

Exhibit 3 to Mediation Statement

The interaction of Clauses 65 and 80

- 1.1 It can be seen from the foregoing that Infraco takes the view that if it is able to bring itself within the parameters of Clause 80, it is protected from an obligation to proceed with the Infraco Works until a tie Change Order is issued (although in many cases, even though a tie Change Order has been issued, work has not yet commenced) or within the narrow circumstances envisaged by Clause 80.15. It is also evident from the foregoing that tie takes issue with Infraco's position.

- 1.2 Infraco has adopted the position that it is entitled exclusively to elect to treat certain events as tie Changes, rather than Compensation Events, in order to bring itself within the ambit of Clause 80, rather than the ambit of Clause 65. That approach is misconceived.

- 1.3 Infraco's motivation for this would appear to be clear: it considers the provisions of Clause 80 to be more favourable to it than the provisions of Clause 65. By way of example.
 - 1.3.1 Clause 65.11 provides that "*notwithstanding the occurrence of a Compensation Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 65 (Compensation Events).*"

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- 1.3.2 Clauses 65.2, 65.3 and 65.4 provide for a series of conditions precedent which, in nearly all cases, would act as a time bar to any entitlement and which, if they are not met by Infraco, are fatal to its claim to be entitled to additional time and money.
- 1.3.3 Clause 65.8 provides that *"tie shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (Compensation Events) not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties"*.
- 1.4 For the reasons explained in this paper, tie takes issue with Infraco's interpretation of the provisions of Clause 80, but nonetheless it is evident that Infraco considers that it has benefit to be derived by keeping itself outwith the provisions of Clause 65 – not least because of its failure to comply with the conditions precedent referred to above.
- 1.5 Approaching the matter at a high level, the purposes of Clauses 65 and 80 are different. Clause 65 is designed to deal with the types of event which might be expected to occur during the course of any large construction project, albeit their actual detail or nature cannot be foreseen. It provides a procedure whereby the contractor might seek redress (compensation) for the consequences of these events whilst ensuring that the works will continue to be progressed. Clause 80, on the other hand, appears primarily aimed at the situation where the employer seeks to vary, or is deemed to have varied (or departed from), the contract works. It gives the employer the right to seek information from the contractor as to the likely impact of the variation in order that he might, amongst other things, modify or

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withdraw the instructed variation in certain circumstances in the event that the likely consequences are not acceptable. It gives the contractor a mechanism to seek redress for the effects of the variation, and it provides that the contractor is not to execute the instruction for a variation until the employer has had an opportunity to consider its likely impact.

1.6 This distinction between Clauses 65 and 80 and the fact that they are capable of co-existing in relation to any change or delay is reflected in the provisions of Clause 34.3, which provide that that any instruction which might delay or disrupt the works falls to be treated as a Compensation Event, and dealt with under Clause 65, save to the extent that the instruction requires any variation to the works, in which case the instruction (or relevant part of the instruction) shall fall to be treated as a Mandatory tie Change and be dealt with under Clause 80.

1.7 Clause 65.1 is expressly aimed at ensuring that any occurrence, which falls within the contractual definition of a "Compensation Event", will be addressed under that clause: its wording excludes the treatment of a Compensation Event under any other provision of the Infraco Contract:

*"The Infraco's **sole right** [emphasis added] to an extension of time and/or relief from the performance of its obligations and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (Compensation Events)."*

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1.8 By contrast, the wording of Clause 80.1 expressly accepts that other provisions may require to take precedence over it (at least with respect to a tie Change):

“Unless expressly stated in this Agreement, or as may otherwise be agreed by the Parties, tie Changes shall be dealt with in accordance with this Clause 80 (tie Changes).”

1.9 Accordingly, in the event of any conflict between Clauses 80 and 65, the latter should take precedence. There is no provision which permits Infracore to make an election between Clause 65 and Clause 80 and certainly no provision which would allow Infracore to seek the same entitlement exclusively through one, or other, provision.

1.10 Indeed, an intention to keep Compensation Events and tie Changes separate and distinct is evident in the provisions of Clauses 22.2 to 22.4 when compared with the provisions of Clause 22.5:

- (a) Clauses 22.2 to 22.4 deal with certain events which occur at any time *prior to* commencement of engineering and construction activities, and accordingly treat them as a Mandatory tie Change (under Clause 80); and
- (b) Clause 22.5, on the other hand, deals with certain events which occur at any time *after* commencement of engineering and construction activities and treats them as a Compensation Event (under Clause 65).

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1.11 The question of the interaction between Clauses 65 and 80 was touched on between the Parties in an adjudication before Robert Howie QC relating to INTC 429 (addressed in more detail below). In that case, it was accepted by tie that the matter fell within the ambit of Clause 80, but no decision was sought from Mr Howie in relation to the interaction point. In any event, Mr Howie's comments on the topic do not form part of his decision, and are not binding on the Parties.

1.12 To the extent that Mr Howie considered that "*a party cannot choose whether to follow the provisions of Clause 65 or those of Clause 80*"¹, then tie agrees with that view. Infraco is not entitled to elect which route to take, for the reasons explained above. However, tie does take issue with Mr Howie's conclusion that the Clause 80 route should take precedence, for the reasons explained above. In any event, the point was not argued in any detail before Mr Howie.

¹ Page 4 of his document issued on 4 June 2010