

Schedule Part 4 (Pricing)

TIE LIMITED

**SUMMARY OF LEGAL INTERPRETATION OF
OF *SECTIONS 1.0 TO 3.0* OF SCHEDULE PART 4 (PRICING)**

relating to

the agreement between tie Limited

and

Bilfinger Berger Civil UK Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles
consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the *Edinburgh Tram (Line Two) Act 2006*

9 December 2009



1. INTRODUCTION

- 1.1 This paper is a distillation of our legal interpretation of *Sections 1.0 to 3.0 of Schedule Part 4 (Pricing)*.
- 1.2 A series of questions are set out, the answers to which highlight the differences in legal interpretation between Infraco and **tie**. The answers to each of those questions from **tie**'s perspective are accompanied by a brief explanatory note. The note focuses on those central points which support **tie**'s position. We also include a "Validation" section on certain questions to record the views of those who have considered the issue to date. It must be noted that we are attempting to summarise the views of others. It may be the summary is too simplistic in some cases to be complete.
- 1.3 The respective positions set out in this paper are extracted from the submissions of **tie** and Infraco in the adjudication concerning Russell Road Retaining Wall 4.

2. LEGAL INTERPRETATION OF SCHEDULE PART 4 (PRICING)

2.1 How does the contract define Infraco's price for the specified works?

tie's position	Infraco's position
<p>Schedule Part 4 says the Infraco's price for the specified works is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements and the Infraco Proposals. Notified Departure occurs if Base Date Design Information is amended, which gives rise to an examination of the price if that is justified.</p>	<p>Adopting the reasoning of Mr Hunter (in adjudication 5a/5b) - Employer's Requirements have, in terms of the price for works been clarified in <i>paragraph 3.1 of Schedule Part 4</i>, and thus limited by the Base Date Design Information and the Schedule Part 4 agreement in respect of the agreed fixed price.</p> <p>This has moved slightly: The current position expressed by Infraco's expert Mr Ian Hunt and Infraco - the Construction Works Price is to be based upon the Base Date Design Information.</p>

- 2.1.1 paragraph 3.1 of Schedule Part 4 (Pricing) states that "*The Construction Works Price is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with the provisions of this Agreement.*";
- 2.1.2 the Construction Works Price is not circumscribed solely by what is depicted on the Base Date Design Information. If it were so, *Schedule Part 4* would have to say so explicitly, and it does not and this was never intended by either party;
- 2.1.3 the Pricing Assumptions and Specified Exclusions are agreed derogations from that lump sum price;
- 2.1.4 the Infraco position, in referring to Employer's Requirements being "*clarified*" or "*based upon*" Base Date Design Information is vague (we



think, deliberately so) and does not attempt to be definitive about what the contractual effect of BDDI is on the ERs;

- 2.1.5 What **tie** has agreed to pay is Infraco's price for the specified works being a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements and the Infraco Proposals. BDDI is a set of design drawings that, if amended, may give rise to an entitlement to more money and time through the contractual change mechanic. What BDDI most certainly is not, is the entire priced scope of works; and
- 2.1.6 It cannot be correct (and is not supported by the contract) that the ERs are based on BDDI. This would mean that the design process was progressively altering the tram scheme specification, not delivering it. This is nonsense.

2.1 - Validation - DLA, McGrigors and Richard Keen QC agree the **tie** position

2.2 What does the Base Date Design Information represent?

tie's position	Infraco's position
The Base Date Design Information is only an interim design of part of the design of the whole of the Infraco Works. It represents the baseline for change to that set of designs. It is not conclusive for pricing the works (see 2.1).	For the purposes of pricing it was to be assumed that the Design (as per the Base Date Design Information at 25 November 2007) was to represent the entirety of the works being priced. The Base Date Design Information is the basis or a basis for pricing the works (see 2.1) as well as a baseline for change.

- 2.2.1 the design carried out by 25 November 2007 (the Base Date Design Information) represents an interim design (predominantly civils) of part of the Design for the whole of the Infraco Works. This part of the Design was to be developed and completed alongside other Design to meet the Employer's Requirements; and
- 2.2.2 the Infraco has warranted that the Infraco Proposals shall meet the Employer's Requirements. The Infraco has priced the Infraco Proposals and therefore the Infraco contracted on the basis of a price for construction of not just what is shown in the Base Date Design Information, but what is contained in the Employer's Requirements as at 14 May 2008.

2.2 Validation - DLA and Richard Keen QC agree the **tie** position

2.3 Does the addition of items into the Design of the works, which were not showing in the Base Date Design Information, trigger a Notified Departure?

tie's position	Infraco's position
No <i>Pricing Assumption 1</i> requires the matter to show on the drawings as it is only concerned with "amendment" to the drawings forming the Base Date	Yes Infraco in adopting the reasoning of Mr Hunter (in adjudication 5a/5b) says that matters that will become Notified Departures are matters that fall outwith



Design Information.	normal design development that could be construed from the information available to Infraco contained within the Base Date Design Information.
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- 2.3.1 the Construction Works Price is not confined to what is depicted on the Base Date Design Information. The Employer's Requirements includes the entire OHL system, an appreciable part of which was not fully designed (and not shown on BDDI) at 14.05.08 but OHL was clearly within Infraco's price;
- 2.3.2 *Pricing Assumption 1* only applies to the design set which is Base Date Design Information, not to the whole of the works required to meet the Employer's Requirements;
- 2.3.3 to have application *Pricing Assumption 1* requires the design feature (which Infraco assert has changed) to show without question on the drawings. This is because the assumption is only concerned with "amendment" to the drawings forming the Base Date Design Information - a design feature cannot be amended if it is not firstly shown;
- 2.3.4 *Pricing Assumption 1* only has application in the case of amendment to the drawings forming the Base Date Design Information, that does not include "additions to" or "additional detail within it" or "development of it"; and
- 2.3.5 *Pricing Assumption 1* is only relevant to that part of the Infraco Works which happens to be covered by the design prepared by the SDS Provider as at 25 November 2007 and to give assurance to Infraco that, as it stands as an interim design, BDDI would not develop in an unexpected way beyond what is required by the Employer's Requirements, and if it did then Infraco would be shielded from that.

2.3 Validation - DLA and Richard Keen QC agree the **tie** position. McGrigors agree the Hunter restriction of design development to that which shows on Base Date Design Information

2.4 Which party carries the burden of proving an alleged Notified Departure?

tie's position	Infraco's position
The onus is on Infraco to prove that the change in facts and circumstances relied upon do not fall within any of the stated exceptions to a Notified Departure (breach of contract by Infraco, an Infraco Change or a Change in Law) and the underlying reason(s) for the change in facts and circumstances are relevant to that enquiry.	Infraco are not required to prove the reason for any change. Infraco are not required to prove a negative. A comparison of the designs depicted on the Base Date Design information and the Issued for Construction Drawings is determinative of the matter.

- 2.4.1 the question of whether or not there has been a Notified Departure is not self evident. In order for **tie** to be able to assess whether there has been a Notified



Departure and, if so, the consequences of that Notified departure, **tie** must be given full information;

- 2.4.2 the words "*save to the extent caused by*" in the definition of a Notified Departure require investigation and explanation of the whole underlying facts and circumstances. If the change in facts and circumstance is caused by one of those matters, it cannot, as a matter of definition, be a Notified Departure;
- 2.4.3 an announced change in design from work which was intended to be capable of meeting Employer's Requirements naturally begs the question as to what drove the change. A breach of contract by Infraco and Infraco Change are intrinsic to the definition of a Notified Departure and it is an obvious matter of practical fact that a party alleging that a Notified Departure has arisen, must explain it as having arisen legitimately; and
- 2.4.4 if Infraco has simply permitted the SDS Provider to redesign the works, for the benefit of Infraco or SDS, Infraco is in breach of its obligation to manage the SDS Provider properly and **tie** is denied protection under Notified Departure exclusion unless and until this is disclosed.

2.4 Validation - DLA agrees the **tie** position. Richard Keen QC disagrees insofar as the factual identification of a Notified Departure is concerned, as opposed to an Estimate

2.5 Does Pricing Assumption 1 apply to any difference whatsoever from what is depicted on the Base Date Design Information when compared against what is depicted on the Issued For Construction?

tie's position	Infraco's position
<p>No Pricing Assumption 1 ONLY applies where:</p> <ul style="list-style-type: none"> • The matter described in the Infraco notification of tie Change shows in the drawings forming the Base Date Design Information; • The matter showing on the drawings forming the Base Date Design Information has been "<i>amended</i>"; • The "<i>amendment</i>" is a "<i>change in design principle, shape and form and/or outline specification</i>"; • The "<i>amendment</i>" does not arise from the normal development and completion of designs; • The facts and circumstances differ in any way from the Base Case Assumptions; and • The different facts and circumstances do not arise (to any extent) from a breach of 	<p>Practically speaking, yes. Pricing Assumption 1 applies to all changes except those which could be considered as the '<i>normal development and completion of design</i>' from the information available at Base Date Design Information and "<i>normal development and completion of design</i>" has to be understood in the particular way provided in this contract in that it excludes changes in shape, form or outline specification.</p>



contract by Infraco, an Infraco Change or a Change in Law.	
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- 2.5.1 the same arguments as are set out at *section 2.3* above apply equally and hold good for this issue; and
- 2.5.2 Infraco's position relies upon an extreme interpretation of Pricing Assumption 1.

2.5 Validation - DLA and McGrigors agree the tie position, as does Richard Keen QC but see limitations on this in 2.6 below.

2.6 What meaning is to be given to the words "normal development and completion of designs" referred to in Pricing Assumption 1?

tie's position	Infraco's position
<p>The development and completion of designs showing in the initial design for part of the Infraco Works (Base Date Design Information) into the detail needed to construct that part of the works as described, all to meet the Employer's Requirements.</p>	<p>Normal development and evolution of designs 'excludes changes of design principle, shape and form and outline specification'.</p> <p>Adopting the reasoning of Mr Hunter: design development from what was shown on the Base Date Design Information drawings. Infraco could only price that which was shown or could be developed from what was on the Base Date Design Information.</p> <p>The position expressed by Infraco's expert Mr Ian Hunt - changes that an experienced contractor and his engineer can expect in providing full construction information.</p>

- 2.6.1 Infraco expected that the Base Date Design Information would be developed and completed to meet the Employer's Requirements (insofar as the Employer's Requirements were actually represented in the Base Date Design Information);
- 2.6.2 by interpreting the whole *Pricing Assumption 1*, the proper meaning is to be found through understanding what the parties have provided and how they attempted to clarify what they provided. The parties' intention is set out within *Pricing Assumption 1* up to and including the three numbered subparagraphs. The words following that are expressly "*for the avoidance of doubt*", in other words to clarify what has been provided. Words used expressly to clarify what is already a whole provision cannot be construed to change it. In this case the "*clarifying*" words patently failed to clarify, so the simple question is whether the provision itself is complete and whether it can be understood without them. It is complete (the opening words of the final paragraph confirm this) and it is easily clear enough on its own. The failed



clarification is of no effect as it does not even try to add or change that provision;

- 2.6.3 the interpretation proposed by Infraco leads to a commercially absurd result, that is on Infraco's interpretation, changes introduced by Infraco for its own purposes, as opposed to being necessary to meet the Employer's Requirements, would constitute a Notified Departure; and
- 2.6.4 *Pricing Assumption 1* is intended to shield Infraco from amendment (to the Design prepared by the SDS Provider by 25 November 2007) in terms of design principle, shape, form and/or specification from the drawings forming the Base Date Design Information, except in the circumstances where that amendment arises as a consequence of the evolution of design through the stages of preliminary to construction stage to achieve the Employer's Requirements.

2.6 Validation - DLA and McGrigors agree the **tie** position. Richard Keen QC disagrees.

2.7 What is the meaning and effect of Clause 4.3?

tie's position	Infraco's position
<i>Clause 4.3</i> does not support either tie's or Infraco's opinion that a Notified Departure has occurred, as that clause does no more than refer questions relating to additional relief or payment to <i>Schedule Part 4 (Pricing)</i> .	Whilst the Infraco has many obligations under the Infraco Contract to do many things, including mitigate costs, <i>Clause 4.3</i> is quite specific that nothing contained within the contract should prejudice Infraco's right to claim additional relief or payment pursuant to <i>Schedule Part 4</i> .

- 2.7.1 *Schedule Part 4 (Pricing)* with all its conditions and qualifications, regulates Infraco's entitlement to additional relief or payment on the matters set out in it. It is those conditions and qualifications which require to be interpreted and applied;
- 2.7.2 *paragraph 1.4* of *Schedule Part 4 (Pricing)* provides that no provision within *Schedule Part 4 (Pricing)* entitles Infraco to more than one payment for any item or other entitlement under the Infraco Contract; and
- 2.7.3 *Clause 4.3* does not express a separate entitlement to be paid in all circumstances but refers to a "right" found elsewhere in the Infraco Contract (*Schedule Part 4 (Pricing)*). This "right" is created by the contract and can only be understood through interpretation of the whole of the Infraco Contract which creates it. In creating it the Infraco Contract itself circumscribes it, being the exceptions to what constitutes a Notified Departure. To say that nothing in a contract shall prejudice a right in the same contract is circular and meaningless.

2.7 Validation - DLA agrees the **tie** position. Richard Keen QC and Calum MacNeill QC both (as far as we can tell) take a less extreme view: the provision does have effect; it promotes the primacy of *Schedule Part 4* which is constrained by its own limitations and direct limits in the conditions.



2.8 Do works which could have been reasonably foreseen by an experienced civil engineering contractor in the knowledge of the ground investigation reports referred to in *Specified Exclusion 3.3 (c)* constitute a Notified Departure?

tie's position	Infraco's position
No	<p>Yes - the second part of <i>Pricing Assumption 3.3 (c)</i> stands alone and if work is required to deal with replacement of any materials below the earthworks outline or below ground obstructions/voids, soft material or any contaminated materials then it is a Notified Departure.</p> <p>Infraco's position may persuade the adjudicator that each of the Base Case Assumptions is capable of generating a Notified Departure; that <i>Specified Exclusion 3.3 (c)</i> is expressly divisible with 2 parts each generating a separate Notified Departure; and that the express provision that this constitutes a Notified Departure means that the other tests applying to <i>Pricing Assumptions</i> are not relevant.</p>

2.8.1 the whole of *Specified Exclusion from the Construction Works Price 3.3 (c)* is to be given effect to, not just the last sentence.

*3.3.(c) 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 20th and 27th November and 6th December 2007. Additionally the *Constructions Works Price* does not include for dealing with replacement of any materials below the earthworks outline or below ground obstructions/voids, soft material or any contaminated materials.*

2.9 Are the Schedule Part 4 Pricing Assumptions and Specified Exclusions to be read as a whole?

tie's position	Infraco's position
<p>Yes</p> <p>There is no order of precedence given to the various Pricing Assumptions and Specified Exclusions. They are all to be considered, not just one part of Pricing Assumption 1.</p>	<p>No</p> <p>Pricing Assumption 1 is crucial in regard to design and all Pricing Assumptions operate independently. See also 2.8.</p>

2.9.1 the various Pricing Assumptions and the Specified Exclusions are concerned with assumptions and exclusions which the Referring Party has made in arriving at its price for the works specified in the Employer's Requirements - they are derogations from *Paragraph 3.1 of Schedule Part 4 (Pricing)*; and



2.9.2 nothing in *Schedule Part 4* supports the Infraco's position.

2.10 Are the facts and circumstances comprised in the Base Case Assumptions mutually exclusive of each other?

tie's position	Infraco's position
<p>No It is the whole facts and circumstances encapsulated in the Base Case Assumptions which require to be considered. Facts and circumstances comprised in one of the Base Case Assumptions (<i>Specified Exclusion 3.3 (c)</i>) is relevant to consideration of whether a fact and circumstance has changed under one of the other Base Case Assumptions (<i>Pricing Assumption 1</i>). For a Notified Departure to occur it is necessary for there to be a change from those whole facts and circumstances.</p>	<p>Yes Infraco only need to identify a change from what is depicted on the Base Date Design Information. See also 2.8.</p>

2.10.1 to put this question in context: *Specified Exclusion 3.3 (c)* refers to certain ground investigation reports. Those ground investigation reports form part of the Base Case Assumptions. Infraco say that a Notified Departure has occurred on the basis of *Pricing Assumption 1* in respect of changes to foundations and piling. In support of that, Infraco rely upon those same ground investigations referred to in *Specified Exclusion 3.3 (c)*. Infraco do not rely upon new ground investigation reports or a change in the facts and circumstances. Instead, Infraco say that they need do no more than identify a change from the Base Date Design Information. Infraco are interpreting information that was part of the Base Case Assumptions; and

2.10.2 a Notified Departure, *paragraph 2.8 of Schedule Part 4 (Pricing)*, is defined by reference to a difference in the facts and circumstances from the Base Case Assumptions (which comprises the whole of the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions) and it is the whole facts and circumstances which require to be considered. The ground investigation reports have never changed, therefore no difference from the Base Case Assumptions has arisen and therefore there is no Notified Departure.

DLA Piper Scotland LLP

9 December 2007