

DLAP comments Jan 29th shown in blackline

BSC Claim for Changes from Base Date Design Information (BDDI) to IFC.

tie basic position

BSC has notified circa 41 occasions to date where they consider that the IFC drawings issued are different from the BDDI drawings such as to be a Notified Departure and therefore a mandatory tie Change.

No Estimates have been provided to date to identify and prove this assertion and these are awaited.

tie's position is that the design production responsibility rests with BSC. BSC are required to carry out and complete the design. If there are design changes from BDDI to IFC then BSC need to demonstrate properly to tie, who made the revisions, what happened to these revisions under the design review process, how these revisions go beyond normal design development and completion of the design and why any design revision has been necessary such as to result in a tie Change. Until this procedure is complete, tie is not committed to a Notified Departure.

BSC Position

1. TIE'S PAPER ENTITLED "DESIGN LIABILITY FOR INFRACO UNDER THE INFRACO CONTRACT *Not sure we have seen this tie paper*

1.1 There are certain fundamental misunderstandings expressed in tie's paper. In particular:

1.1.1 The question of whether or not the Infraco is liable for the design must not be confused with the cost and programme implications (whether positive or negative) arising from a Notified Departure. These are two quite separate and distinct issues. ***Not accurate : they are contractually linked if the ND were caused by Infraco breach*** Design liability arises where the Infraco has not exercised the level of skill, care and diligence to be expected of a professional designer. The issue of the quality/adequacy of the design is irrelevant to the question of whether or not there has been a Notified Departure.

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1.1.2 Tie's statement that "If tie issues a Change it shall be valued using the Base Date Design Information and the Pricing Assumptions in Schedule Part 4" is incorrect. ***Not so. the statement is incomplete but not wrong; the Contract Price adjustment takes place from the baseline of the Pricing Assumptions and the BDDI when applying Clause 80.*** The occurrence of a Notified Departure (i.e. the facts and circumstances differ in any way from the facts and circumstances identified in Pricing Assumptions 1 – 43) gives rise to a Mandatory tie Change the valuation of which is in accordance with the provisions of the Infraco Contract. ***Infraco needs to comply with Clause 80 in order to have a tie Change instructed. Writing a letter saying 'there is a Notified Departure' is not compliance with Clause 80.***

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1.1.3 The "Acceptance of Liability by the Infraco" provisions set out in Clause 6 of the Novation Agreement address the liability of the Infraco for the acts and omissions of tie prior to the date of the novation and are not relevant in the context of liability for design carried out prior to that date.

2. INFRACO'S LIABILITY FOR DESIGN

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2.1 The obligations of the Infraco in relation to design **There are several layers more - which are important and relevant e.g. Clause 7.1 (full responsibility, 7.3.13 (GIP), 7.3.14 (design to be buildable and maintainable), 7.4 (Infraco Proposal warranted to meet ERs)7.5 (maximising productivity), 10 in particular 10.3, 10.4 and 10.5 (compliance with Schedule Part 14 design review procedure) and design development process) 11.3 (ensuring SDS performs)** are:

2.1.1 to "exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity" (Clause 7.2)

2.1.2 to carry out and complete the Infraco Works "so as to ensure compliance with the Employer's Requirements **and the Infraco Proposals**" (Clause 7.3.4)

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These obligations arise in respect of the Infraco Works as a whole whether or not carried out prior to the date of novation of the SDS Agreement. **Agreed**

2.2 Breach in Design

2.2.1 It should be noted that the risk of negligence by the SDS Provider (or failure by the SDS Provider to achieve IFC issue by the dates set out in the Programme) is a shared risk. In particular Compensation Events (t) and (u) (the SDS Compensation Events) together with the provisions of Clauses 65.11 and 65.12 **(obliges Infraco to seek redress from SDS in terms of application of SDS Agreement LDs and recovery of costs)** of the Infraco Contract address how that risk is shared between the Infraco and tie. **Agreed and note that 65.11 obliges Infraco to continue performance notwithstanding the fact that SDS may have produced an incompetent design (Compensation Event).**

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2.2.2 More fundamentally, however, the question of the Infraco's liability for failure to comply with its contractual obligations arises on breach. In other words, the question of any liability of the Infraco for defective design arises where the design itself is negligent and causes loss to tie or the design does not comply with the Employer's Requirements. This is of no relevance to the question of design development and the evolution of design and the cost/programme implications of Notified Departures (unless the underlying cause of the Notified Departure was the negligence of the Infraco in design of the Infraco Works). **¹ But a breach by Infraco is relevant to its right to claim an ND: that breach could relate to its warranty about design, its duties to manage SDS or its obligations to proceed diligently with the works. Infraco cannot simply assert that there is an ND if the Pricing Assumptions is not longer true because of something Infraco has done or should have prevented or mitigated.**

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2.3 Risk allocation re design development/evolution

2.3.1 The risk allocation in relation to design development/evolution is clearly identified in Schedule Part 4 (Pricing) of the Infraco Contract. Paragraph 3.5 of Schedule Part 4 **Interestingly this is relied upon here but is ignored in the BDDI arguments** provides:

¹ Note that the definition of Notified Departure seeks to exclude the Schedule Part 4 mechanism "to the extent caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law".

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2.3.2 *"The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions² 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. For the avoidance of doubt tie shall pay to the Infraco, to the extent not taken into account in the Estimate provided pursuant to Clause 80.24.1, any additional loss and expense incurred by the Infraco as a consequence of the delay between the notification of the Notified Departure and the actual date (not the deemed date) that tie issues a tie Change Order, such payment to be made by tie following evaluation, agreement or determination of such additional loss and expense pursuant to Clause 65 (Compensation Events) as if the delay was itself a Compensation Event."* **correct citation but not sure where that takes us**

2.3.3 Design Development/evolution is specifically addressed in Pricing Assumption 1. The assumption is that:

2.3.4 *The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):*

1.1 *in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information (except in respect of Value Engineering identified in Appendices C or D to this Schedule Part 4);*

1.2 *be amended from the scope shown on the Base Date Design Information and Infraco Proposals as a consequence of any Third Party Agreement (except in connection with changes in respect of Provisional Sums identified in Appendix B); and*

1.3 *be amended from the drawings forming the Base Date Design Information and Infraco Proposals as a consequence of the requirements of any Approval Body.*

For the avoidance of doubt normal development and completion of design means the evolution of design through the stages of preliminary to construction stage and excludes changes of design, principle, shape and form and outline specification.

2.3.5 Whilst we will turn to the detail of this Pricing Assumption it should first be noted that the provisions of Paragraph 3.5 (Mandatory tie Change flowing from circumstances that differ from a Base Case Assumption) apply to all categories of Base Case Assumptions. The definition of Base Case Assumption (as identified above) includes a separate and distinct category of "Base Date Design Information" It follows that it might be reasonably argued that any change to the Base Date Design Information is a Mandatory tie Change whether or not the tests set out in Pricing Assumption 1 have been satisfied. ***Disagree ; the contract would need to say so.***

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² The Base Case Assumptions" are the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions.

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2.3.6 For current purposes we are asked simply to address the development of design in the context of Pricing Assumption 1. The test for the triggering of a Mandatory tie Change is whether or not the facts and circumstances differ "in any way" from those set out in the Pricing Assumption. It follows that the following events would trigger a Mandatory tie Change ***this simply breaks out Clause 3.4.1 into its component parts:***

- (a) the design principle being amended from the drawings forming the Base Date Design Information;
- (b) the shape being amended from the drawings forming the Base Date Design Information;
- (c) the form being amended from the drawings forming the Base Date Design Information;
- (d) the specification being amended from the drawings forming the Base Date Design Information³;
- (e) the scope being amended from the drawings forming the Base Date Design Information or Infraco Proposals as a consequence of any Third Part Agreement; and
- (f) the design being amended from the Base Date Design Information as a consequence of the requirements of any Approval Body,

save where ***there has been an Infraco brach, an Infraco Change or a Change of Law*** any such changes arise from "normal development and completion of design". This term is defined to exclude changes to design principle, shape, form and specification ***but it specifically includes " the evolution of design through the stages of preliminary to construction stage"*** so in practical terms this exception from the Infraco's entitlement to a Mandatory tie Change is likely to be very limited (although this is a matter that would ultimately require to be determined by professional designers). ***That is to say it will be a matter of fact and expert opinion what the design evolution has been and it is not an Infraco unilateral opinion which determines there has been an ND and any related entitlement. If Infraco fails to provide tie with the Clasue 80 information, Infraco is in breach (See 80.24).***

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³ 1-4 in the list mentioned above are, of course, subject to an exception in the case of Value Engineering)