

INFRACO CONTRACT "BUILDING BLOCKS"

Introduction

This paper summarises the relationship between the main technical and financial "building blocks" in the Infraco Contract, contained in the original scope of works, the agreed price, and the proper basis for adjustment to that price in the event of changes to the scope. In summary, the question is whether each of the building blocks is aligned to the others and if not, what are the consequences in terms of contract entitlement.

This paper considers three questions:

- (i) What is the original scope of work?
- (ii) Is that scope fully in line with a fixed price? i.e. is the stated fixed price entitlement, a price for the original scope of work, nothing more or less? and
- (iii) Is that scope (and price, if aligned) fully in line with the start point/baseline for price adjustment for changes to scope?

Scope

In the Infraco Contract conditions, Clause 7.1 provides that:

tie hereby appoints the Infraco in accordance with the terms of this Agreement and the Infraco hereby accepts full responsibility and agrees to carry out and complete the Infraco Works fully and faithfully in accordance with this Agreement.

The term Infraco Works represents the scope of works here, as evidenced by its definition:

means as the context requires, the EAL Works and all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it, all in accordance with this Agreement and the Employer's Requirements.

The original scope of works is therefore defined very widely. It is not comprised only in the Employers Requirements: the scope of works is described in this definition - everything required to deliver the Edinburgh Tram Network and to maintain it - all of this to be done in accordance with the Agreement and the Employer's Requirements. The reference to Employer's Requirements is not technically required, other than (probably) for emphasis as the Agreement covers the Conditions and all Parts of the Schedule including Part 2.

At Clause 7.4 of the Infraco Contract, the Infraco *undertakes and warrants that the Infraco's Proposals shall meet the Employer's Requirements*. Under Clause 11.3, the Infraco undertakes that it *shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement*.

Clause 4.2 provides that the Employer's Requirements in any event have priority over the Infraco Proposals.

What Infraco have priced

Our view is that Infraco have priced the Infraco Works, as originally scoped, in accordance with the definition of Infraco Works. Counsel has taken the view that the Infraco may assert legitimately that the Construction Works Price is the price for the work specified in the Employer's Requirements and Infraco Proposals (Schedule Part 4, paragraph 3.1). In full, that paragraph states:

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.

We agree that view and say that the "work required" as specified in ERs, Infraco Works.

Connection to Base Case Assumptions and BDDI

Schedule Part 4 is clear 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... and the Infraco Proposals*". It is also clear from Schedule Part 4 (paragraph 3.5) that the Contract Price (which incorporates the Construction Work Price) is founded on the Base Case Assumptions (meaning "*the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions*").

In summary, we therefore have in paragraph 3.5 a connection between two expressions of the fixed price and both the Employer's Requirements and Infraco Proposals on the one hand, and the Base Case Assumptions on the other, although that is not a very strong connection: At one end the fixed price is the price for the Works but at the other, the price is only "founded on" the Base Case Assumptions. In other words, this looks like a simple acknowledgement of the "fixed" aspect of the fixed price and not a connection between the Base Case Assumptions and the calculation of the price itself. One baseline for change does connect with the priced scope: Pricing Assumption No. 3 is:

"The Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco Proposals and the Employer's Requirements"

which is in our view, an explicit connection between the scope of works and the baseline for evaluation of change, or at least one of the baselines since the Deliverables represents all of the design and related work produced by the SDS Provider pre-contract. On its own, this is straight forward to understand, on the usual logic that the contractor will accept adoption of the design frozen immediately before entering into the construction contract on the basis (following due diligence or with a warranty) that the design immediately pre-contract complies with Employers Requirements and Infraco Proposals. In this case it has to be acknowledged that Pricing Assumption No. 1 makes reference to BDDI frozen in September 2007 and not at contract formation in May 2008.

The question therefore moves on to look for the contractual provisions which deal with any discrepancies which might have arisen in the further development of the Deliverables beyond BDDI as against the further development of either or both of Employers Requirements and Infraco Proposals. This issues was recognised in the contract, in the provisions generally known as "Misalignment". There are two distinct parts to Misalignment, to deal with misalignment which may have arisen between the developed Deliverables and both Employers Requirements and Infraco Proposals, respectively.

This is important because the exercises were agreed in order to bring about alignment and if they were completed successfully - a question for **tie** - this should have created (in the language of the question

raised last week at Challenge) the explicit connection between the baseline for change in Pricing Assumption No. 1 (BDDI) and the priced scope of the Works. Acknowledging that these things are not the same (otherwise the provisions would not be necessary) the Misalignment process intends to produce records which detail each change to the Deliverables in order to achieve compliance and provide expressly for the extent of contractor entitlements arising from those changes.

Misalignment between Deliverables and Employers Requirements are dealt with at clause 4.6 of the Novation Agreement dated 14 May 2008, as follows:

4.6 *tie warrants that it has received a report from the SDS Provider (annexed at Part B of Appendix Part 7) setting out the misalignments between the Deliverables completed prior to the date of this Agreement and the Employer's Requirements and that it has issued initial instructions (in the form of the letter annexed at Part A of Appendix Part 7) to the SDS Provider in relation to addressing all such misalignments. Upon completion of the work entailed to resolve the misalignments, the SDS Provider confirms to tie and the Infraco that such Deliverables shall be consistent with the Employer's Requirements.*

Misalignments between the Deliverables and Infraco Proposals are dealt with in clauses 4.7 and 4.8 of the Novation Agreement as follows:

4.7 *As soon as reasonably practicable, the Parties shall commence and expeditiously conduct a series of meetings to determine the development of the Infraco Proposals and any consequential amendment to the Deliverables (the "Development Workshops"). The matters to be determined at the Development Workshops shall be those set out in the report annexed at Part C of Appendix Part 7 (the "Misalignment Report"), together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4 to be dealt with in the following order of priority and objective unless otherwise agreed:*

- 1 *Roads and associated drainage and vertical alignment with the objective of minimising the extent of full depth reconstruction for roads thus minimising cost and construction programme duration*
2. *Structures value engineering, including track fixings to structures with the objective of enabling BBS to realise the Value Engineering savings for the structures identified in Schedules 4 and 30 of the Infraco Contract (Pricing and Infraco Proposals respectively)*
3. *OLE Design with the objective of identifying and agreeing the actions, responsibilities and programme to enable Infraco to implement their proposals for OLE as identified in the Infraco Proposals*
4. *Trackform with the objective of completing an integrated design to enable BBS to implement their proposals for trackform*
5. *Sub-station buildings with the objective of resolving the misalignment between Infraco Proposals and SDS Design with the minimum of changes to accommodate the Infraco Proposals for substations.*

The following to be reviewed at the end of the Development Workshop to identify any issues arising from the above items:

1. *Earthworks*

2. *Landscaping*
3. *OLE Foundations*
4. *Alignment*
5. *Site Clearance*
6. *Tramstops*
7. *all other items in the Misalignment Report together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4.*

At the Development Workshop, the Parties shall also develop a strategy for co-operation between the SDS Provider and the Infraco to manage design development and the necessary interface between the Infraco's design and the design developed by the SDS Provider.

- 4.8 *The product of the Development Workshops shall be a report signed by each of the Parties to detail the conclusions in respect of each matter and the payments to be made to the SDS provider in respect of the work to be carried out by the SDS Provider as a result of the conclusions set out in the report. Any consequential tie Change Orders or instructions shall be appended to such report as and when the same are issued. tie shall pay the SDS Provider for the work required for the Development Workshop on an hourly rate basis in accordance with the hourly rates set out in Appendix Part 8 and the SDS Provider agrees that the Infraco shall not be liable to make such payments to the SDS Provider. For the avoidance of doubt, the Infraco and tie agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in this report will be a Mandatory tie Change under the Infraco Contract, and a Client Change under the SDS Agreement.* (emphasis added).

This takes us to what we understand to be the Infraco submissions for additional money and time entitlement based on alleged Notified Departures arising from this second part of the Misalignment process - the alignment between Deliverables and Infraco Proposals. As we understand it, Infraco have based their entitlement on Pricing Assumption No. 3 (Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco Proposals and the Employers Requirements). We take the view that if this is the express basis of entitlement in the Infraco submissions, it is the wrong one. The existence of the Misalignment exercise in the Novation Agreement is in our view a clear indication that the parties did not intend that Pricing Assumption No. 3 would cover the misalignment items identified to be dealt with in that process. We take the same view on Pricing Assumption No 1, to the extent that changes from BDDI were covered in the Misalignment exercise. Instead, we take the view that:

1. In relation to aligning the Deliverables with Employers Requirements, the Infraco must have entitlement arising from implementation of the changed or additional work set out in the letter referred to in Part A of Appendix Part 7; and
2. Infraco's entitlement in relation to the alignment of Deliverables and Infraco Proposals will depend on those amendments to Deliverables which will have been set out in the report referred to in clause 4.8 of the Novation Agreement above. They will be Mandatory tie Changes. The best view is that any other consequential changes, not included in the reports still have to be presented by Infraco for approval and would constitute Infraco Changes.

In our view, the extent of the items listed in the **tie** letter and the reports, will be the determining factors, whether Infraco currently see this or not. On that basis, discussion of the provisions dealing with discrepancy and priority, should not come into it.

Conclusion

1. The original scope of works is described in the definition of Infraco Works - which are required to be carried out and completed in accordance with the entire Agreement, which of course includes the Employer's Requirements and the Infraco Proposals.
2. The explicit connection between price and scope is paragraph 3.1 of Schedule Part 4 which provides that the Construction Works Price is a lump sum, fixed and firm price for all elements of the work required as specified in the Employer's Requirements...and the Infraco Proposals.
3. The Contract Price is the total price for all of the works required under the Agreement, comprising the Construction Works Price and ancillary items.
4. Paragraph 3.5 of Schedule Part 4 states that the Contract Price has been fixed on the basis of inter alia the Base Case Assumptions. The Base Case Assumptions are defined as the Base Date Design Information, the Base Tram Information, the Pricing Assumptions (including Pricing Assumptions No. 3) and the Specified Exclusions.
5. The disconnection between the priced scope and BDDI may have been gathered up in the contract in the Misalignment process although that process is a general alignment and not confined to the period between formation of BDDI and formation of the contract. The key questions are what it covered and whether it was successfully completed:
 - i) In selecting the items for alignment, did this include all items of Deliverables known to have been developed since BDDI?
 - ii) Were the reports produced and agreed?

DLA Piper
15 September 2009