

COMMENTARY ON VARIOUS MATTERS REFERRED TO DISPUTE RESOLUTION PROCEDURE UNDER THE INFRACO CONTRACT

1. Introduction

Following detailed legal analysis and Senior Counsel's opinion, the decision was taken by **tie** in the late summer of 2009 that **tie** would commence dispute resolution proceedings to unlock the contract administration impasse which had developed around three issues:

- the Infraco's position that in any case where it puts forward an Estimate in respect of a **tie** instructed variation to the Infraco Contract, the Infraco has no obligation to carry out the works comprising the variation unless and until **tie** either agrees the Estimate or places it into dispute resolution ;
- the Infraco's position that any amendment to design which altered the so called Base Date Design Information (a limited set of drawings as opposed to the totality of the ETN Scheme) represents an event which entitles the Infraco to automatic additional payment and time relief regardless of the reasons for such alteration; and
- the Infraco disregard of contractual time scales in which it is obliged to produce reasonable Estimates in respect of variations.

A discrete number of disputed matters were initially selected for dispute resolution. This followed concerted efforts to reach compromise through mediation. It should be understood that the DRP was commenced with full recognition that, despite serviceable levels of confidence on outcome, there could be adverse findings. The proposition was that without DRP Infraco would continue with damaging obstinacy and no resolution on either entitlement or value on their claims would be reached without **tie** simply conceding across the board to demonstrably inflated claims. Understood in this context, the use of DRP was the only route open to **tie**, indeed not deploying DRP would have meant ignoring the proper contractual mechanism for resolving difference. Additionally, the DRP contains an internal process to achieve settlement by agreement and **tie** wished to engage this to ensure that all effort had been used to avoid formal proceedings. In numerous instances this has resulted in **tie** driving Infraco to a compromise on the Estimate which would not have been achievable without either the reality or threat of DRP co-ercing the Infraco to revisit its valuation of the variation in question.

This note provides an overview on the main issues which have been referred to the Dispute Resolution Procedure under the Infraco Contract. It is not legal advice on the outcome of the completed adjudications or on the continuing DRP Strategy.

2. Hilton Hotel Car Park

Infraco had refused to accept that it was obliged under the Infraco Contract to proceed with the carrying out and completion of the construction/re-configuration of the car parking spaces at the Hilton Hotel ("**Hilton Hotel Car Park**") unless and until it received an instruction from **tie**. **tie** then referred that matter to the Dispute Resolution Procedure.

Infraco claimed that carrying out the works to the Hilton Hotel Car Park constituted a variation to the Infraco Contract. The amount claimed for this variation was £90,067. The Adjudicator (Mr Robert Howie QC) wholly agreed with **tie's** position, in that Infraco was obliged to carry out and complete the Hilton Hotel Car Park without instruction (or any additional payment) from **tie**.

3. Gogarburn Bridge and Carrick Knowe Bridge

Infraco and **tie** did not agree as to the extent to which the matters depicted on the Issued for

Construction Drawings in respect of the structures known as Gogarburn Bridge and Carrick Knowe Bridge constituted a Notified Departure in terms of *Pricing Assumption 3.4.1.1* of *Schedule Part 4 (Pricing)* (referred to generally as the "BDDI to IFC issue"). **tie** then referred both matters to the Dispute Resolution Procedure.

On matters of interpretation of *Schedule Part 4 (Pricing)* generally, **tie's** position was that *Schedule Part 4 (Pricing)* says the Infraco's price for the specified works (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. A Notified Departure occurs if the Base Date Design Information is amended, which gives rise to an examination of the price if that is justified. Infraco's position was that the Construction Works Price is to be based upon the Base Date Design Information only and matters that will become Notified Departures are matters that fall outwith normal design development that could be construed from the information available to Infraco contained within the Base Date Design Information - on Infraco's view *Pricing Assumption 3.4.1.1* applies to all changes except those which could be considered as the "*normal development and completion of design*" from the information available at Base Date Design Information and "*normal development and completion of design*" has to be understood in the particular way provided in the Infraco Contract in that it excludes changes in shape, form or outline specification.

The Adjudicator (Mr Hunter) reasoned (on which point neither party invited him to do so) that the Employer's Requirements have, in terms of the price for works been clarified in *paragraph 3.1* of *Schedule Part 4*, and thus limited by the Base Date Design Information and the *Schedule Part 4 (Pricing)* agreement in respect of the agreed fixed price. Adopting that reasoning, the Adjudicator proceeded to find that a number of the matters depicted on the Issued for Construction Drawings in respect of the structures known as Gogarburn Bridge and Carrick Knowe Bridge constituted a Notified Departure in terms of *Pricing Assumption 3.4.1.1*. DLA, McGrigors, Richard Keen QC and Mr Wilson (a subsequent adjudicator) agree with **tie's** position.

Though Mr Hunter was not asked to decide upon matters of valuation, it is the case that **tie** is of the opinion that the Estimates submitted by Infraco in respect of each of the Gogarburn Bridge and Carrick Knowe Bridge structures are grossly overstated - such that (1) Infraco's Estimate in respect of Gogarburn Bridge was in the amount of £313,080.31 (now revised by Infraco to £239,353.26), whereas **tie's** assessment is in the amount of £72,551.35; and (2) Infraco's Estimate in respect of Carrick Knowe Bridge was in the amount of £391,971 (now revised by Infraco to £165,507.76), whereas **tie's** assessment is in the amount of £99,403.92.

4. Russell Road Retaining Wall

Infraco and **tie** did not agree as to the contents of Infraco's Estimate in respect of the structure known as Russell Road Retaining. Infraco then referred that matter to the Dispute Resolution Procedure. The Estimate was in the amount of £4,597,847.07 and concerned three elements (LOD, Contamination and Foundations)

As part of that dispute, the arguments previously advanced by both Infraco and **tie** in the Gogarburn Bridge and Carrick Knowe Bridge disputes were rehearsed before a different adjudicator (both **tie** and Infraco accepting that the decisions of Mr Hunter were not binding on the adjudicator).

On matters of interpretation, the Adjudicator (Mr Wilson) roundly rejected Infraco's position that the Construction Works Price could be construed as being solely for the Works shown on the Base Date Design Information. Similarly, the Adjudicator largely agreed with **tie's** interpretation of *Pricing Assumption 3.4.1.1*, in that "*normal*" development of design is progression towards the Employer's Requirements as would be expected by an experienced contractor and his designer; and the word "*amendment*", which qualifies the application of *Pricing Assumption 3.4.1.1*, means that *Pricing Assumption 3.4.1.1* can only apply to something showing on the Base Date Design Information, not an addition to achieve compliance with the Employer's Requirements.

Notwithstanding the issues of principle rehearsed before and examined by the Adjudicator, the substantive dispute concerned the contents of Infraco's Estimate. It was acknowledged that certain of the defences proposed by **tie** to the monetary claims made by Infraco (as set out in the Estimate) might not succeed. Those defences did not, by and large, succeed but it was the case that Infraco's Estimate was initially in the amount of £4,597,847.07, **tie** having assessed an amount of £701,467.95 in respect of Foundations (LOD having been withdrawn by Infraco as part of the dispute resolution process and both Infraco and **tie** agreeing that Contamination was to be dealt with separately) and the Adjudicator decided that the amount of the Foundations to be £1,461,857.21.

5. Section 7A Track Drainage

Infraco and **tie** did not agree as to the contents of Infraco's Estimate in respect of Section 7A Track Drainage. **tie** then referred that matter to the Dispute Resolution Procedure. The Estimate was in the amount of £1,350,000 (and was subsequently reduced to £1,024,443.45). **tie's** assessment was £24,073.60.

As part of that dispute, the arguments previously advanced by both Infraco and **tie** in the Gogarburn Bridge and Carrick Knowe Bridge disputes were rehearsed before a different adjudicator (both **tie** and Infraco accepting that the decisions of Mr Hunter were not binding on the adjudicator).

During the adjudication process **tie** and Infraco were able to agree the valuation of certain Notified Departures, those amounting to £242,014.63.

tie sought a declaration that the matter relied upon by Infraco for the balance of its claim did not constitute a Notified Departure. The Adjudicator (Mr Coutts) came to the view a Notified Departure had occurred in respect of Section 7A Track Drainage. The matter of valuation of that Notified Departure was not before the Adjudicator.

6. Tower Place Bridge

Infraco and **tie** did not agree as to the contents of Infraco's Estimate in respect of the structure known as Tower Place Bridge. **tie** then referred that matter to the Dispute Resolution Procedure. The Estimate was in the amount of £595,358 (and was subsequently reduced to £455,881.56). **tie's** assessment of the admitted Notified Departure was (negative) £305,026.66. The dispute principally concerned matters of valuation. As part of that there was discussion concerning the operation and administration of the electronic data room and the documents stored therein in respect of the Base Date Design Information.

The Adjudicator (Mr Hunter) decided that the value of the admitted Notified Departure was (negative) £260,973.48.

7. Depot Access Bridge

Infraco intimated a Notified Departure in respect of the structure known as Depot Access Bridge (S32). Infraco's Estimate valued the Notified Departure at £2,478,205.05. **tie** challenged the Estimate on the basis that it took no account of the associated walls of the single integrated structure of which **tie** said the Depot Access Bridge formed part. **tie** also contested the Infraco's valuation of elements of the Estimate. **tie** placed a negative value of £4,827,117.21 on the Estimate (in **tie's** view, the associated walls which Infraco took no account of in its Estimate produced a negative value). Agreement could not be reached on the contents of the Estimate and Infraco then referred the matter to the Dispute Resolution Procedure. In its Referral Notice in the adjudication, Infraco reduced the value of its Estimate to £1,819,180.29 (a reduction of £659,024.76).

The Adjudicator (Mr. Porter) decided that the Depot Access Bridge did not form part of a larger single integrated structure affected by the same Notified Departure, and so the associated walls did not

require to be valued in the Estimate. (It would be open to **tie** to intimate a separate Notified Departure to Infraco in respect of the associated walls). Mr. Porter valued the Notified Departure in the sum of £1,230,624.80.

8. MUDFA 8

Infraco intimated a Notified Departure in respect of delays to the MUDFA Works. Infraco's Estimate sought an extension of time in respect of the four Planned Sectional Completion Dates. More particularly, Infraco sought an extension of time for Section A from 1 June 2010 to 13 December 2010; for Section B from 1 July 2010 to 10 January 2011; for Section C from 10 March 2011 to 22 November 2012; and for Section D from 6 September 2011 to 20 May 2012. The Estimate did not deal with costs. **tie** contested the Estimate on the basis that it was not competent because, in broad terms, it did not take account of possible mitigation measures and did not deal with costs. Following a meeting, notwithstanding it undertook to go away and consider proposals put forward by **tie**, Infraco referred the matter to the Dispute Resolution Procedure.

In the adjudication, **tie's** principal position was that the Estimate was incompetent because it did not comply with the requirements of Clauses 80.4 and 80.7 of the Infraco Contract and, in particular, it did not show that the **tie** Change would be dealt with in the most cost effective manner, and did not deal with costs (Infraco argued that there was an agreement to deal with costs once the time element had been agreed - **tie** disputed that such an agreement had been made). **tie's** alternative position was that even if the Estimate was competent, Infraco had failed to prove its entitlement to the extensions of time sought because its delay analysis was flawed. **tie** argued, inter alia, that the delay analysis did not consider readily available and cost effective mitigation measures (including accelerative measures) available to it. **tie** also argued that so far as Infraco's calculation of its entitlement to an extension of time was based on its right to exclusive access to Designate Working Areas, which it equated with Intermediate Sections, it was bound to fail.

The adjudicator (Mr. Howie) held a preliminary hearing at which he considered **tie's** principal position (during the hearing Infraco withdrew its argument that there was an agreement between the parties that costs would be dealt with once the time element had been agreed). Mr. Howie decided the Estimate was competent; compliance with each of the requirements of Clause 80.4 and 80.7 was not a condition precedent to the Estimate being considered. In his reasons, Mr. Howie suggested that it would have been open to **tie** to refuse to participate in a clause 80.9 meeting unless Infraco provided a fully completed Estimate.

At a second hearing, Infraco led evidence in support of its claim for an extension of time. Mr. Howie decided that in respect of Section A, Infraco was entitled to an extension to 2 November 2010. In relation to the other sections, Mr. Howie found that Infraco had failed to prove its case. In his Reasons, Mr. Howie held that Infraco had wrongly equated Designated Working Areas with Intermediate Sections. He also held that Infraco were under no obligation to include acceleration measures as part of the Estimate.

9. Future matters

A number of other Estimates submitted by Infraco have been identified as being potential candidates for referral to the Dispute Resolution Procedure, principally on the basis of those Estimates being heavily overstated, but also to drive home **tie's** interpretation of the Infraco Contract that the lump sum Construction Works Price is not circumscribed by what is depicted on the Base Date Design Information but rather represents the price for constructing the entire Infraco Works in accordance with the Employer's Requirements.



10. Adjudication Outcome

Under the Infraco Contract, an adjudicator's decision is binding unless overturned by a court judgment and either party is free to take an adjudicator's decision to litigation.

DLA Piper Scotland LLP

5 October 2010