BRIEF FOR SENIOR COUNSEL

INTRODUCTION

tie Limited ("**tie**") is the public sector body which was set up by City of Edinburgh Council to complete the procurement of the Edinburgh Tram Network. In implementing this purpose, **tie** has completed a number of procurements dealing with (amongst others) the operation of the scheme once in public service (DPOFA), provision of tram vehicles (Tram Supply), diversion of utilities on the route (MUDFA) and the design of the scheme (SDS). In May 2008, **tie** completed the procurement of an Infrastructure provider and entered into the Infraco Contract and associated suite of documents.

One of the conditions precedent of the Infraco Contract [see Counsel's Papers at 1 and 2] is that the Infraco enters into a novation agreement with **tie** and the SDS Provider ("**Novation Agreement**") (*Clause 11.1* of the Infraco Contract). On the last date of execution of the Novation Agreement **tie** and the Infraco are to execute a collateral warranty from the SDS Provider in favour of **tie** ("**Collateral Warranty**") (*Clause 11.2* of the Infraco Contract). The Infraco has therefore become the Client as regards the SDS Agreement [see Counsel's Papers at 3 and 4].

The production of designs by the SDS Provider has been significantly delayed both before and after novation for various reasons. Design had been programmed for completion before the Infraco was to be appointed, and the delay has created numerous difficulties to programme and the consequential effect upon the obligations of other parties in the remainder of the contractual suite. One such difficulty was the extended negotiation with the Infraco over the terms of the SDS Novation Agreement and associated documentation and contractual provisions/reliefs.

A limb of this Infraco positioning, and the Infraco negotiations on other key risk fronts, developed into the late inclusion of a more complicated Schedule Part 4 than was originally envisaged [see Counsel's Papers at 5]. This involved the Infraco requiring a long list of pricing assumptions and notified departures which were intended to shield the Infraco from certain risks that it would otherwise assume under the main provisions of the Infraco Contract.

Subsequent to the execution of the Infraco Contract, the project has encountered significant difficulties in terms of delay across various sections of the works. The Infraco has behaved in a manner which has deeply frustrated **tie**, and undermined the partnering principles contained within the Infraco Contract. This has applied on numerous fronts including in relation to design issues, Estimates, and sub-contracting.

Clause 80 of the Infraco Contract sets out the process for Changes, and has been the focus of most of the key disagreements between **tie** and the Infraco. The parties have been unable to agree such items as Estimates, the application of the Notified Departures principles, and the legitimacy of **tie** instruction during the Change process. The net effect has been extreme delay to key areas of the project.

tie has concluded that certain of the key issues should be referred to Counsel for opinion, as set out below.

PART A - What is Base Date Design Information?

The following questions arise in the context of a disagreement between **tie** and Infraco as to the interpretation, status and effect of a bundle of drawings, which were unilaterally annotated by Infraco and upon which Infraco have sought to rely to limit their obligations in connection with the scope of works to be undertaken by them (in particular, to limit the scope of road reconstruction and surfacing works to Phase 1a of the works).

In short, Infraco seek to argue that the bundle of annotated drawings take precedence over the entire terms of the Infraco Contract, with the effect that the annotated drawings, not any other terms of the Infraco Contract, determine part of the scope of works the Infraco is obliged to carry out. It is on that basis that Infraco seek additional payment to the extent that they are required to carry out works in addition to the scope of works indicated on the annotated drawings.

Instructing solicitors are of the view that the annotated drawings do not have the status or effect argued by Infraco. Reliance by Infraco on these annotated drawings is in the circumstances misconceived.

1. **As a matter of construction, which documents go to make up "Base Date Design Information" as that term is defined under the Infraco Contract? In particular, would either (a) the 21 drawings highlighted in Appendix A of Schedule Part 30 of the Infraco Contract; or (b) drawings unilaterally annotated by Infraco be construed as forming part of the documents comprised in "Base Date Design Information"?**

   Instructing solicitors' view is that:

   In terms of the Infraco Contract, Base Date Design Information comprises the set of all design drawings information available to, or issued to, the Infraco prior to the design freeze date of 25 November 2007.

   Schedule Part 4 of the Infraco Contract defines Base Date Design Information as "*the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4*" (paragraph 2.3). Appendix H of Schedule Part 4 specifically includes "*All of the Drawings available to Infraco up to and including 25th November 2007*". The purpose of Base Date Design Information was, through a design freeze date, to establish a baseline from which the Infraco would calculate and fix its final price for an identified scope of work.

   By way of background, it is instructing solicitors' understanding that, design information drawings were available to the Infraco via the Data Room, which gave named Infraco personnel access to live design information, and were issued to the Infraco on CDs issued by **tie** Document Control. The Infraco had requested that information be additionally issued on CD and a weekly update CD was therefore provided by **tie** (under cover of a Document Transmittal Form which confirms issue/requests acknowledgement of receipt).

   It is instructing solicitors' view that neither the list of documents contained at Appendix A of the Infraco Proposals (*Schedule Part 30*) [see Counsel's Papers at 6] nor drawings unilaterally annotated by Infraco can be construed as forming part of "*Base Date Design Information*".

2. **What is included in the Construction Works Price as set out in Schedule Part 4?**

Instructing solicitors' view is that:

Schedule Part 4 (*Pricing*) of the Infraco Contract is the master document with regard to establishing the Price tendered and agreed for the Infraco Works. As an aside, the importance to the Infraco of Schedule Part 4 (and the protections which it contains) is supported by the inclusion of *Clause 4.3* of the Infraco Contract.

The Construction Works Price is defined as: "*a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements... and the Infraco Proposals*" (paragraph 3.1 of Schedule Part 4). The Contract Price (which incorporates the Construction Work Price) is founded on the Base Case Assumptions (meaning "*the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions*") (paragraph 3.5 of Schedule Part 4).

Instructing solicitors' consider that in order to ascertain what the Construction Works Price includes, consideration must be given to the requirements in the Employer's Requirements and the elements of work in the Infraco Proposals, together with consideration of the Base Case Assumptions (including the Pricing Assumptions and the Base Date Design Information) to determine how such assumptions impacted upon the Price ultimately tendered by the Infraco and accepted by **tie**.

3. **Infraco draws a distinction between information which was "issued" to it and information which was "available" to it. To what extent does Counsel consider that there is any distinction with material effect between the definition of "Base Date Design Information" contained in paragraph 2.3 of Schedule Part 4 and the further statement in Appendix H of Schedule Part 4? Specifically, does Counsel consider that there is any distinction between reference to design information drawings "*available to*" or "*issued to*" the Infraco?**

Instructing solicitors' view is that:

There is no distinction with material contractual effect.

The language used represented the factual position at date of contract signature.

The design information drawings were both available to the Infraco via the Data Room, and were issued to the Infraco on CDs issued by **tie** Document Control (as further described in 1 above). What is captured by Base Date Design Information amounts to the same via either medium.

4. **If Counsel considers that there is a material distinction in response to question 3, to what extent would this elevate/affect the status of the list of drawings annexed by the Infraco in Appendix A to Schedule Part 30 (*Infraco Proposals*)?**

Instructing solicitors' view is that:

Any perceived distinction would have no effect on the status of the Schedule Part 30 list.

In any case, as a matter of fact the Schedule Part 30 list cannot be the Base Date Design Information because:

Appendix A to Schedule Part 30 provides a list of documents appended to the Infraco Proposals. This list is not, and is not stated anywhere to be, exhaustive of all the design data, information and drawings available to or issued to the Infraco up to and including the 25th November 2007. There is no basis (contractual or otherwise) for saying that Appendix A contains all of the design information drawings available to or issued to the Infraco at 25th November 2007. Whatever Appendix A is, it does not comprise the set of information which is the Base Date Design Information.

5. **As a matter of contractual interpretation, does the absence of an itemised list of Base Date Design Information (which could have comprised Appendix H to Schedule Part 4, but did not) detract from the meaning of what is Base Date Design Information?**

Instructing solicitors' view is that:

The definition of Base Date Design Information directs you to an identifiable set of design drawings information (as laid out in 1 above). Despite the fact that there is no itemised list, instructing solicitors' view is that this does not alter the meaning and intention of Base Date Design Information.

Certainly, there is no contractual or factual basis for the Infraco assertion that, in the absence of an itemised list of Base Date Design Information to accompany Schedule Part 4, the Parties intended that the drawings listed at Appendix A to the Infraco Proposals (*Schedule Part 30*) should be used exclusively to represent the Base Date Design Information.

6. **Infraco's assertion is that also the design information drawings which are not listed in the Infraco Proposals Schedule Part 30 list have status only as Background Information: would Counsel concur with this?**

Instructing solicitors' view is that:

There is no basis for this assertion.

The Schedule Part 30 list does not and cannot comprise Base Date Design Information (see comments above). Therefore it is not logical to state that any design information drawings which are not included on the Schedule Part 30 list are not Base Date Design Information and instead are Background Information (as defined in the Infraco Contract).

7. **The Infraco asserts that the 21 drawings highlighted in Appendix A of Schedule Part 30 (where the drawings appear in the Appendix A list) form the basis of the Infraco Proposals. Is there any merit in the proposition that this assertion has the effect of overturning the roads reconstruction Pricing Assumptions 12 and 14 and/or paragraph 9 of Schedule Part 4?**

Instructing solicitors' view is that:

The reliance by Infraco on Appendix A cannot overturn the meaning and purpose of the Pricing Assumptions.

The Construction Works Price for the relevant Infraco Works is based on the Employer's Requirements plus the Infraco Proposals, taking into account the factors in the Base Case Assumptions, including the Pricing Assumptions and the Base Date Design Information.

The Pricing Assumptions were required by the Infraco in order to develop, refine, offer and fix the Construction Works Price. The 43 Pricing Assumptions were negotiated in detail and

at length. Reliance upon the Schedule Part 30 list to the exclusion of all other design information drawings is entirely at odds with the intent and content of the Pricing Assumptions.

The Infraco agreed Pricing Assumption 12 which gives a protection for the Infraco in the form of no requirement for full roads reconstruction for four named and discrete locations in Phase 1a. No Pricing Assumption, such as Pricing Assumption 12 and Paragraph 9, would have been necessary if the only agreement governing roads reconstruction scope and price were the 21 drawings contained in the Infraco Proposals Schedule Part 30 list, since these drawings are annotated in manuscript to show planning and resurfacing is calculated for all areas in the scope for Phase 1a.

Furthermore, Pricing Assumption 14 is a clear stipulation regarding road construction depth on all of Phase 1a. This technical statement would not be necessary if the road works scope accepted by **tie** had been restricted to planning and resurfacing on Phase 1a as the 21 drawings are purported to show.

It is instructing solicitors' view that manuscript annotations on working drawings are not sufficient to override Schedule Part 4 and its specific provisions. If these annotations were agreed to have the contractual significance alleged, they would require at the very least supporting language in Schedule Part 4. There is none.

8. In what circumstances can the Infraco Proposals (*Schedule Part 30*) override or take precedence over the Pricing Assumptions in Schedule Part 4?

Instructing solicitors' view is that:

There is no express statement in the Infraco Contract as to the ranking of the Infraco Proposals against other Schedules to the Infraco Contract, other than the Employer's Requirements (in which case the Employer's Requirements takes priority over the Infraco Proposals - Clause 4.2). Therefore, the Infraco Proposals cannot automatically take precedence over the Pricing Assumptions.

Clause 4.2 provides that if there is any ambiguity or discrepancy between the provisions of any Schedules, **tie** shall state in writing which provision shall take priority and this shall be deemed to be an instruction issued pursuant to *Clause 34.1* (which potentially triggers a Compensation Event).

Instructing solicitors do not consider there to be an 'ambiguity' between the provisions of the Schedules and therefore would not consider it necessary or appropriate to issue an instruction under Clause 34.1. The definition of Base Date Design Information is clear (the 21 annotated drawings do not fall within the definition). The Pricing Assumptions (and their purpose) are also clear.

9. The 21 drawings highlighted in Appendix A of Schedule Part 30 contain manuscript annotations unilaterally made by the Infraco, which were not discussed, raised with or highlighted to tie. These annotated drawings were not made available to or issued to the Infraco by tie/the SDS Provider. Certain of the drawings which have been annotated by the Infraco were not available at the 25th November 2007 (design freeze date). To what extent does Counsel consider that these drawings can be considered Base Date Design Information and what status and effect do these drawings have in terms of the Infraco Contract?

Instructing solicitors' view is that:

These 21 annotated drawings cannot be considered Base Date Design Information. They are not captured by the definition (or the intention) of Base Date Design Information in terms of Schedule Part 4 (see question 1).

10. **Would any weight be given to an argument that the list of drawings at Appendix A to Schedule Part 30 (specifically the highlighted drawings) had at no time been discussed with tie, raised with tie, or highlighted to tie? Furthermore, this list of drawings was provided one day before the contract was supposed to sign? (after a prolonged period of discussion and negotiation). And that tie did not receive any copies of the 21 listed drawings before contract close?**

Instructing solicitors' view is that:

Whilst this is useful background information, instructing solicitors appreciate that this is in the nature of pre-contractual evidence and may be of limited value. Instructing solicitors would nevertheless be interested to hear Counsel's views.

11. **In light of the above facts and circumstances, does Counsel consider that there is any merit in advancing a case that Infraco is in breach of warranty under Clause 75.1.2 of the Infraco Contract? Infraco maintains that its pricing is based on annotated drawings which are facts that (a) rendered the Pricing Assumptions misleading; and (b) if properly disclosed, would have caused tie not to contract on that basis (Schedule Part 4) with Infraco.**

Instructing solicitors' view is that:

There could be an argument that the 21 annotated drawings were not adequately 'disclosed' in writing to **tie**; and that, as a consequence, this renders the meaning of the Pricing Assumptions misleading and, if these annotated drawings had been properly disclosed, **tie** would have not contracted with the Infraco on the basis which they did.

Instructing solicitors do not consider there to have been adequate 'disclosure'.

The list of drawings to be appended to the Infraco Proposals in Schedule Part 30 was not discussed with **tie** in any detail: the 21 annotated drawings were not mentioned to **tie**. Appendix A was issued by the Infraco to **tie** by email one day prior to the planned date for contract signing (two days prior to the ultimate signing date). A CD containing the entire set of drawings listed in the Schedule Part 30 list was provided on the planned date for contract signing (one day prior to the ultimate signing date). Six boxes of hard copy drawings were delivered to instructing solicitors' offices on the day of contract signing, purporting to contain copies of the entire Schedule Part 30 list of drawings. Instructing solicitors were advised that a further set of drawings which had been missed out of the box (but which were on the CD) would be delivered following contract close. These drawings were never received.

tie did not receive a copy of the 21 annotated drawings prior to contract close (**tie** received a copy of 21 annotated drawings when the dispute arose - the Infraco stated that 3 drawings had been omitted from the Schedule Part 30 list). At contract signature, **tie** sought assurance from Infraco that the drawings were in order and Infraco confirmed this (oral evidence).

tie contracted on the basis that the particular issue of road reconstruction and how this affected the price tendered by the Infraco was dealt with in Schedule Part 4 (Pricing) and in particular the Pricing Assumptions (see Pricing Assumptions 1, 12 and 14) and Paragraph 9 of Schedule Part 4.

There were detailed and prolonged discussions and negotiations with regard to Schedule Part 4 (*Pricing*) in the months up to contract close. The Pricing Assumptions were required by the Infraco in order to develop, refine, offer and fix the Construction Works Price which they tendered for carrying out the relevant part of the Infraco Works. A departure from the base case in the Pricing Assumptions entitles the Infraco to make a claim against **tie** for relief/additional payment over and above the Construction Works Price.

As an aside, on the day or the day prior to contract signing, the Infraco sought to have the scope of Pricing Assumption 12 extended to cover not just the four discrete areas, but the entire length of Phase 1a. This does not suggest that the Infraco were contracting on any other basis (i.e. content of the annotated drawings in Schedule Part 30) with regard to the road reconstruction works.

On this basis, it could be argued that **tie** was misled as to the effect of the Pricing Assumptions with regard to the road reconstruction works.

12. What does Counsel consider the threshold to be for breach by the Infraco of the general obligations contained in the Infraco Contract (in particular, clauses 6.1; 6.3.1; 6.3.2; 6.3.5; 7.3.13; 7.3.17; and 7.5.5.)?

Instructing solicitors' view is that:

We would be interested to hear Counsel's views on the merit of seeking declaration that Infraco is in breach of all or some of the above obligations and to the likely threshold which requires to be met before it could be said that there could be a breach of the general obligations by the Infraco.

PART B - Base Date Design Information to Issued for Construction

The dispute surrounding Base Date Design Information revolves around the Infraco assertion that anything beyond very minor changes to the BDDI after contract signature on 14 May 2008 will constitute a Notified Departure under the agreement and therefore give rise to an entitlement on the part of the Infraco to additional time and money.

The Infraco has served a number of formal notices under the Infraco Contract. Those notices purport to give notice to **tie** that a **tie** Change has occurred - the basis of the **tie** Change is said by the Infraco to be that a Notified Departure (which is a Mandatory **tie** Change) has occurred as a result of changes in design from BDDI to IFC stages. This triggers section 3.4 of Schedule Part 4. The difficulty with this interpretation is, in the opinion of Instructing Solicitors, that it results in the Infraco (and its design consultant) enjoying absolute freedom to change the design to serve their own purposes as opposed to achieving compliance with the Employer's Requirements.

Instructing solicitors are of the view that the changes in design from BDDI to IFC stages may not, of themselves, give rise to an entitlement on the part of the Infraco to additional time and/or payment. **tie** is unable to assess the validity of many of the claims because no information explaining it has been supplied to **tie** by the Infraco. The Infraco has not provided any Estimates for these Notified Departures.

1. **What are the respective responsibilities of the key parties in undertaking the completion of design between the date of BDDI and the date of the design achieving Issued for Construction status?**

   Instructing solicitors' view is that:

   The design (which had been under preparation since October 2005 by Parsons Brinkerhoff) at the date when the parties entered into the Infraco Contract (14 May 2008) was not complete. Instructing solicitors consider that the design was therefore to be completed by the Infraco with Parsons Brinkerhoff (the **"SDS Provider")** as their novated design subcontractor. The Infraco confirm in their proposals (Schedule Part 30) that the design was to be developed and finalised to Issue for Construction status, that the design was incomplete or had not been issued for some sections of the works, that the Infraco had carried out and issued a design due diligence summary, and that the design would, where possible, be developed and finalised in accordance with Section 3.4, the Pricing Assumptions included in Schedule Part 4.

   Instructing solicitors are of the view that Design responsibility sits squarely with the Infraco, and that several contractual provisions state this and support this [being: *Clause(s) 10 and 11*]. Section C at pages 20-21 of Schedule Part 14 [see Counsel's Papers at 7] confirms the process which the Infraco adopts to achieve the objective of design completion. Paragraph 2.1.1 of Schedule Part 14 confirms the Infraco will deliver the detailed design. Paragraph 2.1.4 of Schedule Part 14 confirms that the detailed design takes the preliminary design (i.e. the Base Date Design) forward to achieve the deliverables.

   The term 'Issued for Construction Drawings' are defined at page 259 of the Agreement as being:

   'Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure;

Instructing solicitors consider that **tie**'s role in respect of design between BDDI to IFC is to approve design amendment through the contractual review procedure contained in Schedule Part 14 and as enshrined at *Clause 10* of the Infraco Contract.

2. What is the effect upon the Infraco's claim that a Notified Departure has arisen if the Infraco submits limited information to tie about that Notified Departure?

Instructing solicitors' view is that:

If there are design changes needed from BDDI to IFC then Infraco need to demonstrate properly to **tie** within the operation of Clause 80 (**tie** Change) all of the matters referred to in (a) to (f) below. Until this procedure is complete, **tie** is not committed to a Notified Departure.

In order for the Notified Departure and **tie** Change mechanism to operate, **tie** needs to be able to assess the validity of the assertion. **tie** requires an examination of the changes which Infraco state have been made to the state of individual design post BDDI. That analysis needs to establish:

(a) the specific BDDI relevant to the Infraco Notice of Change under *Clause 80*;

(b) who made the design change and what was the technical reason for the change;

(c) how the design change process adopted by the Infraco satisfied *Clause 10* and in particular *Clause 10.2* of the Infraco Contract: *"The Infraco shall submit any Deliverables associated with any Permitted Variations to **tie**'s representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan)."* (Permitted Variations include Notified Departures);

(d) the factual and technical grounds justifying why the changes exceed normal design development from BDDI to IFC stage;

(e) how Infraco has complied with its duty to mitigate the effect of Notified Departure and the **tie** Change (if there has been one); and

(f) that there has been no Infraco breach or SDS Provider breach, Infraco Change or Change in Law, which has caused or contributed to the occurrence of a Notified Departure.

It is clear that when a Notified Departure occurs, this triggers a Mandatory **tie** Change. Instructing solicitors reject the premise that under the Infraco Contract, it is for Infraco to determine unilaterally that in circumstances envisaged by Schedule Part 4 Pricing Assumption 3.4.1, any design change must automatically be a Notified Departure. The type of design revision, its submission to review and the reasons for it must all affect whether it constitutes a Notified Departure. Infraco is obliged under *Clause 80* to provide such information, as *Clause 80.24* specifically states that the *Clause 80* provisions apply to the Mandatory **tie** Change process.

The onus is on the Infraco to track through the requirements of the **tie** Change mechanism. If the Infraco fails to provide sufficient information in the form of an Estimate, **tie** cannot issue a **tie** Change Order and the Infraco is either intentionally or negligently preventing the proper operation of the **tie** Change provisions.

3. What constitutes 'normal design development' as intended by Schedule Part 4?

Instructing solicitors' view is that:

The inclusion of the drafting phrase 'normal design development' in Schedule Part 4 Pricing Assumption 3.4.1 should logically be construed to imply that not every change in design from BDDI to IFC will be sufficient to trigger the Notified Departure mechanism.

Rather: there must be a standard, set by the application of reasonable engineering judgment and technical expertise to any particular design change, which represents the magnitude and type of amendment that any design can undergo between preliminary and final readiness before such amendment would be deemed abnormal development.

Instructing solicitors consider that refinement of a design, rather than an alteration to an essential element will, in most cases, be insufficient to be deemed abnormal development. The test should be to establish what level of amendment would an experienced designer anticipate to his preliminary design in order to bring that design to a state where it is ready to be issued for construction.

The Parties have exposed their basic arguments on this matter in the correspondence which is included at [9] in Counsel's papers. Counsel will note that considerable emphasis is placed by the Infraco on the Pricing Assumption 1 language excluding any amendment to design principle, shape, form and/or specification.

4. Have the Infraco claims thus far in respect of Notified Departures been deficient such that tie's assertion that it cannot issue a tie Change Order is correct?

Instructing solicitors' view is that:

If there are design changes from BDDI to IFC then the Infraco need to demonstrate properly to **tie**: who made the revisions; what happened to these revisions under the design review process; how these revisions go beyond normal design development and completion of the design; and why any design revision has been necessary such as to result in a **tie** Change. Until this procedure is complete, **tie** cannot be committed to a Notified Departure and would be failing in its duties as Employer to properly review and assess additional costs to the Project.

The correspondence in respect of the Notified Departures which have arisen to date demonstrates that the Infraco are failing to provide sufficient information, and are failing to rectify any such shortcomings which are notified by **tie**.

5. Is the Infraco in breach as regards the design development process (or otherwise in respect of Notified Departures), or has the failure to go through development resulted in a unilateral Infraco Change arising and, in either case, how should any relevant claim for a Mandatory tie Change therefore be affected?

Instructing solicitors' view is that:

If the Infraco has failed to put design changes through the review process, or has failed in its management of the SDS Provider's design obligations and thereby to mitigate cost increases, then the definition of Notified Departure provides that any such failure would have an adverse impact on the Infraco's claim for a Mandatory **tie** Change.

The definition of Notified Departure is *'where now or at any time the facts or circumstances differ in any way from the Base Case Assumptions save to the extent where caused by a breach of the contract by the Infraco, an Infraco Change or a Change in Law.'*

Further, if the Infraco claims that it is not in breach as it has not deemed it necessary to go through the design development process, instructing solicitors consider that this would be persuasive evidence that the changes in design were not sufficiently material to constitute abnormal design development. Any development of design outside of normal parameters must contractually have required submission through the review procedure.

Instructing solicitors consider that the effect upon the Notified Departure of such a failure by Infraco would depend upon the facts and would require agreement or expert determination to resolve. The Infraco would need to provide much more extensive information on Notified Departures than has been provided to date in order to achieve such resolution.

Lastly, the Infraco has warranted that the Infraco Proposals meet the Employer's Requirements (*Clause 7.4*). If they do not and the reason they do not requires a revision to design, instructing solicitors regard such a change as stemming from an Infraco Breach and therefore not capable of being a Notified Departure.

PART C - Exclusive Possession of Parts of Site

"Designated Working Area" is defined as *'any land, worksite or area of the public road which the Infraco occupies for the purposes of executing the Infraco Works'*. The purpose of this separate definition was to distinguish this element of the Site from Permanent Land and Temporary Land.

1. **Are the Infraco entitled to refuse to commence work where a tie Change reduces the size of the Designated Working Area?**

The significance of this issue is to what extent Infraco may be justified in using this to support a claim for relief against delay.

Instructing solicitors' view is that:

The access rights under the Infraco Contract are primarily dealt with in *Clause 18*. *Clause 18.1* provides that **tie**:

> *'18.1.1 warrants to the Infraco that it will grant access to the Permanent Land and Temporary Sites and provide Infraco with all necessary Land Consents in each case accordance with this Clause 18.*
>
> *18.1.2 hereby grants a non-exclusive licence to the Infraco to enter and remain upon the Permanent Land for the duration of the Term and an exclusive licence to the Infraco to enter and remain upon the Designated Working Area for the duration of the time required (pursuant to Schedule Part 15 (Programme)) for completion of the Infraco Works to be executed on such Designated Working Area; and*
>
> *18.1.3 shall provide the Infraco with all necessary Land Consents in relation to the Permanent Land for the duration of time required (pursuant to Schedule Part 15 (Programme)),*
>
> *in either case only in so far as the same is required for the purposes of carrying out the Infraco Works. For the avoidance of doubt, the rights provided to the Infraco pursuant to this Clause 18.1 shall not confer nor be deemed to confer upon the Infraco a right of ownership, a lease or any other interest in the Permanent Land other than a right of access, egress or occupancy as is required for the purposes of carrying out the Infraco Works.'*

Under *Clause 18.1.2*, **tie** grants Infraco exclusive licence to occupy Designated Working Areas (defined as "*any land, worksite or areas of the public road which Infraco occupies for purposes of executing the Infraco Works for the relevant programmed construction period*"). Nowhere does the Infraco Contract relieve the Infraco from its obligation to progress the works at a particular location simply because **tie** has instructed a Change which reduces the area available within the Designated Working Area. The exclusivity of occupation of sections of public road is both for safety and construction efficiency and the exclusivity is only for a programmed period.

PART D - Ground Conditions

Under *Clause 5.1*, the Infraco Contract states that the Infraco shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied itself before the Effective Date as to the ground conditions on the Site including the climatic, geotechnical, ecological, environmental, hydrological, sub-soil and sub-surface conditions.

This is subject to the Compensation and Relief Event clauses, and to *Clause 22* (*Adverse Physical Conditions and Artificial Obstructions*). *Clause 22* is relevant when considering Schedule Part 41 to the Infraco Contract, which includes ground and utility information as known by **tie** at the date of contract signature, and upon which the Infraco based their price.

Clause 22.1 provides that *'If at any time prior to 3 weeks before the commencement of engineering and construction activities (as shown in the Programme) on the affected area of the Site, the Infraco identifies or has reason to believe that there is unexploded ordnance, unidentified utility apparatus not listed in the Utilities Information or adverse physical conditions, ground conditions, artificial obstructions and/or land which is contaminated (other than land which is contaminated by the Infraco) and is not listed in the Ground Condition Information, the Infraco shall as early as practicable give written notice thereof to **tie**.'*

The Clause goes on to state that the Infraco must submit details of the effects of such discoveries, the mitigation it will/has undertake(n) and the estimated delay and cost caused by the newly discovered conditions.

Under *Clause 22.4*, **tie** must then issue instructions either to investigate alternative works, take the steps which Infraco recommends, or otherwise instruct how the issue should be dealt with. **tie** must either issue a suspension of the works or instruct a Change, which will constitute a Mandatory **tie** Change. Any such discoveries within three weeks of the start date of works in the relevant area will be a Compensation Event (limb (g) of the definition of Compensation Event), and is subject to standard mitigation and justification provisions.

Clause 22.5 provides that:

'Notwithstanding the provisions of Clause 5 (Provision and Interpretation of Information), the discovery by Infraco at any time following the date 3 weeks before the commencement of engineering and construction activities (as stated in the Programme) on the affected area of the Site:

(a) unexploded ordnance;

(b) utility apparatus which is not identified in Schedule Part 41 (Ground Conditions and Utilities Information) and which could not have, or the nature of which could not have, reasonably been foreseen from the use of and interpolation from the Utilities Information; or

(c) adverse physical conditions, ground conditions, artificial obstructions and/or land which is contaminated, where such contamination has not been included in the Contract Price Analysis which could not have or the nature of which could not have reasonably been foreseen from the use of and interpolation from the Ground Condition Information;

shall be a Compensation Event in accordance with Clause 65 (Compensation Events) provided that:

*22.5.1 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco*

proposes to execute the Infraco Works in order to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress by the Infraco of the Infraco Works; and

22.5.2 the Infraco demonstrates to the reasonable satisfaction of ***tie's*** *Representative that the Infraco has used its reasonable endeavours to minimise and mitigate any extra costs incurred in relation to such adverse physical conditions, ground conditions, artificial obstructions, unexploded ordnance, unidentified utility apparatus or land which is contaminated; and*

22.5.3 the Infraco demonstrates to the reasonable satisfaction of ***tie's*** *Representative that any claim for additional time relates to timing implications which exceed those that are contained within the Programme in relation to the discovery of unexploded ordnance, unidentified utility apparatus, adverse physical conditions, ground conditions, artificial obstructions or land which is contaminated.'*

1. **What level of expertise should the Infraco be applying in terms of its capacity to anticipate utility apparatus and adverse physical conditions, ground conditions and generally heads (b) and (c) of 22.5?**

Instructing Solicitors' view is that:

tie is entitled to rely upon Infraco's duty of care as set out in *Clause 7* in particular Clauses *7.2, 7.3.13, 7.3.17, 7.6* and *7.8*.

Inventory of Papers

Infraco Contract Relative to the Edinburgh Tram Network

1. Copy of conditions of contract relative to contract between **tie** Limited and Bilfinger Berger (UK) Limited and Siemens plc dated 14 May 2008;

2. Copy of minute of variation among **tie** Limited; Bilfinger Berger (UK) Limited; Siemens plc and Construcciones Y Auxiliar de Ferrocarriles S.A. dated 14 May 2008;

3. Copy of novation agreement among **tie** Limited; Bilfinger Berger (UK) Limited; and Parsons Brinckerhoff Limited;

4. Copy of collateral warranty between Parsons Brinckerhoff Limited; **tie** Limited; Bilfinger Berger (UK) Limited and Siemens plc dated 14 May 2008;

5. Copy of schedule Part 4 to the contract among **tie** Limited; Bilfinger Berger (UK) Limited; Siemens plc and Construcciones Y Auxiliar de Ferrocarriles S.A.;

6. Extract from Schedule Part 30 to the contract among **tie** Limited; Bilfinger Berger (UK) Limited; Siemens plc and Construcciones Y Auxiliar de Ferrocarriles S.A;

7. Copy of schedule Part 14 to the contract among **tie** Limited; Bilfinger Berger (UK) Limited; Siemens plc and Construcciones Y Auxiliar de Ferrocarriles S.A.;

8. Copy of schedule Part 9 to the contract among **tie** Limited; Bilfinger Berger (UK) Limited; Siemens plc and Construcciones Y Auxiliar de Ferrocarriles S.A..; and

9. Copy of position papers prepared by Infraco and **tie**.