

Exhibit 1 to Mediation Statement

Design Development and Pricing Assumption No.1

1 Clause 66.1 of the Infraco Contract states that tie shall pay the Contract Price to Infraco for
the carrying out and completion of the Infraco Works. The Contract Price is defined in
Schedule Part 4 as including the Construction Works Price.

2 Clause 3.1 of Schedule Part 4 states:

3 *"The Construction Works Price is a lump sum, fixed and firm price for all elements of work
required as specified in the Employer's Requirement...and the Infraco Proposals...and is
not subject to variation except in accordance with the provisions of this Agreement."*

4 Clause 1.2 of Schedule Part 4 states that the Construction Works Price is on a lump sum
basis that is fixed until completion of the Infraco Works.

5 Clause 3.5 of Schedule Part 4 is of central importance. It states:

6 *"The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions
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..."*

7 The Base Case Assumptions include the Pricing Assumptions¹. Clause 3.2.1 of Schedule
Part 4 introduces the Pricing Assumptions and explains that these arise as a consequence
of the need to fix the Contract Price against the developing factual background. The Pricing
Assumptions are said to *"...represent factual statements that the Parties acknowledge
represent facts and circumstances that are not consistent with the actual facts and
circumstances that apply. For the avoidance of doubt, the commercial intention of the
Parties is that in such circumstances the Notified Departure mechanism will apply."*

¹ Clause 2.2 of Schedule part 4

- 14 Infraco has previously relied on clause 3.5 of Schedule Part 4 in this context: that provides that the Contract Price has been fixed on the basis of *inter alia* the Base Case Assumptions: the words *inter alia* here are of crucial import.
- 15 The Contract Price is not fixed solely by reference to the Base Case Assumptions. The Construction Works Price – which is one element of the Contract Price – has also been fixed by reference to the Employer's Requirements and the Infraco Proposals. It has not been fixed solely by reference to that part of the Infraco Works which had been incorporated in the design information drawings issued up to 25 November 2007. That would, in any event, make no commercial sense.
- 16 Clause 3.5 of Schedule Part 4 provides that a Notified Departure:
- 17 "*will be deemed to be a Mandatory tie Change requiring a **change to the Employer's Requirements...***" [emphasis added]
- 18 Where the BDDI fails to take account of something in the Employer's Requirements it would make little sense for the resulting design change to be deemed to require a change to the Employer's Requirements: the essence of the issue is that the design is changed to take account of the Employer's Requirements, and there is no change to the Employer's Requirements. Infraco's interpretation fails to make sense of the clause 3.5 wording.
- 19 Taking the example of change to the BDDI which occurs in order to provide for something which is required by the Employer's Requirements (such as the provision of bat boxes at Gogarburn Bridge²) but which was not shown on the BDDI: the Construction Works Price was fixed on the basis that it would deliver all elements of work required as specified in the Employer's Requirements.
- 20 To take a further example, the interpretation that Infraco contend for would lead to the proposition that Infraco would be entitled to be paid for changes which it has itself has promoted – for example, to improve buildability. Such a change would be wholly within Infraco's control and for its own benefit: no reasonable person would conclude that it was intended that Infraco would be entitled to be paid for this type of amendment to the BDDI.

² Adjudication decision of John Hunter dated 16 November 2009 at p27

design development means that which is required to be done to the BDDI in order to take it to the point of being issued for construction in line with the contractual requirements.

Accordingly, in construing Pricing Assumption No 1 objectively in the context of the Infraco Contract, an amendment does not give rise to a Notified Departure if the amendment is necessary to make the design work in a way that complies with stated (*i.e.* those stated in the Infraco Contract), statutory or best practice requirements.

28 In any event consideration requires to be given to whether a reasonably experienced design and build contractor in Infraco's position could reasonably have foreseen the amendment on the basis of the information that it had at contract formation. If it could reasonably have been foreseen, then Infraco ought to have taken account of it in its price.

29 Applying these tests to the above mentioned bat box example: bat boxes are necessary to comply with the Employer's Requirements. Moreover, because the necessity for the bat boxes is capable of being discerned from the Employer's Requirements, an experienced design and build contractor ought reasonably to have foreseen that they would be needed. The bat boxes would not therefore give rise to a Notified Departure.

30 In conclusion, Infraco is required to develop the design in terms of design principle, shape, form and/or specification from the drawings forming the BDDI to completion such as is necessary to meet the Employer's Requirements, Codes of Construction Practice etc and in doing so a Notified Departure is not triggered, taking into account those matters which ought reasonably to have been foreseen by Infraco at the time of contract formation.