

LEGAL ADVICE NOTE

INFRACO CONTRACT - TERMINATION

1. Background

We have been asked to produce a very brief note on the relevant termination provisions in the Infraco Contract, in terms of both Infraco and **tie** Default and the requirements of the Infraco security package. For further detail refer to the relevant clauses of the Infraco Contract and associated defined terms.

2. Infraco Default (clause 90)

The relevant heads of Infraco Default are:

- breach of any of its obligations which materially and adversely affects the Infraco Works; and
- suspension of the Infraco Works for 15 BDs after receiving written notice from **tie** to proceed.

To trigger termination for Infraco Default, the steps are:

- **tie** notifies the Infraco of the Infraco Default - "Remediable Termination Notice";
- Infraco may submit a rectification plan within 30 BDs (or longer if **tie** agrees);
- **tie** must consider the rectification plan and **tie** has 10 BDs (or such longer period as may be agreed) to decide if the plan is acceptable (at **tie**'s absolute discretion);
- If the plan is acceptable, the Remedial Termination Notice is no longer effective and Infraco must comply with the terms of its rectification plan (if the Infraco does not, **tie** can terminate after 5 BDs' written notice);
- If the plan is not acceptable (or the Infraco does not submit a rectification plan), **tie** may terminate the contract after 5 BDs' written notice.

On termination, **tie** may have various rights open to it, including: accessing the Site, and exercising Step-In rights in any collateral warranties. Further termination provisions (clauses 94 and 95) apply.¹

3. tie Default (clause 88)

The potentially relevant heads of **tie** Default are:

- breach by **tie** of any material contractual obligation which "substantially frustrates or renders it impossible for the Infraco to perform any material part of its obligations.. for a continuous period of 45 Business Days;" or
- non payment by **tie** (ultimately CEC) of an amount exceeding £250k for more than 30 days beyond the due date.

¹ See DLAP paper: "Truncation or Termination" (22 April 2009) for further detail.

To trigger termination for **tie** Default, the steps are:

- Infraco serves a written termination notice on **tie**, specifying the type of **tie** Default;
- If this is a valid notice and the **tie** Default is not capable of rectification, the contract terminates 30 BDs after **tie** receives the notice;
- If the **tie** Default is capable of rectification, **tie** has 30 BDs to rectify the **tie** Default;
- If **tie** does not rectify the **tie** Default within the 30 BDs, the contract terminates after 30 BDs;

On termination the Infraco has various rights and the effects of termination provisions (clause 94 and 95) apply.²

Note that the Suspension of Work termination provisions (clause 87.2 and 87.3) do not apply unless **tie** has previously suspended the Infraco Works on instruction and a period of 6 months have passed.

4. Security package

4.1 Performance Guarantee (ANZ)

To call on the Performance Bond (currently 23m), **tie** issues a Demand Notice.

The Demand Notice:

- must be in the form included in the Appendix to the Bond and signed by the appropriate officers;
- must be accompanied with a written statement identifying the Infraco's failure/default;
- must attach a certified copy of **tie**'s written notice to the Infraco notifying it of the failure/default ("**Default Notice**");
- must not be presented to the Surety within 14 days of the Default Notice i.e. **tie** has to issue the Default Notice to the Infraco, then wait 14 days before calling on the Bond.

The Surety must pay within 5 BDs of receipt of the Demand Notice and has no right to question a valid Demand Notice.

4.2 Retention Bond (Deutsche Bank)

Identical provisions as above apply where **tie** wishes to call on the Retention Bond (currently £2m).

4.3 Bilfinger Berger AG/Siemens AG Parent Company Guarantees

The PCGs irrevocably guarantee the performance of all of their respective subsidiary's obligations under the Infraco Contract (financial and performance).

² See DLAP paper: "Truncation or Termination" (22 April 2009) for further detail.

Conditions to calling the PCGs include:

- **tie** must first make the demand in writing to the relevant Infraco Member;
- the Demand Notice should be in the form included in the PCG; and
- regarding a demand for payment, **tie** must make the same demand of both parent companies (for Bilfinger Berger and Siemens).

The parent company must pay within 5 BDs of receipt of a Demand Notice.

5. CEC Guarantee

The CEC Guarantee only extends to **tie**'s payment obligations i.e. if **tie** fails to pay to the Infraco an amount properly due and payable (which is not otherwise being disputed), the Infraco is entitled to issue a demand notice to CEC and CEC is obliged to pay the Infraco within 5 BDs of receipt.

DLA Piper Scotland LLP

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