



SHEPHERD+ WEDDERBURN

City of Edinburgh Council
Edinburgh Tram Project
Review of Adjudicator's Decisions

1. Introduction

- 1.1 We have been asked by the City of Edinburgh Council ("CEC") to provide a review of the document "Commentary on Various Matters Referred to Dispute Resolution Procedure Under the Infraco Contract" (the "Commentary").
- 1.2 The purpose of this Note is to advise as to whether or not the Commentary accurately reflects the issued adjudication decisions. We have not had sight of the various documents and/or arguments advanced by the parties and are therefore unable to comment on the substantive issues raised in each of the adjudications.
- 1.3 We understand that there have been 16 disputes referred to the Dispute Resolution Procedure ("DRP"). Four of those disputes were settled during the Internal Process. Two disputes were settled at mediation and adjudication determinations have been issued in respect of the remaining nine procedures.
- 1.4 This Note is intended to review the nine adjudication decisions. However, we are still awaiting a copy of Robert Howie's reasons in relation to the Hilton Hotel Car Park adjudication. As soon as we have a copy of these to hand we can finalise this review.

2. Summary

- 2.1 We are unsure as to the precise scope of the Commentary, however, we note that section 1 of the Commentary states that it is intended to *"provide an overview on the main issues...and is not legal advice on the outcome of the completed adjudications or on the continuing DRP Strategy"*. Having reviewed the adjudication decisions, we are of the view that, overall, the Commentary identifies the "main issues" raised in each adjudication.
- 2.2 We have, however, considered in detail each decision below, and would make the following general remarks in relation to the Commentary:

- 2.2.1 The Commentary does not include reference to the awards of expenses granted by the adjudicator in each adjudication;
- 2.2.2 The Commentary does not clearly summarise the arguments advanced by the parties, nor does it make clear whether or not each decision was a 'success', 'mixed success' or 'defeat' for tie;
- 2.2.3 The Commentary assumes that the reader has a detailed level of understanding of the issues involved (we appreciate that this may be intentional depending on the intended recipient); and
- 2.2.4 It is not always apparent which party has been successful as the findings and awards granted by the adjudicator are not clearly summarised in each instance.

3. Hilton Hotel Car Park

- 3.1 We have received a copy of the adjudicator's decision, however, we are still awaiting a note of the adjudicator's reasons.
- 3.2 We agree that the adjudicator, Robert Howie QC, found that Infraco is obliged under the Contract, and without further instruction, to proceed with the carrying out of the Car Park Works in accordance with the Programme.
- 3.3 We are unable to confirm whether or not the adjudicator's decision "*wholly agreed with tie's position*". We can, of course, confirm this on receipt of the reasons for the decision.
- 3.4 We would add that the adjudicator found that tie be liable for one third of the adjudicator's fees and expenses and Infraco liable for two thirds.

4. Gogarburn Bridge and Carrick Knowe Bridge

- 4.1 It is not clear from the Commentary that reference is being made to two separate adjudications, (1) Gogarburn Bridge and (2) Carrick Knowe Bridge, albeit we understand similar arguments have been advanced in both adjudications.
- 4.2 Both adjudications relate to whether changes have occurred between the Base Date Design Information (BDDI), upon which the parties contracted, and the Issued For Construction Information, to the extent that such changes amount to a Notified Departure as defined in the Contract. In both instances tie referred the dispute to adjudication.
- 4.3 The Commentary summarises (1) the outcome of the adjudication, and (2) the extent to which the parties' arguments were successful. The Commentary concludes that the adjudicator

"proceeded to find that **a number** of the matters depicted on the Issued For Construction drawings in respect of the structures known as Gogarburn Bridge and Carrick Knowe Bridge constituted a Notified Departure in terms of the pricing assumption of 3.4.1.1. DLA, McGrigors Richard Keen QC and Mr Wilson ...agree with tie's position". We are unclear as to what is meant by the last sentence. Further, the summary, in our view, does not accurately reflect the findings of the adjudicator. In both adjudications tie were unsuccessful in the redress sought by them.

- 4.3.1 In the Gogarburn Bridge Adjudication, the adjudicator found that 12 out of 14 issues set out on the IFC drawings constituted a Notified Departure and found that tie should bear responsibility for the adjudicator's fees and expenses; and
- 4.3.2 In the Carrick Knowe Adjudication, the adjudicator found that 9 out of 12 issues set out on the IFC drawings constituted a Notified Departure and tie should bear responsibility for 75% of the adjudicator's fees and expenses.
- 4.4 The Commentary does not clearly summarise the arguments of the parties or reasoning adopted by the adjudicator. In this regard the adjudicator considered that the proper approach was to carry out a comparison between the BDDI and the IFC drawings to reveal the changes in circumstances that have occurred during the process of moving from BDDI to IFC stage. The adjudicator was of the view that those changes must firstly be established as changes in design principle, shape, form or specification, and secondly, the changes must be assessed in order to conclude whether or not they are categorised as design development in which case they would not constitute a Notified Departure.
- 4.5 We are unable to comment on the Estimates submitted.

5. Russell Road Retaining Wall

- 5.1 This adjudication concerned whether the change to the Russell Road Retaining Wall constituted a Notified Departure and Mandatory tie Change and, if so, the value of each Change. Infraco subsequently referred the dispute to adjudication.
- 5.2 We agree that the Commentary accurately summarises that, "*on matters of interpretation the Adjudicator...roundly rejected Infraco's position that the Construction Works Price could be construed as being solely in respect of the works shown on the Base Date Design Information*" and that "*the Adjudicator largely agreed with tie's interpretation of Pricing Assumption*".

- 5.3 However, the Commentary does not clearly state that tie were unsuccessful in their defence. In this regard, the Commentary provides that *"Those Defences did not by and large succeed but it was the case that Infraco's estimate was initially in the amount of £4,597,847.07, Tie having assessed an amount of £701,467.95 in respect of the foundations"*.
- 5.4 Whilst we do not have all information to hand in relation to the Estimate, the Commentary does not make clear that, in relation to the sums claimed by Infraco in the adjudication, Infraco's Estimate was in the sum of £1,840,407.73 (albeit we note that this was a revised Estimate). The adjudicator found that there had been a Notified Departure and deemed mandatory tie Change and that the value of those Changes was in the sum of £1,461,857.21. Further, the adjudicator found tie liable to pay his fees and expenses.
- 5.5 Overall, we are of the view that the Commentary does not reflect the fact that Infraco were largely successful in the redress sought.

6. Section 7A Track Drainage

- 6.1 This dispute concerned the extent to which a number of issues relating to the Track Drainage were Notified Departures. Tie referred the dispute to adjudication and the Commentary states that, during the adjudication process, tie and Infraco were able to agree the valuation of certain Notified Departures. We are, however, unable to comment on whether or not this statement is accurate.
- 6.2 We note that the Commentary states that *"tie sought a declaration that the matter relied upon by Infraco for the balance of its claim did not constitute a Notified Departure. The Adjudicator came to the view that a Notified Departure had occurred in respect of the remaining Section 7A Track Drainage."* We agree that this reflects the decision of the adjudicator. However, we would add that the adjudicator commented that neither party got the declarations they sought in the Notice of Referral and Response (which we have not had sight of), but that the major success overall lies with the responding party, Infraco and, as such, found tie liable for 80% of his fees.
- 6.3 We are unable to comment on the valuation of the Notified Departure or that this was settled during the internal DRP stage in the sum of £755,000.

7. Tower Bridge Place

- 7.1 This dispute concerns a Notified Departure and the content's of Infraco's Estimate, which tie referred to adjudication. The Commentary accurately reflects the decision of the adjudicator that the value of the admitted Notified Departure was -£260,973.48. We also agree that the estimate claimed by Infraco was in the sum of £455,881.56 and that tie's assessment of the admitted Notified Departure was -£305,026.66.
- 7.2 We would add, however, that on the face of the information available to us, this was a largely successful adjudication in favour of tie.

8. Depot Access Bridge

- 8.1 This adjudication relates to the scope and value of a Notified Departure relating to Depot Access Bridge S32 on which the parties could not agree. Infraco therefore referred the dispute to adjudication.
- 8.2 We are unable to comment on the original figures put forward by Infraco in their Estimate. We confirm, however, that the value placed on the Estimate by Infraco in the adjudication was in the sum of £1,819,108.29. The Commentary does not make clear, however, that this figure was split into an Estimate in relation to the Depot Access Bridge in the sum of £1,269,985.02 and the Temporary Works in the sum of £549,195.27.
- 8.3 Neither does the Commentary make clear that Infraco were largely successful in respect of the substantive issues and that the adjudicator rejected tie's argument that the Depot Access Bridge and Retaining Wall are a single integrated structure, the whole of which was subject to the Notified Departure to which the adjudication relates.
- 8.4 We confirm that the Commentary correctly states that the Notified Departure was valued in the sum of £1,230,624.80. However, we would add that, in relation to the substantive issues, tie was ordered to pay the adjudicator's fees and expenses (there being a separate jurisdictional challenge brought by Infraco for which they were unsuccessful and ordered to pay the adjudicator's fees and expenses).

9. MUDFA 8

- 9.1 This adjudication relates to Infraco's entitlement to be awarded an extension of time within which to complete four sections of the tram network, and, if entitled to an extension of time, the length of that extension. Infraco referred the dispute to adjudication.
- 9.2 We understand that the adjudicator, Robert Howie QC, considered two preliminary issues at an earlier hearing and issued a Note of Reasons in relation to the preliminary issues. We have not had sight of that Note of Reasons and, as such, are unable to comment on those sections of the current adjudication which cross refer to the earlier Note of Reasons. We are therefore unable to comment on the decision reached at the preliminary hearing.
- 9.3 With regard to the second hearing, we agree that the extensions of time awarded to Infraco in relation to each Section have been accurately reflected.
- 9.4 We agree that Infraco were under no obligation to include acceleration measures as part of the Estimate.
- 9.5 We would add that the adjudicator found each party liable to pay one half of his fees and expenses.

10. 80.13 Instruction

- 10.1 The Commentary states that this is the decision as to whether Clause 80.13 allows Tie to instruct/direct Infraco to proceed with works in the context of a Notified Departure. We would add, that this issue was considered in the context of the agreement that the works constituted a Notified Departure and that, at the time that the instruction/direction was issued to Infraco there was no agreed Estimate for the works.
- 10.2 We agree that the Commentary accurately states that Lord Dervaird concluded that tie is not empowered by Clause 80.13 to instruct/direct Infraco. However, we would add that tie was not empowered under Clause 80.13 to issue the instruction in respect of those works as an Estimate had not been agreed in respect of the relevant works at the time that the instruction was issued by tie. As the instruction bore the heading "Clause 80.13 Instruction", it was held that it was not a valid instruction and Infraco was not under any obligation to comply with it.
- 10.3 We agree that Lord Dervaird did not provide any meaning as to the words at the end of Clause 80.13: "...*unless otherwise directed by tie*".

- 10.4 We note that DLA indicate that Lord Dervaird did not decide whether Clause 34.1 empowers tie to issue an instruction where the claimed Notified Departure is disputed, however, it is not clear whether or not the adjudicator was actually asked to decide on this point.

SIJ/DJA C2174.55

26 November 2010