

ADJUDICATION

By

LORD DERVAIRD

In dispute between

BILFINGER BERGER CIVIL UK LIMITED, SIEMENS PLC and  
CONSTRUCCIONES Y AUXILIAR DE FERROCARILES S.A. "INFRACO"

Referring Party

and

tie LIMITED  
"tie"

Responding Party

In relation to

LANDFILL TAX

1. In November 2010 I was appointed by the parties to be the adjudicator in the dispute between them in relation to Landfill Tax. In accordance with my direction tie provided its response to the notice of referral by Infraco and on 18 November 2010 Infraco made its reply thereto, to which tie filed its retort. I proceed to determine the questions at issue on the basis of these items and the documents produced in support.
2. By virtue of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line 2) Act 2006 various works were authorised to be completed, services to be provided and plant machinery and equipment to be supplied and installed by Infraco, being necessary to deliver the Edinburgh Tram Network and maintain it "the Infraco Works."
3. By agreement, made on 14 May 2008 (as later varied) "the Infraco Contract" Infraco agreed to carry out the Infraco Works and tie to

pay such capital expenditure and revenue as was provided for in the Infraco Contract.

4. The present dispute relates to the payment of Landfill Tax in respect of the disposal to landfill of contaminated materials removed from the site as part of the Infraco Works. Infraco claims that tie is responsible for all Landfill Tax associated with the disposal to landfill of contaminated materials removed from the site. Infraco was not obliged to see or obtain an exemption from Landfill Tax in respect of that contaminated material. In any event that contaminated material would not have qualified for an exemption under Finance Act 1996 ss43A and 63B. tie claims that the contaminated land was eligible for exemption under the statutory provisions, and that it was for Infraco to apply for and obtain such an exemption.
  
5. The Construction Works Price is brought out in Appendix A to Schedule Part 4 of the Infraco Contract as £238,607,664. That figure is based upon certain assumptions "Base Case Assumptions", and under Section 2.2 of Schedule Part 4 these include "the Base Date Design Information, the Pricing Assumptions and the Specified Exclusions." While the Pricing Assumptions are set out in Section 3.4 of Schedule Part 4, Section 3.2.1 states:- "It is accepted by tie that certain Pricing Assumptions have been necessary and these are listed and defined in Section 3.4 below. The Parties acknowledge that certain of these Pricing Assumptions may result in the notification of a Notified Departure immediately following the execution of this Agreement. This arises as a consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt the commercial intention of the

Parties is that in such circumstances the Notified Departure mechanism will apply.”

6. In terms of Section 3.3(c) of Schedule Part 4 one set of Specified Exclusions from the Constructive Works Price is:- “Ground conditions that require works that could not be reasonably foreseen by an experienced civil engineering contractor based on the ground conditions reports provided to BBS on 20<sup>th</sup> and 27<sup>th</sup> November and 6<sup>th</sup> December 2007. Additionally the Construction Works Price does not include for dealing with replacement of any materials below the earth works outline or below ground destructions/voids, soft material or any contaminated materials.” 3.3.1 provided: “In the event that Infraco is required to carry out any of the Specified Exclusions, this shall be a Notified Departure.” Section 3.4 states the Pricing Assumptions, including 3.4.11:- “The Infraco shall not encounter any below ground obstruction.....or any contamination.”
  
7. In terms of Schedule 4 Item 2.3 a “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 they are caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law. It is matter of admission that a Notified Departure will occur where Infraco deals with contaminated materials. Item 3.5 of Schedule Part 4 provides that “The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions noted herein. If now or at any time the facts or circumstances differ in any way from the Base Case Assumptions (or any part of them) such Notified Departure will be deemed to be a Mandatory tie Change requiring a change to the Employer’s Requirements and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the Contract Price and/or Programme in respect of which tie will be deemed to have issued a tie Notice of

Change on the date that such Notified Departure is notified by either Party to the other.

8. Where a tie Change has occurred Clause 80 of the Contract makes provision therefor, by requiring Infraco to make an Estimate as to the valuation of such Change. Failing Agreement on such Estimate it may be referred for determination in accordance with the Dispute Resolution Procedure. Infraco has submitted Change Estimates in relation to disposal of contaminated material, and these Estimates included figures for repayment of Landfill Tax which Infraco has paid, and which tie refuses to agree.
9. This adjudication is not concerned with the determination of the disputes between the parties as to the appropriate figures to be established in respect of those Change Estimates relating to disposal of contaminated material. This adjudication is concerned with the question which of Infraco and tie is responsible for payment of Landfill Tax payable for the disposal of contaminated materials carried out in the course of the contract.
10. Infraco did not apply for a Landfill Tax exemption in respect of these disposals. There is no specific obligation in the Infraco Contract on either party to make application for an exemption to the payment of Landfill Tax. The closing date for making such an application was 30<sup>th</sup> November 2008. Accordingly no such application can now be made.
11. Section 43A of the Finance Act 1996 requires various conditions to be met for disposal to be a non-taxable disposal, in particular that it is of material all removed from land in relation to which a certificate under s.43B was in force at the time of removal. A contaminated land certificate is issued under s.43B where the reclamation qualifies under s.43B(7). In terms of s.43B(7) a reclamation qualifies if (a) it

is, or is to be, carried out with the object of facilitating development, conservation, the provision of a public park or other amenity, or the use of the land for agriculture or forestry; and also satisfies the conditions of s.43B(8). These include (a) that the reclamation constitutes or includes cleaning the land of pollutants which are causing harm; (b) that in a case within subsection 7(a) above, those pollutants would (unless cleared) prevent the object concerned being fulfilled.

12. As I understand the situation the pollutants to which this case relates are Japanese Knotweed and Giant Hogweed. Both these plants are known to be contaminants. But I do not understand that land affected by their presence is required to be first reclaimed before the development, i.e. the Improve Works could take place. Rather to a certain extent the land so affected was removed as part of the development, not as a separate or preliminary exercise to facilitate the development. It is not proposed that any more material be removed than is necessary to allow the tramway line to be constructed. The tramway line once constructed will be left surrounded by ground containing pollutants. In my view the fact that prior reclamation to allow development to take place is not required renders this project ineligible to qualify for exemption. Further the fact that the tramway line will be left surrounded by similarly pollutant land appears to be remarkably similar to one of the examples of ineligible projects given in Notice LFT2 Reclamation of Contaminated Land (the version I have seen is the July 2010 version but I assume that it does not materially differ from the April 2003 version, which would have been in force at the relevant time. On that basis also it would not have been an eligible project qualifying for exemption.
13. Having reached that view, it is not necessary for me to come to a decision as to which party should have applied for such an

exemption. But I consider that it was for tie as the potential beneficiaries from such an exemption to make any relevant application.

14. Against that background I determine the specific matter for my determination as follows:-

1. Always provided the Notified Departure Mechanism is complied with, Infraco would be entitled to be paid or reimbursed Landfill Tax for the disposal of contaminated materials.
2. Infraco was not obliged under the Infraco Contract to prepare or apply for a Landfill Tax Exemption for the disposal of contaminated materials.
3. It has not been established that the contaminated material in respect of which Landfill Tax is payable would have been granted an exemption if application therefore had been submitted prior to 30 November 2008.
4. The amounts payable or to be reimbursed to Infraco for Landfill Tax for the disposal of contaminated materials do not require to be discounted by reason of Infraco not having applied for or obtain an exemption from Landfill Tax.
5. tie shall pay the whole fees and expenses of the Adjudicator.

Lord Dervaird  
Adjudicator