slab as a foundation for the system throughout the length of the track on Princes St. The estimated additional costs for this are:

Example: Roads Construction

The Infraco Contract (Schedule Part 2 – Employers Requirements) includes the requirement to design and construct the road, including the carriageway and footways to the Design Manual for Roads and Bridges (DMRB). DMRB and associated documents, sets out how to design a road pavement or carriageway, based upon criteria for traffic loading (Million Standard Axles(MSA)) and foundation conditions (California Bearing Ratio (CBR)).

It was unclear to **tie** and CEC how the road design and construction was to be designed and approved. Further the minimalist design as set out from the initial proposals from SDS (overlay in fill and full reconstruction for cut) through to the apparent over design solutions of 1.1m proposed for Princes Street highlighted this concern in design philosophy through to construction. The Development workshop process for this subject matter commenced in May 2008 and resulted in an agreement which was to provide a palette of approved carriageway design options that could be employed, without further design work, and thus enable appropriate choices to be determined on site, supported by site investigation information to identify general formation conditions and soft spots. The ultimate out-come was to be a set of tables and procedures to be followed that enabled choices to be made that were fit for purpose and offered value for money. At 3rd June 2010 these have yet to be finalised by Infraco. The time scale for the development of this has been prolonged

and protracted. The material impact of this has been that the roads construction for Princes St was not built in the most cost effective manner since the detailed design information was not in place to allow an accurate correlation between CBR ratio and design solution. Can we estimate the value of this?

Example: Failure to advise of non-Compensation Event delays (clause 65.10) - the Infraco's consistent failure to inform **tie** of circumstances which cause delay to the Infraco Works and failure to provide an estimate of the likely effect and any evidence of necessary acceleration measures. This is a blatant disregard for the provisions of Clause 65.10. In addition, if the Infraco were behaving as a competent and professional contractor, the Infraco would be informing the client of such delays or affect on programme in accordance with the contract terms and managing the programme and mitigating the effects of any delay.

- lots of correspondence on the file - in section 5 on Comp Events.

Example: Continual and Repeated Material Errors

Examples include: Princes Street Look-Ahead Programme and the 4-weekly update on Rev-D programme; Gogarburn Bridge; A8 Underpass; Abortive Works at Edinburgh Park Bridge; Abortive Works at Depot Access Road; and Princes Street defects.

- Princes Street Look-Ahead Programme - the Look-Ahead Programme and the 4-weekly update on Rev-D programme contained various errors, such as the track-laying activities were omitted from the Look-Ahead Programme and inaccurate percentages were quoted on the 4-weekly update on the Rev-D programme (e.g. on the programme dated 26 June 2009, Drainage/Rail connections (WBS 1.12.1.18) and Side drainage (WBS 1.12.5.4) activities were referred to as 0% (not started yet), whereas they have been completed by approximately 60%). The omission of track-laying activities from the programme was raised by **tie** at various progress meetings in the period *** to *** but there was no action taken by the Infraco in this regard. This was again notified to the Infraco at the progress meeting held on 30 June 2009 and in writing on 10 July 2009. [What happened next? Did the Infraco comply with this request].
- Gogarburn Bridge

Comments from PM - The issue associated with the Gogarburn Bridge insitu concrete defective works is covered in the Gogargurn Bridge update. Depot Access Road defective sub base issue was rectified and did not affect the Gogar Depot critical path.

- A8 Underpass

[Jo has info - Jo to update]

- Abortive Works e.g. Edinburgh Park Bridge Abortive Works - on 7 April 2010, **tie** wrote to the Infraco (ref: INF CORR 4672/TC) requesting details of the likely Abortive Works as a result of the defective parapet units installed on span 4 of Edinburgh Park Bridge. By letter dated 9 April 2009 (ref: 25.1.201/JDo/5318), the Infraco disputed that any Abortive Works had occurred. The value of these defective works are ...

Comments from tie :Item 15B – Edinburgh Park Bridge Abortive Works

The defective work relates to the paint system on the span 4 parapets, which needs to be made good.

Some of this work will probably have to be done during a RoR possession [to access the outside of the parapet to touch it up], however in the overall scheme of this is minor, therefore it is not a good example to use.

Example: The failure of the Bilfinger Berger element of the Infraco to place Key Sub-Contracts and lack of procurement strategy and policy.

[Jo has info - Jo to update]

The Infraco has interfered with tie's ability to exercise its rights and to perform its obligations - including in respect of tie's reporting obligations to CEC, compliance with the Tram Acts, compliance with best value commitments, responding to queries from stakeholders and interface with stakeholders.

Jo, the types of evidence I would cite here include:

- Lack of programme information to allow accurate reporting to CEC
- Lack of coherent weekly updates to allow communications to Stakeholders, weekly newsletters, communications log, details of breaches in relation to CoCP
- Lack of cost management reporting as per the ER's

Although I'm not sure we have much written evidence to support this apart from our view that it just hasn't been provided.

Example: No access to BIW

Clause 10.4 of the Infraco Contract requires Infraco to establish and maintain an extranet which tie may access remotely to review Deliverables. This has not been provided by Infraco. Additionally, the ER's 12.3.1 require that Infraco use tie's extranet as the official conduit of the issuing of project information. This has never been done.

Example: Clause 104 audit letters

tie has requested information and audit access under Clause 104 of the Infraco Contract. Infraco has consistently made issue with the ability of tie to undertake such audits and request such information as can be demonstrated from the correspondence and audit reports and has failed on a number of occasions to provide the information requested.

Example: Contaminated Material at Carricknowe (INTC 188)

INTC 188 was issued on 4 November 2008. The Infraco's original Estimate was submitted on 7 May 2009 totalling £380k. tie got a "check price" from Frontline Construction Ltd and an order was placed at £142k on 16 June 2009. tie advised the Infraco on 19 June 2009 that Frontline would carry out the works at a meeting on site which was confirmed by email on 24 June 2009. The Infraco revised their Estimate to £130k only when challenged with the significantly lower check price and they realised that they were not going to be instructed to carry out the work.

Jo to review this section: Infraco submitted many notices of change informing tie that in their opinion Notified Departures had occurred consequently becoming Mandatory tie Changes. Despite being frequently asked to provide timeous Estimates and to provide proper reasons/ evidence for the occurrence of a Notified Departure Infraco steadfastly refused to provide this information saying that they did not require to do so. This resulted in the protracted agreement of Estimates and some being

referred to DRP simply to gain an understanding of the Infraco position. In addition the Estimates when received have been largely overvalued by Infraco thus increasing the time taken to agree Estimates and to issue Change Orders. To illustrate this the current statistics are that the value of agreed Change Orders raised to date are circa 56% of the original Estimate values submitted.

Examples of both time to complete estimates and failure to demonstrate the occurrence of Notified Departures can be found in two change requests that resulted in DRP actions.

Firstly Russell Road Retaining Wall where a notice of change was submitted on 14th October 2008 and an Estimate submitted on 14th May 2009 (seven months later). There are several items of correspondence on this matter of lateness of submission of Estimate but generally Infraco has ignored the provisions of Clause 80.3 stating in their letter of 12th December 2008 that '...there is no obligation placed upon us to identify why an extension of time may be required nor are we required to provide an expected date for submission of an Estimate' and go on to say that '...except in respect of very simple changes, Estimates cannot be provided within 18 Business Days of receipt of the Notices of Change'. This clearly disregards the Contract requirement to act reasonably.

In relation to the provision of reasons/evidence that a Notified Departure had occurred on Russell Road Retaining Wall **tie** continued to request as late as 10th March 2009 (tie letter INF CORR 821) for general information relating to the change and in particular the basis for it. This was not provided until meetings were held in late March 2009 some 6 months after notice.

Similarly on Carrickknowe Bridge the notice of change was submitted on 19th September 2008 and an Estimate submitted on 7th May 2009 (8 months later). Infraco attempted to justify their position on the lateness of the submission by outlining in their letter of 11th December 2008 a process that takes a minimum of 21 weeks (105 Business Days) from notice to Estimate. The letter ignores the contractual obligation to provide within 18 Business Days or to request on individual merit reasons an extension. The process demonstrates that they have set up to fail in their obligations and to therefore generally and openly disregard them. This disregard for the timing of submissions of Estimates has resulted in delays for which Infraco should be responsible.

In addition it was not until 12 May 2009 that some form of demonstration was provided in support of the assertion that the Notified Departure had occurred.

Example: MUDFA Rev 8 & referral to DRP - speak to John M DLAP

Example: obstructive behaviour

Example: Elevated Estimates - plenty info on that

Example: Volume of INTCs and de minimus - see section 4 on tie Changes / Estimates

Examples: Refusal to provide information

Example: Position on Schedule Part 4 - The manner in which the Infraco has acted indicates that the Infraco has sought to concentrate on extracting additional payment from **tie** by offering explanations of Schedule Part 4 which are convenient to the Infraco at the time. For example, in explaining your assertions on design of the track the Infraco referred only to Schedule Part 4, paragraph 3.6.1 (b) and not (c) which in fact produces "the finished earthworks levels for construction". This ambiguous approach to Schedule Part 4 is also demonstrated by your assertions in the DRP Adjudications about the meaning of Pricing Assumption 1. During the adjudication hearing for Russell Road Retaining Wall 4 (December 2009), the Infraco asserted that it had only priced for BDDI and that anything not represented on the BDDI was a Notified Departure. Indeed the Infraco's legal representative's view

was that the exclusionary drafting of Pricing Assumption 1 did not allow for any development and completion of the design. The Infraco shifted its view by the hearing for Section 7 Drainage (May 2010) to argue that "of course" there was a qualitative allowance for development and completion of design, that the Infraco had reasonably allowed for that in such cases and that there needed to be a materiality test applied to Pricing Assumption 1.

Example: Value Engineering not delivered

The Infraco has [repeatedly] failed in its obligations under the Infraco Contract in relation to Value Engineering (clause 5.7 of Schedule Part 4), by failing to provide **tie** with Estimates for the VE Items included in Appendix C to Schedule Part 4 of the Infraco Contract, and delaying to provide a response to **tie** in relation to the VE Items. The Infraco is obliged specifically to use all reasonable endeavours to achieve the savings for each Value Engineering opportunity identified in the Infraco Contract (paragraph 5.7.5 of Schedule Part 4 of the Infraco Contract), as well as being obliged generally to take all reasonable steps to manage, minimise and mitigate all costs. By not engaging with **tie** on the VE process, the Infraco is in breach of its obligations under the Infraco Contract. VE opportunities represent a value of £***; therefore the Infraco's breach in this regard has a material and adverse effect on the carrying out and the completion of the Infraco Works, in particular with regard to Price.

On 2 June 2008 (letter ref: PRO.CORR.41), **tie** reminded the Infraco of its obligations in relation to Value Engineering and requested an Estimate from the Infraco specifically in relation to VE Items 7, 12, 14, 16 and 17.

As at 1 August 2008, the Infraco had not delivered Estimates for these VE Items. **tie** therefore informed the Infraco of this failure (letter ref: INF.CORR 065). [The Infraco had advised ***by letter dated 30 July 2008 (ref: 25.1.20W1/SMcF/325).]

[The Infraco did / did not deliver Estimates as requested for [any of] these Items. The Infraco did / did not respond to this letter.]

[Specific examples included in the folder: Carricknowe Bridge Parapet / Edinburgh Park Viaduct / Roseburn Street Viaduct - why is the Infraco's behaviour in relation to these a breach?]

- **Edinburgh Park Viaduct (VE Item 12)** - the Infraco did not provide **tie** with an Estimate. **tie** repeatedly chased the Infraco on 2 June, 1 August, 5 September, 30 September and 29 October 2008 and 5 January 2009. [The Infraco failed to respond.] Infraco's position is that they informed **tie** on 3 June 2008 that this VE opportunity was not programme feasible since a redesign of the bridge would require 40 weeks. **tie**'s position is that the Infraco has not attempted to [pursue this Value Engineering Item.] What is **tie**'s position on this? What is the key point about this example? Any update on VE?
- **Roseburn Street Viaduct (VE Item 15)** - the two Key Qualifications for this VE Item were met on ***. This was communicated to the Infraco by **tie** on 29 May 2008, by letter PRO.CORR.34 dated 20 May 2008. [The Infraco has not provided **tie** with an Estimate.] The Infraco suggested (by letter dated 29 July 2008, ref: 25.1.201/SMcF/314) that **tie** should confirm this item as a "Design to Cost" item. **tie** responded on 30 July 2008 (ref: INF_CORR.060) that the Infraco is obliged to provide its proposals as to how the Infraco will deliver a final design acceptable to **tie** and the relevant stakeholders as required by the Infraco Contract. On 17 October 2008, the Infraco attempted to rely on the fact that the Programme included in Schedule Part 15 of the Infraco Contract stated that the Infraco were to receive the IFC Drawings on 27 May 2008, but the Infraco did not receive the IFC Drawings until 19 August 2008. Infraco appear to seek to rely on this as their justification for not attempting to

consider the VE opportunity. This is at odds with the Infraco's position on Programme generally and it is at odds with the obligations in relation to minimising and mitigating costs.

CLAUSE 7 - INFRACO'S BREACH OF CORE OBLIGATIONS

- 6.28** The Infraco has breached its obligation under Clause 7.1 of the Infraco Contract to carry out and complete the Infraco Works fully and faithfully in accordance with the Infraco Contract.
- 6.29 From the outset of the Infraco Contract, the Infraco has shown deliberate disregard for the Infraco Contract and a defiance to carry out the Infraco Works fully and faithfully in accordance with the Infraco Contract. The extent, duration and pervasive character of this breach and its cumulative effect is materially and adversely affecting the carrying out and completion the Infraco Works to a degree where tie no longer considers the Infraco intends to complete the Infraco Contract.
- 6.30** The Infraco has breached its duty of care under Clause 7.2 of the Infraco Contract to ensure that in carrying out and completing the Infraco Works, the Infraco exercises a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity.
- 6.31** The Infraco has breached its obligation under Clause 7.3.3 to ensure that the Infraco Works are completed in accordance with the Infraco's quality management system and plans as developed in accordance with Clause 105.
- 6.32 The Infraco has consistently failed to comply with its contractual obligations and apply the expertise that can be expected of a properly qualified and competent contractor acting reasonably with regard to quality and environmental issues, including: non-appointment of an HSQE Manager in accordance with Clause 105.5 of the Infraco Contract (Bilfinger Berger has an HSE Manager and the Infraco has a Quality Manager, both of which have been replaced without tie's approval); lack of expertise with regard to Site Waste Management Plan, Construction Site Drainage Plan, Princes Street Site Acceptance Test records, Environmental Incidents and Utility Inspection and Test Plans; failure to carry out quality inspections; failure to complete full IDR check on design.
- 6.33** The Infraco has breached its obligation under Clause 7.3.4 of the Infraco Contract to ensure that the Infraco Works are in compliance with the Employer's Requirements.
- 6.34 The Infraco has demonstrated disregard for certain sections of the Employer's Requirements. The Employer's Requirements are effectively the client's specification for the Infraco Works which the Infraco was employed and is being paid to carry out and complete. This is a breach of contract by the Infraco, which, separately and cumulatively, materially and adversely affects the delivery of the Infraco Works.
- 6.35 Example: Programme**
- 6.35.1** The Infraco has failed to comply with the Programme requirements set out in the Employer's Requirements, in terms of failure to provide any cogent Programme, failure to provide Progress Reports; failure to comply with the Document Standards & Control, failure to comply with the requirements in relation to Mandatory Codes.

6.36 Example: Risk Management requirements

6.36.1 The Infraco has failed to provide Risk Deliverables as required under the Employer's Requirements. The Bilfinger Berger element of the Infraco to this date does not have a satisfactory Risk Register in place for the entirety of the On Street and Off Street civil engineering works (Siemens and CAF, as members of the Infraco, have adequate and compliant Risk Registers in place). This seriously jeopardises **tie** having any comfort or visibility that the Infraco has a transparent and robust approach to risk, which on a Project of this nature is fundamental and puts **tie** in a position where Owner Controlled Project Insurances may be vitiated.

6.37 The Infraco has breached its obligation under Clause 7.3.7 of the Infraco Contract to comply with the Code of Construction Practice.

6.38 Compliance with the CCoP is a statutory duty of the City of Edinburgh Council and, by delegation, of **tie** under the Edinburgh Tram Acts. The Infraco is obliged to comply with the CCoP under the Infraco Contract in order that CEC and **tie** discharge their responsibilities.

6.39 Example: Schedule of Buildings Condition

6.39.1 The Infraco has failed to provide schedule of all buildings or other structures (including scheduled monuments and listed buildings that are located within the Site, or which are located directly adjacent to such Work Sites), which may be at risk of physical damage or damage caused by vibration generated during the Infraco Works and to arrange a record of conditions and surveys prior to commencing the Infraco Works.

6.40 Example: Invasive Species

6.40.1 The Infraco has failed to implement an Invasive Species Plan in accordance with the requirements of the CoCP and repeatedly fail to comply with the contractual obligations in relation to advising **tie** where Invasive Species are encountered and the treatment/mitigation which the Infraco intends to carry out. As at the date of this Remediable Termination Notice, the Infraco has not carried out any treatment - this causes delay [*how much ?*] and is potentially a breach of statutory duties (Wildlife and Countryside Act 1981 (as amended)).

6.41 The Infraco has breached its obligation under Clause 7.3.10 to ensure that the Infraco Works are carried out and completed so as to ensure compliance with all applicable Law.

6.42 Example: Deliver a Safe Tram (DaST)

6.42.1 The Deliver a Safe Tram Report which **tie** conducts every reporting period in order to comply with **tie's** DaST strategy pursuant to ROGS (Railways and Other Guided Transport Systems (Safety) Regulations 2006 highlight that the Infraco continually fails to meet the requirements of the inspection which reviews Interdisciplinary Design Check, Hazards, Inspection and Test Plan System, Design Variation/Change, As Builts and Asset Register.

6.42.2 The above will cause delay and cost at the point when the Independent Competent person requires to satisfy himself on the competence of project management techniques throughout the execution of the Infraco Works.

6.43 The Infraco has breached its obligation under Clause 7.3.12 to ensure that the Infraco Works are carried out and completed in accordance with all applicable environmental regulations and requirements.

6.44 Example: Environmental Management Plan

6.44.1 As at the date of the Remediable Termination Notice (25 months after the Commencement Date), the Infraco does not have in place a fully approved Environmental Management Plan, due to the Infraco's unsatisfactory and non-compliant drafts (for example, not containing a Construction Site Drainage Plan as it is meant to).

6.45 The Infraco has breached its obligation under Clause 7.3.13 to carry out the Infraco Works in accordance with Good Industry Practice.

6.46 Example: Failure to contract secure and stable supply chain which is competent and willing to provide Estimates (see section 7 of this Remediable Termination Notice).

6.47 Example: Failure to advise of non-Compensation Event delays (clause 65.10)

6.47.1 The Infraco's has consistently failed to inform **tie** of circumstances which cause delay to the Infraco Works and failure to provide an estimate of the likely effect and any evidence of necessary acceleration measures. This is contrary to the provisions of the Infraco Contract and this is contrary to Good Industry Practice.

6.48 The Infraco has breached its obligation under Clause 7.3.15 to assist tie in relation to providing information that best value has been secured in respect of the carrying out and completion of the Infraco Works.

6.49 See section 0 of this Remediable Termination Notice.

6.50 The Infraco has breached its obligation under Clause 7.3.16 of the Infraco Contract to carry out and complete the Infraco Works in such a manner as not to wilfully detract from the image and reputation of tie, CEC and the Edinburgh Tram Network.

6.51 See section 0 of this Remediable Termination Notice.

6.52 The Infraco has breached its obligation under Clause 7.5 to use reasonable endeavours to ensure that in carrying out the Infraco Works, it and the Infraco Parties maximise productivity by reference to Good Industry Practice, minimise disruption to the City of Edinburgh and minimise costs.

6.53 [Example: OLE on Guided Busway and Princes Street

6.53.1 The Infraco has failed to apply expertise to anchor the OLE poles correctly on Princes Street, requiring rectification and replacement which causes further disruption to the City of Edinburgh. This is a highly visible activity resulting in public disquiet over the competence of both the supervision and the execution of the works.]

[PM COMMS: Facts are partially correct. Remedial action was to Hydro-Dem part of the upper section of nib to expose sufficient bolt length to ensure adequate sheer connection could be achieved. Bolts were not renewed as stated. This has only been part completed and there remains several bases where additional works are still required to meet this criteria.]

6.54 The Infraco has breached its obligation under Clause 7.6 of the Infraco Contract to keep itself fully informed about current professional and technical standards and all matters related to, or which may have a bearing on the carrying out of the Infraco Works.

6.55 Example: Landfill Tax

6.55.1 The Infraco failed to apply timeously for the landfill tax exemption as they ought to have done and as a responsible contractor, taking cognisance of changes in the law, would have done. This resulted in the loss of the ability to **apply** for a landfill tax saving of approximately £ [***].

Further information

Example: Programme - the Infraco has failed to comply with the Programme requirements set out in the Employer's Requirements, in terms of failure to provide any cogent Programme, failure to provide Progress Reports; failure to comply with the Document Standards & Control, failure to comply with the requirements in relation to Mandatory Codes.

[Jo to update section on basis of information provided by tie: The Infraco has failed to comply with the Programme requirements set out in the Employer's Requirements (as well as those set out in Clause 60 of the Infraco Contract, for which, see below). The Infraco has continuously failed to comply with the following sections of the Employer's Requirements (this is a non-exhaustive list): sections 12.1.2 (Progress Reporting); section 12.2 (Programme Management); section 12.8.1 (Document Standards & Control); section 39.3 (Basis of Programme) and section 39.5 (Mandatory Codes).

Amongst other matters, compliance with these Programme requirements is essential in order to have visibility of the works which the contractor is carrying out, the programme, any slippage and mitigation measures and any confidence and any form of certainty around the completion of the Infraco Works.

On 10 July 2009 (ref: INF CORR 1758/MJ), **tie** wrote to the Infraco specifically in relation to the Princes Street two week Look-Ahead programme and progress update, but also stating that, as at that date, no submissions had been made by the Infraco to comply with section 12.1.2 (Progress Reporting), section 12.2 (Programme Management) and section 12.8.1 (Document Standards & Control). The Infraco was asked to rectify this as a matter of urgency.

On 29 July 2009 (ref: INF CORR 1860/MJ), **tie** again wrote to the Infraco, as the Infraco had not replied to this letter (ref: 1758). Once again **tie** recorded the Infraco's failure to comply with the Employer's Requirements.

[Then what?] [The Infraco did not and as at today's date, no submissions have been made in accordance with the standards set out in the Employer's Requirements.]

The Minutes of the Progress Meeting held on 23 March 2010 record that the Infraco stated that the Infraco will no longer be submitting construction programmes to **tie** as they were being used to generate contractual letters, until the Programme has been agreed. Frank McFadden of **tie** requested a letter to formalise this, to which [Kevin Russell of Bilfinger Berger] noted that a letter would be issued in response to a formal **tie** request. **tie** subsequently issued a formal request by letter of 7 April 2010 (ref: INF CORR 4686/SC) to which [the Infraco did not respond. OR what happened?]

*[Section 12.8.1 requires Planning Deliverables to be in Primavera V6 and should specifically be in complete, self-contained, and fully editable formats. [Despite repeated requests from tie on ***, ***, and *** /on a weekly basis / at *** meetings], the Infraco has failed to comply with this provision. Compliance with this requirement is material to the Infraco Works because ***.]*

Example: Risk Management requirements

On 2 February 2009, the Infraco provided its first draft of the "BSC Risk Management Plan & Procedure (Rev A)" for tie's review.

The document was reviewed by tie in accordance with the Design Review Procedure contained in Schedule Part 14 of the Infraco Contract and on 25 February 2009, tie notified the Infraco that tie endorsed it "Level C - Resubmit" as it was inadequate. tie provided detailed reasons for that endorsement on the Record of Review issued to the Infraco on that day.

The Infraco provided a copy of their Risk Register on 7 May 2009. This draft was entirely unsatisfactory to tie as it did not comply with the reasonable requirements of tie, via tie's designated Risk Manager, in accordance with the Employer's Requirements. On 11 December 2009, tie notified the Infraco in writing (letter ref: INF CORR 2983/MH) that tie considered that the Infraco was applying little or no effort in the production of the Risk Register as required by the Infraco Contract. At this date, tie offered an alternative approach to assist the Infraco. This letter was re-issued on 22 December 2009 (ref: INF CORR 3091/MH). The Infraco responded on 3 February 2010 rejecting tie's alternative approach and accepting that the Infraco remains responsible for assessing risk ownership, severity, ranking and mitigation proposals for risks incorporated in the Risk Register, in accordance with the Employer's Requirements. The Infraco has yet to deliver to tie a satisfactory Risk Register.

Example: Traffic Management

Traffic management was installed at the Gogar roundabout on the A8 in connection with the A8 underpass works on xxxxx. This was planned as 4 phases of traffic management for a total duration of x months. This traffic management, at a key gateway to Edinburgh, is still in operation due to delays to the A8 works and is likely to be in place until at least aaaa.

Access to the ScotRail carpark at Haymarket was taken by infraco on xxx and expected to be for a total duration of www months. This removed car parking spaces and therefore revenue to first ScotRail. Due to delays with the viaduct works the total duration of access to the car park has extended to yyy months, meaning additional disruption and loss of revenue to this key Stakeholder.

Example: OLE on Guided Busway and Princes Street [Confirmed by PM 9 June 2010]

At some OLE bases on Princes Street, the bolts to anchor the OLE poles were set at the wrong level - the Infraco investigated whether sleeves (or some other solution) could be used to increase the exposed bolt length, but their designers said that this would not work from a bolt sheer perspective, so the Infraco had to break out the nib, and locally the top of the OLE base to remove the original bolts and then replace and re-set using new bolts.

PM COMMS: Facts are partially correct. Remedial action was to Hydro-Dem part of the upper section of nib to expose sufficient bolt length to ensure adequate sheer connection could be achieved. Bolts were not renewed as stated. This has only been part completed and there remains several bases where additional works are still required to meet this criteria.

Failure in relation to Third Parties

- whole new section in the folder! see end of section 7

Draft - FOISA Exempt

7. CLAUSE 10 - DESIGN DELIVERABLES

7.1 The Infraco has breached its obligations under Clause 10, Clause 102 and Schedule Part 14 of the Infraco Contract.

7.2 The Infraco has failed to comply with Clause 10.1 and Schedule Part 14 in not submitting all of the Deliverables to **tie's** Representative for review in accordance with Schedule Part 14. The Infraco has not submitted any part of the SDS Provider's Design Deliverables to **tie** for review before their issue for construction.

7.3 The Infraco has failed to comply with Clause 10.2 in not submitting any Permitted Variation which has involved change to the SDS Provider's original design to **tie's** Representative for review pursuant to Schedule Part 14.

7.4 The Infraco has failed to comply with Clause 10.4 by not establishing an extranet accessible by computer to **tie**, any **tie** parties and any other party reasonably required by **tie**.

7.5 The Infraco has failed to comply with Clause 10.5 by not setting out in the Programme the order in which the SDS Provider's Design Deliverables are to be submitted for review in accordance with the Review Procedure.

7.6 The Infraco has failed to comply with Clause 10.13 by not notifying **tie** of conflicts, ambiguities, discrepancies, errors or omissions within or between Deliverables together with its proposals for resolving such conflicts, ambiguities, discrepancies, errors or omissions. In particular, the Infraco has failed timeously to notify **tie** of conflicts and discrepancies between drawings issued by the SDS Provider. Conflicts have had to be pointed out by **tie** to the Infraco.

7.7 The Infraco has attributed immaturity and discrepancies in design, irrespective of the reason for that immaturity or discrepancy, to matters requiring design development from BDDI, thereby enabling a claim to be established against **tie**, rather than dealing with the matter through its contract with the SDS Provider.

7.8 The Infraco's breach of its obligations in respect of Design Deliverables leads to a situation where there is no fully integrated and assured design solution, the design is often of indifferent quality, the design is significantly late and the design has not secured best value for **tie**. This has a material and adverse effect on the carrying out and completion of the Infraco Works. The Infraco has failed secure the legal ability to discharge its obligations under Clause 102 regarding grant of licences and **tie's** ability to deploy the entirety of the Design as it sees fit.

7.9 Example: Late Delivery of Design

7.9.1 In relation to the 112 IFC packages contained within v31 of the Design Delivery Programme and Rev 1 of the Programme, the SDS Provider delivered IFCs late on 53 occasions from the date of commencement of the Infraco Contract; 37 of these late IFC packages relate to Phase 1a of the Edinburgh Tram Network for which the Infraco is contracted to construct. This has included late delivery of IFCs for all roads, street lighting, drainage and landscaping packages; for Tram Stops throughout Section 1; and for drainage at the Depot.

Further information

Example: Princes Street

[tie to substantiate]

Example: Section 7

[this is Gogar Landfill I think ? - Jo has info on separate emails in folder]

Example: Changes in IFC packs

[tie to substantiate]

Example: trackslab and roads drawings and Design Assurance Statements

[Jo/tie to review: As yet, some two years into the Contract, and despite numerous review meetings and exchanges in correspondence, the Infraco is still not in a position to issue an approved integrated set of construction drawings for the trackslab and roads. Nor can the Infraco provide the necessary Design Assurance Statements, or even give any assurance that the design has been completed to enable [the Infraco] [tie?] to authorise construction at little or no risk.

To accommodate the manner in which the Infraco has sought to manage this issue, such Design Assurance Statements would include input from all relevant designers, including SDS or Siemens, such assurance should include warranty from any sub-contracted design (for example BAM for track design) and a licence from the Intellectual Property Owner for "Rheda City"(if part of the design solution) in favour of tie (in accordance with Clause 102.2.2 of the Infraco Contract). All should be confirmed by Infraco in an integrated consolidated solution, including a register of residual risks and how they are expected to be controlled. Clause 2.8.2 of Part C of Schedule Part 14 provides a detailed list of the information which is subject to review. This information has not been forthcoming.]

See comments from Damian in folder at section 8 - refers to Draft Acutus Report - in folder at section 2 (Programme mitigation / lack of)

8. CLAUSE 28 – BREACH OF OBLIGATIONS IN RELATION TO KEY SUB-CONTRACTOR ARRANGEMENTS

8.1 The Infraco has failed to successfully place all necessary Key Sub-Contracts to carry out and complete the Infraco Works.

8.2 The Infraco Contract reflects the intention that the Infraco would procure and sub-contract with Key Sub-Contractors for certain elements of the Infraco Works, including: major civils works contractors (civil engineering elements of Phase 1a), piling contractors, ground stabilisation contractors and trackwork supplier installers.

8.3 From prior to the commencement of the Infraco Contract (and, as background, as part of the Infraco's tender bid submission), this has been the message from the Infraco (including in Progress Meetings, at Management Meetings; in Work Plans; at the Sub-Contract Audits; in dialogue; and through correspondence). The matter of sub-contracts and the failure of the Infraco to manage its Key Sub-Contractor arrangements and commitments has been the subject of much communication over the last two years. Irrespective of this and tie's continual push to close out the sub-contracts, the Infraco continue to be in breach of the sub-contract provisions in the Infraco Contract.

8.4 The Infraco, as regards the tram infrastructure installation works, operates as a management contractor, without any meaningful construction resources of its own. Given that the engagement of sub-contractors is fundamental to execution of the Infraco Works in the first instance and that the engagement of sub-contractors on terms which are compliant with the Infraco Contract is fundamental to carry out and complete the Infraco Works in accordance with the Infraco Contract, tie's position is that the Infraco's breach is materially and adversely affecting the carrying out and completion of the Infraco Works.

8.5 As at the date of this Remediable Termination Notice, the Infraco has executed two Key Sub-Contracts (BAM Rail and CORE, both of which are Siemens' Key Sub-Contractors).

8.6 The Infraco has placed and executed none of the Key Sub-Contracts for the Key Sub-Contractors of the Bilfinger Berger element of the Infraco (i.e. the major civils works).

8.7 The Infraco's lack of Key Sub-Contracts causes tie grave concern around the Infraco's capability, willingness and commitment to carry out the Infraco Works. The failure to have in place Key Sub-Contracts has a detrimental effect on Programme, Price, the ability to prepare and submit timely, adequate and fair Estimates for Changes, security of delivery of the Edinburgh Tram Project and performance and quality of work security (via collateral warranties as provided for in the Infraco Contract).

8.8 The Infraco has breached its obligation pursuant to Clause 28.4 of the Infraco Contract to obtain tie's approval for all work which is sub-contracted to each Key Sub-Contractor in advance of the each sub-contract's execution.

8.9 As at the date of this Remediable Termination Notice, only one of Bilfinger Berger's Key Sub-Contractors (Farrans) has had its sub-contract formally approved by tie (on 23 March 2009), which approval was subsequently retracted in February 2010. The Infraco has not obtained tie's approval for the letters of intent on which certain Key Sub-Contractors are engaged.

8.10 The Infraco has breached its obligations to ensure that Key Sub-Contracts meet the requirements of Clause 28.4 of the Infraco Contract.

8.11 The Infraco has breached its obligation to provide tie with the collateral warranties which are required pursuant to Clause 28.7 of the Infraco Contract.

8.12 At the date of this letter, tie has not received collateral warranties for any of the Bilfinger Berger Key Sub-Contractors. tie has received no indication from the Infraco when these are likely to be forthcoming.

Further information

The Infraco has not placed Key Sub-Contracts for the following Key Sub-Contractors:

- *Farrans - the Farrans form of sub-contract was initially approved by tie on 23 March 2009. The sub-contract was still not executed by March 2010 (tie subsequently requested the Infraco to refresh certain elements of the sub-contract in order to align with the Infraco Contract commitments).*
- *Barr - no Key Sub-Contract has been placed. tie letter 10 March explaining concerns and what action was required to ensure that the Key Sub-Contract could be approved by tie in accordance with the Infraco Contract and BSC response 23 March 2010.*
- *Grahams - no Key Sub-Contract has been placed. tie letter 10 March and BSC response 23 March 2010*
- *McKean -*
- *Crummock -*
- *Expanded -*
- *Mackenzie Construction Ltd - approval was granted by tie on 2 October 2009 for Mackenzie to carry out Key Sub-Contract Works between chainage 130000 (cut line) Princes Street and Haymarket Terrace in accordance with the Infraco Contract. At the Sub-Contract Audit in [February 2010], Bilfinger Berger indicated that they would be in a position to execute a sub-contract in mid April 2010. As at the date of this Remedial Termination Notice, there is no contractually compliance sub-contract.*
- *Mackenzie - approval was granted by tie on 16 February 2009 for the works noted in (Infraco letter 046/881 10 nove 2008?) subject to full compliance in accordance with the Infraco Contract.*

Example: Early lack of engagement on sub-contractor process

tie called a meeting for 10 June 2008 (4 weeks after the Infraco Contract was signed), in order to discuss the lack of visibility of the Infraco's Mobilisation progress.

The Minutes of the Meeting note that, at this stage, the Infraco confirmed that it still had to appoint any package sub-contractors and that they were still negotiating with 4 package contractors (Farrans, Grahams, R J McLeod and Barr) and no appointments had been made. tie pressed for clarity regarding the impact this was having on programme and what alternatives were being put in place if agreement was not reached. The Infraco stated that they will / are awarding small packages of work to protect programme (it is noted that tie awaited evidence of this) and if no agreement is

reached the Infraco will undertake the works directly. It is noted that **tie** will require evidence of appropriate resource capability in this circumstance.

Example: Lack of procurement strategy or policy

The Bilfinger Berger element of the Infraco has failed to demonstrate that it has a procurement strategy or policy in place which it is using to manage the sub-contractor process. This information and demonstration was requested from the Infraco during the sub-contract audit process conducted during January and February 2010. [refer to audit report].

Bilfinger Berger [Jo to insert text from audit report re management and monitoring via weekly meetings and construction programmes.]

*For a project of this scope and complexity (civils work value of £***), this is entirely unsatisfactory and is contrary to Good Industry Practice and it [means that the Infraco ***] which, as a result, has a material and adverse effect on the carrying out and completion of the Infraco Works and the delivery of the Edinburgh Tram Project.*

Example: Letters of Intent (unapproved by tie)

For the majority of Bilfinger Berger's Key Sub-Contractors, the Infraco is relying on letters of intent.

tie has notified the Infraco that this is unsatisfactory (by letters dated x, y and z and meetings on x, y and z)

Letters of Intent

Sub-Contracts for Farrans, Grahams, Barr.

Correspondence

Collateral Warranties :-

This means that tie has no direct contractual link with the Key Sub-Contractors as it was envisaged that it would have. This means that tie is unable to fulfil its commitments to CEC and Stakeholders. This potentially puts tie in breach of its statutory obligations under the Tram Acts that only authorised parties may carry out the authorised works.

By letter of 26 February 2010 (ref: INF CORR 4262/RJ), tie advised the Infraco that it would apply its contractual right under Clause 67.14 of the Infraco Contract to retain monies paid in respect of work carried out by a Key Sub-Contractor for which the Infraco has not procured a collateral warranty in accordance with Clause 28.7.

DLAP: Audit Report is in folder

9. CLAUSE 73 - BREACH OF BEST VALUE OBLIGATIONS

- 9.1 The Infraco has breached its obligations under Clause 73 by failing to make any arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and a combination of economy, efficiency and effectiveness and has failed to assist tie in the discharge of its Best Value obligations on behalf of the City of Edinburgh Council.
- 9.2 The Infraco's overarching approach to the Infraco Contract is at odds with this contractual commitment and materially and adversely affects the carrying out and completion of the Infraco Works and the cost of the Infraco Works. Specific examples of this breach include: lack of consideration and compliance with Value Engineering contractual obligations; provision of elevated Estimates; non-management of SDS Provider and the failure to procure a complete, assured and integrated Design which is legally transferable to tie; failure to evidence verification and/or controlling of costs; lack of visibility of information in relation to INTCs and Compensation Events; seeking unjustified payment of Preliminaries.

Further information

[To expand examples if necessary, tie to provide info on Mrs X and Princes Street costs and seeking payment for sub-contractors not on site - VE;- Clause 80.7.4; - Estimates; - Failure to evidence controlling of costs - Mrs X? ; - Lack of visibility of information in clause 80 and clause 65; - programme; - [examples of where tie awarded contracts to other contractors due to Infraco's inflated price] ; - Princes St costs - purported increase in the cost of the works which you carried out in Princes Street (480%) ; - no double recovery ; certify completion or approve that Preliminaries are due for payment on the basis that certain resources/sub-contractors upon which the application is founded, notably the on street sections, are not actually on the site

10. CLAUSE 41 - BREACH OF OBLIGATIONS IN RESPECT OF APPLICATION FOR CERTIFICATION AND MILESTONE PAYMENTS

10.1 The Infraco has breached its obligations under Clause 41.1 to give tie notice where it considers that Construction Milestones or Critical Milestones will be achieved and has failed to comply with its contractual commitments where the Infraco is seeking payment of a Milestone Payment.

10.2 Where the Infraco fails to comply with the contractual payment mechanism by submitting claims for payment which cannot be validated, this seriously undermines the credibility of the Infraco and the Infraco Works and it brings into question the Infraco's capability and commitment to carrying out and completing the Infraco Works in accordance with the Infraco Contract.

Further information

[By letter of 7 May 2010 tie advised the Infraco that they had not followed contract protocols in relation to Milestone Completion notices and subsequent Applications for Payment for Milestones for Preliminaries. Consequently, tie stated that it was not in a position to certify the Preliminaries claimed in their March Application.

The Infraco responded on 12 April 2010 making two points: firstly, that they were baffled by our stance since we had not adopted this previously; and secondly that Milestones for Preliminaries are not to be classified as Construction Milestones.

tie responded on 7 May 2010 restating the position in respect of the contract procedure. In essence, the Infraco are required to notify tie when a Construction Milestone is complete and thereafter apply for payment in interim Applications. In relation to Construction Milestones there is no contractual distinction between Construction Milestones and 'Preliminaries' Milestones therefore all Milestones fall to be classified as Construction Milestones.

In any event, tie has to (under the terms of the Infraco Contract) approve the payment.

Therefore tie make the following conclusions:

- That the Infraco has failed to notify (as required by Clause 41) that Construction Milestones are complete in order that tie may issue a certificate of completion to that effect;
- Notwithstanding this, tie would not issue a certificate on the basis that the Preliminaries claimed include, inter alia, for on street works which the Infraco are not currently progressing;
- That the Infraco cannot claim for Milestone Payments that do not already have a completion certificate issued by tie (clause 67);and
- On a general note tie is not willing to either certify completion or approve that Preliminaries are due for payment on the basis that certain resources/sub-contractors upon which the application is founded, notably the on street sections, are not actually on the site. [tie to obtain the evidence for this e.g. GIS maps]

These conclusions evidence that the Infraco is not complying with the Infraco Contract in terms of payment mechanism. This seriously undermines the credibility of the Infraco and the Infraco Works

and it seriously brings into question the Infraco's capability and commitment to carrying out and completing the Infraco Works in accordance with the Infraco Contract.]

11. CLAUSES 7.3.16 AND 101.14 - CONFIDENTIALITY/REPUTATIONAL BREACH

11.1 The Infraco has taken actions which wilfully detract from the image and reputation of tie and the Edinburgh Tram Network.

11.2 The Infraco has attempted to discredit the management of tie on several occasions throughout the duration of the Infraco Contract, including: writing to CEC with derogatory accusations against tie; providing its recently appointed PR adviser (Donald Anderson) with misinformation on the nature of the DRPs and giving him the remit to represent the Infraco externally; releasing biased information directly and indirectly to the media in a manner intended to cause a negative impact on tie's image and reputation .

11.3 The Infraco has breached the confidentiality obligations which it owes to tie under Clause 101 of the Infraco Contract, by disclosing Confidential Information belonging to tie and by releasing public relations material and press releases without tie's prior written approval.

11.4 The Infraco has released public relations material and press releases without tie's prior written approval on several occasions throughout the duration of the Infraco Contract, including for example: extensive direct comments to journalists as the time of the dispute on Princes Street beginning in February 2009; briefings directly to Ministers which were captured on film by the BBC.

This behaviour and these breaches seriously undermine the trust which tie ought to be able to have in its contractor with regard to commitment to deliver the Infraco Works and the Project vision and it seriously harms the relationship between the parties, which relationship is fundamental in delivering the Infraco Works and the Edinburgh Tram Project.

Further information

In a letter of 8 March from the Infraco to CEC (letter ref: RJW/CEC20100308), the following accusations were made against tie:

"unable or unwilling to address the realities of the situation", "denial of the budget overrun" and "chooses not to engage with the consortium in any meaningful or constructive manner". This letter also asserts that it is Infraco's view that the current allocated funding is quite unrealistic.

In a follow up letter on the 1 April (letter ref: 25.1.201/RWa/5226) the Infraco replied to a response from the CEC Chief Executive Tom Aitchison. In this more direct letter, Richard Walker stated that the tie "will not isolate the Council from criticism" and suggests that Tom Aitchison needs to respond directly to assurances that funds will be met for the Project, and in addition any additional costs arising from the adjudication ruling. In the letter Richard Walker takes the opportunity to undermine tie by stating that tie's behaviour is simply not consistent with an organisation wishing to progress the project in an efficient manner and goes further to suggest that as an organisation we wish to substantially frustrate the progress.

This action wilfully detracts from the image and reputation of tie with CEC (one of tie's key Stakeholders) and completely undermines the spirit of Project Partnering, collaborative working and avoiding disputes. As a result, this affects, materially and adversely, the carrying out and completion of the Infraco Works.

Has taken every opportunity to discredit the management of tie by:

Providing its recently appointed pr adviser (Donald Anderson) with misinformation on the nature of the disputes and giving him the remit to represent the consortium externally. (Comments made by Donald Anderson in person to Richard Jeffrey and to Leanne Maberley) These included acknowledgement that Richard Walker's first letter should never have been sent.

Comment to Leanne Maberley "I am going to bring tie down"

Writing twice to CEC in extremely derogatory manner regarding the management of tie

2nd letter dated 1st April – directly questioning CEC's ability to meet the cost of the project.

The Infraco has released information directly and indirectly to the press in a manner deliberately and materially against the contract with tie Clause 101 on several occasions throughout the duration of the Infraco Contract. These included extensive direct comments to journalists as the time of the dispute on Princes Street beginning in February 2009 and also included briefings directly to Ministers which were captured on film by the BBC.

A further spate of direct and indirect quotations have been to the press and media made since February of this year. This began when an agreement was reached on coordinating our approach to a significant Financial Times review of the project. Despite joint agreement on how this was to be covered as such an important milestone article, Richard Walker deliberately used the article to attribute blame to tie and to discredit any family approach to the project.

A further quotation was made by Richard Walker again blaming utility delays to the Daily Mail on the 23rd February.

On the same day, very specific information was disclosed to the Evening News on the adjudications which could only have been provided by someone with access to those documents. These documents are subject to "breach disclosure" – needs a form of words". This information listed the exact number of adjudications outstanding and also quoting sources close to the consortium regarding attributed allocation of costs by the adjudicator.

These quotations escalated in March 2010 – BBC News Consortium spokesman – "There will be further increase in the cost of the scheme"

On the 11th of March Bilfinger accused tie of being "in denial" about what it called the budget shortfall and deliberately accused tie of misleading its parent company CEC. The Herald were also given a copy of Richard Walker's extremely derogatory letter to the Council's Chief Executive indicating that the people of Edinburgh should not have faith in the Council. In several quotes made to the journalist Richard Walker referred to tie as being "entrenched", "in denial" and "unwilling to address the realities of the situation". This article also includes further detail on adjudications not provided by tie.

This was closely followed by sources close to the consortium in the Evening News 16th March stating that tie "does not have a hope in hell" of imposing fines for late completion of the project. This article quoted again a start date of 2014 with an extra £100m causing yet another escalation of anxiety and stakeholder lack of confidence. This ran also on STV news.

The last of this spate of articles culminated in a detailed interview given without name by a consortium spokesman citing against the CEC "interference by local authority bureaucrats", "micromanagement by tie" and "progress being virtually zero". This article which was written partly by an ex employee of Bilfinger and it also provided financial information on the project which was confidential. This is one of the most damaging articles.

For example, on 16 February 2010, an article was published in the Financial Times which included a direct quotation from Richard Walker which was misleading and incomplete and did not align with the transcript of the interview with which the Infraco provided **tie** for approval. This quotation was phrased with clear intent to say that **tie** was acting irrationally (which is neither true nor fair comment) and which had a straightforward negative effect on the Project's image. **tie** notified the Infraco of this breach on 18 February 2010 and subsequently exchanged correspondence with the Infraco on the matter. The outcome remains that this example is a breach of the Infraco Contract, which as a result adds to **tie**'s belief that the Infraco's breaches materially and adversely affect the carrying out and completion of the Infraco Works.