

## Legal Paper 1: Design Development and Contractual Change Responsibilities

There are a number of elements that need to inform decisions on legal, financial and programme risk analysis to allow tie to lay out clear options and recommendations on the way forward for the TPB and CEC. It is essential to understand all aspects of the contractual design change exposure across all aspects of the design and construction.

To that end **tie** seek a crystal clear paper from DLA which distils previous comments and addresses the following key issues:

1. How the various terms of the Infraco contract combine to establish that pricing of design changes should be by reference to Employer's Requirements / Infraco Proposals and amended, if appropriate by the permitted variation mechanisms within Schedule Part 4 and Clause 80.

In previous DRP submissions, **tie** has argued in overall terms that the changes pursued by Infraco were in fact the product of normal design development and were therefore not Notified Departures. It is understood that the basis for pricing changes is by reference to BDDI drawings not the ERs, but only to the extent that changes are outwith normal design development, as defined in Schedule Part 4, 3.4.1.1.

**tie's** basis was considering the ERs and IPs and then testing if there are permitted variations against which change can be determined, while Hunter / Infraco assess the character of change against the BDDI drawings.

The paper should specify where the Hunter adjudication judgment is strong and weak. It needs to be clear about weaknesses in **tie's** argument, i.e. those aspects where there is evidence in the form of signals of the parties' intent, common commercial sense or other circumstantial support as opposed to unambiguous contract language.

2. How the responsibilities and obligations of the SDS Provider and compliance with the contractual obligations for items such as the Design Review Process fit with the above issues, together with clear recommendations on options for progressing any challenge to the performance of such obligations and recovery of loss associated with that performance.
3. How any contractual exposure associated with the Misalignment processes and obligations fits with any design change exposure.
4. How the contractual condition preventing Infraco from being paid twice for Works should be referenced and deployed.

In addition to the above, the advice received from Richard Keen QC during the Consultation on the 1 December 2009, should be clearly laid out with commentary on how that strengthens or weakens the legal and contractual arguments made above.

Steven Bell  
7 December 2009.