



1 General

- 1.1 This file note relates to the DRAFT Expert Report version 10. It is an incomplete document, the preparation of which was put on-hold by **tie** pending the outcome of mediations discussions between the Parties.
- 1.2 Depending on the outcome of these discussions, and the subsequent actions of the Parties, it might not be necessary to finalise and publish this report. That being the case, **tie** directed Acutus to halt work on the report's preparation. **tie** asked Acutus to provide it with a copy of the draft as it currently stands.
- 1.3 It should be noted that there are a number of matters associated with this report still to be resolved and that there may be changes to **tie**'s strategy in addressing these issues. This is likely to include the review and development of various legal arguments. The reader of these notes and the draft report should bear these matters in mind before drawing any conclusions or opinion for these documents as, in their current state, they are incomplete, unchecked and may be subject to further development and revision based on legal advice and opinion.
- 1.4 The draft report document contains many comments against particular words and paragraphs. The reader of this file notes is directed to these comments if a comprehensive view on all outstanding, incomplete or yet to be determined issues is to be had.

2 Contractual matters

- 2.1 The question of under which clause(s) of the contract the subject matters of INTC 536 should be considered remains a matter for debate. The draft of the report has been left with both clauses 65 and 80 being considered. It is suggested that the wording be refined and tightened up when **tie**'s legal strategy is decided upon.
- 2.2 Consideration to be give to whether reference should be made to the design review procedures and processes, particularly with respect to adding weight to the argument of design being the dominant cause of delay.

3 Base Data

- 3.1 The MUDFA dates schedule has been prepared on the basis of advice provided by **tie** staff. It should be reviewed and updated prior to finalisation of the report, particularly if further information becomes available following the passage of time.



- 3.2 The design data schedule has also been prepared on the basis of advice provided by **tie** staff. It also should be reviewed and updated prior to finalisation of the report.
- 3.3 It should be noted that changes to the aforementioned scheduled are likely to require changes to the delay analyses and the narrative of the report.

4 Narrative updates

- 4.1 There are several places in the draft report where statements require to be reviewed to check that they remain current at the date the report is finalised and published. For the most part, these have been identified in the draft report.
- 4.2 The end of Section 3 requires completion to record the actual details of the referral of the Estimate for decision by adjudication (or whatever other means may arise).

5 Issue Construction Drawings

- 5.1 There are a number of contractual matters that still require to be considered by the legal team. The Infraco construction programme has milestones entitled “Issue Construction Drawings” but the Infraco Contract uses the defined term “Issue for Construction Drawings”. That definition increases the scope of the term to beyond just drawings. There is also the issue that some drawing sets have been issued more than once. i.e. there have been subsequent revisions after the initial issue. This gives rise to the question “Is **tie** liable for the delay arising from sub-sequence issues or only the initial issue?”
- 5.2 The Infraco (and the SDS Provider) has introduced additional “Issue Construction Drawings” milestones to the various elements of the Programme. How should these be treated in terms of analysis of delay? Some of these new milestones have been created by the sub-division of the scope of original milestones. Some relate to design integration. Some relate to M&E design that does not appear within the detail of the Programme yet is required to allow delivery of the Infraco Works.

6 Changes to Infraco’s proposed order and method of delivering the Infraco Works

- 6.1 Ref. paragraph 7.7.2 of the draft report. Graphics to be prepared to show the changes to the intermediate sections 1B and 1C traffic management and phasing of works. They are to contrast that which is shown in the original Infraco construction programme and that



which is set-out in the Revision 3 programme. The different traffic management drawings provided by Alasdair Sim show the changes on site plans.

7 “Phoenix” programme

- 7.1 We are advised that this programme (which has not, been seen by Acutus) changes some of the programme logic contained within the Rev. 1 programme. It is logic that the Infraco previously stated could not be changed. The revised logic saves time. This point was raised by SC of **tie** at the meeting held on 24 March 2011. She directed that this matter be noted in this file note so that it could be considered further ,if and when, the Expert Report is to be finalised and published.

8 Late delivery of design

- 8.1 More work to be done to sub-section 13.4 of the draft report if it is to be finalised and published.
- 8.2 At paragraph 13.4.6 of the draft report reference is made to BDDI to IfC, but with no explanation. SC directed that this be left meantime and be addressed, if and when, the report is to be finalised and published.

9 Nature of utilities delays and transfers

- 9.1 In the INTC 536 Estimate the Infraco seeks to treat all utilities delays as **tie** Changes and in many instances relies on previously issued **tie** Change Orders (tCOs) as the grounds for seeking EoT under INTC 536. Some of these previously issued tCOs note no impact on the Programme. Others note “To be assessed following submission of detailed particulars”. Through the INTC 536 Estimate the Infraco is seeking to secure EoT for matters that are already tCOs. This does not appear to be the proper and correct operation of the **tie** Change mechanism. This matter to be considered further by **tie** and its legal advisers.
- 9.2 Some of the tCOs relate to transferred utilities and some of them have an impact date that post-dates the commencement of affect works. The Infraco seeks to impact that effect as a pre-commencement event. Clearly, that is not the case. (Examples:- A8 underpass, Russell Road Retaining Walls.) Again, this matter to be considered further by **tie** and its legal advisers.



10 Acutus delay analysis programmes and schedules

- 10.1 The input to these programmes has been checked for accuracy and the output reviewed through tracing the critical paths. However, time constraints have not permitted thorough checking throughout the detail to make sure there are no non-critical anomalies that might give the Infraco material to try to undermine the credibility of them. If these programmes are to be published with the final report they need to be reviewed by both Acutus and tie to double-check that there are no such anomalies.
- 10.2 SDS dates schedule has not currently been included in the draft report, although the data from it has been used along with the actual reported progress to produce the Appendix 11/3 programme. Consideration to be given to including this and, perhaps, conducting a more detailed examination of the SDS V60 programme to identify as much of the late design as possible.

11 Referenced correspondence

- 11.1 The draft report contains a number of references to particular items of correspondence between the Parties. Only those considered of particular pertinence are included in the appendices to the report. If the report is to be finalised and published consideration should be given as to whether or not all correspondence referred to should be included in the appendices.

12 Appendices

- 12.1 General review and check required prior to report publication.
- 12.2 Appendix 7/0 – Infraco Period Report to 17 July 2010. Content to be check for anything that might be used by the Infraco to question that covered by and stated in this report.

13 Conclusions and Executive Summary

- 13.1 Section 14 of the draft report, “Opinion and conclusions” has yet to be drafted as its content can only be considered and set-down when the other sections have been finalised.
- 13.2 An initial draft of the Executive Summary has been included, but like section 14, it can only be meaningfully concluded when the other sections are finalised.



14 Other file notes / papers

14.1 Reference is made to the following file notes / papers (attached to the hard copy of this file note and included as separate files in the electronic versions).

14.1.1 "Acutus Note on the Infraco Contract specific to the Infraco's obligation to include within the Estimate for a **tie** Change the impact on the Programme", dated 19 October 2010.

14.1.2 "Contract requirements and specification for design production, review, certification and approval", dated 26 January 2011.

15 EoT claim for Section A

15.1 It should be noted that on 4 March 2011, the Infraco submitted a separate EoT claim covering various changes that it claimed impacted on the Section A Completion Date. The content of that claim has not been considered in this draft report.

I McAlister 31 March 2011