

## Appendix 5

### Legal analysis in relation to omitting work

- 1 In the event that the Infraco Contract remains in place (because the Settlement Agreement is not entered into for some reason other than funding), consideration may be given to omitting the section of the network from York Place to Newhaven.
- 2 Schedule Part 1 defines tie Change as including:  
*"any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80 (tie Changes)..."*
- 3 The definition of Mandatory tie Change contains similar wording ("any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80 (tie Changes) which this Agreement specifically states shall be a Mandatory tie Change.")
- 4 Accordingly, the Infraco Contract envisages that tie will have the power to alter the Infraco Works, by instructing a reduction or omission. The Infraco Works are defined as follows:  
*"...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."*
- 5 The Edinburgh Tram Network is, in turn, defined as:  
*"the tramway which is to be designed, constructed and maintained in Edinburgh pursuant to this Agreement in Phase 1a (forming part of Line One and Line Two as described in the Tram Legislation) and, if the Phase 1b option set out in Clause 85 is exercised, Phase 1b, together with all associated works and facilities required pursuant to this Agreement including all civil engineering and track works, Trams, infrastructure, plant, machinery and equipment installed or used for the operation of such tramway."*
- 6 The extent to which tie is entitled to omit work from Infraco's scope is likely to be a question of degree, having regard to the definition of the Infraco Works, having regard to the scope of the wording referred to above. To take two extreme examples: tie is likely to be held to have the power to remove a retaining wall from the scope of the works. At the other extreme, had tie purported to remove the whole of the track from Edinburgh Airport to Newhaven from Infraco's scope on the day after contract formation, then it is unlikely that this would be held

to constitute a valid instruction to omit. In that example, the whole purpose of the Infraco Contract (the delivery of the Edinburgh Tram Network) would have been thwarted, and Infraco would have been deprived of the opportunity to design, construct and maintain the ETN.

- 7 The issue then arises as to whether the removal of the section of the project from York Place to Newhaven would constitute such a dilution of the Infraco Contract as to render it wholly different from what had been intended. There would be reasonably good arguments available to tie to establish that the work which remained within Infraco's scope (Airport to York Place) still delivered the Edinburgh Tram Network, albeit a truncated one.
- 8 Of relevance to this issue is the question of the driver behind the omission: there is a body of case law which establishes that, depending on the wording of the power to omit, the power does not extend to excluding work in order to have another contractor carry it out (usually more cheaply). In other words, if tie omitted York Place to Newhaven for the purposes of going out to tender on that section in order to obtain better terms, then the instruction to omit is more likely to be treated as a breach of contract, for which Infraco would be entitled to recover damages.
- 9 The measure of damages in this situation would be by reference to the profit which Infraco could demonstrate that they would have earned, had they been allowed to complete the omitted work (in other words, what they would have been paid for the work, less what it would have cost them to carry out – all by reference to the terms of the Infraco Contract).
- 10 Where work is omitted because tie no longer requires that work to be carried at all, for example, because it cannot afford it, then the instruction to omit is less likely to be held to constitute a breach of contract (subject to the comments made above in relation to the degree to which work has been omitted).
- 11 Whether it is held that an instruction to omit has been validly made in terms of the Infraco Contract, it is likely that Infraco would be entitled to recover the profit that they would have made on the work omitted, whether through the operation of the valuation mechanism in the Infraco Contract, or as damages for breach of contract.
- 12 If the instruction to omit the work from York Place is a lawful one within the meaning of the Infraco Contract, in common with any other tie Change, it will require to be valued in accordance with the provisions of the Infraco Contract. Clause 80.6 provides that the valuation of tie Changes shall be carried out in accordance with the following principles:

"80.6.1 *by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (Pricing) or Schedule Part 7 (Maintenance Contract Price Analysis) as the case may be in so far as such rates and prices apply;*

80.6.2 *if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;*

80.6.3 *if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (Pricing) and Appendix F Schedule Part 7 (Maintenance Contract Price Analysis);*

80.6.4 *if the value of the tie Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with Appendix G to Schedule Part 4 (Pricing) and Appendix F to Schedule Part 7 (Maintenance Contract Price Analysis);*

*provided that where any tie Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the tie Change shall be ascertained by measurement and/or valuation at fair rates and prices."*

13 On the basis of the foregoing, it is likely that Infraco would be entitled to recover any element of profit on the work that had been omitted for reasons which include the following:

(a) If a valuation is carried out under clauses 80.6.1 and 80.6.2, and that does *not* lead to payment of loss of profit, then that is likely to be held to be unreasonable, such that fair rates and prices will apply in terms of the final paragraph of clause 80.6 quoted above. Infraco are likely to have a good argument that fair rates and prices would entitle them to recover lost profit on work omitted. The application of fair rates and prices may extend to an entitlement to recover loss of contribution to overheads. Such a claim is likely to require either evidence of a drop in turnover not caused by any factor, or by evidence that work had been turned away in order to accommodate the omitted work, which eventually was never carried out.

(b) If a valuation is carried out under clauses 80.6.3 or 80.6.4, then the principles contained in Appendix G of Schedule Part 4. Clause 1.2 of Appendix G provides

for an element of overheads and profit of 10% on civil engineering works and 17% on systems and trackworks. Clause 1.4 of Appendix G provides that where the valuation of change results in an omission, the profit element should be deducted – in other words, Infraco would be entitled to retain the profit element calculated at the rates set out in clause 1.2 of Schedule G. In this case, the application of the percentage would include for overheads, and any additional claim for loss of contribution to overheads beyond the percentage ought not to succeed.

- 14 If it is held that the instruction to omit constitutes a breach of contract, then Infraco would be entitled to recover damages calculated to put them in the position that they would have been in had the breach not occurred: in other words, damages to restore to them the profit that they would have made had the work not been omitted. For the same reasons explained above, this may extend to a claim for lost contribution to overheads.
- 15 In each case, it is likely that Infraco would also be entitled to recover the direct costs associated with demobilising *etc* in relation to the work omitted.

**McGrigors LLP**  
**29 June 2011**