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TIE LIMITED

Report on Four Key Questions

with

Recommendations

13 December 2009

INTRODUCTION

This paper addresses a series of four questions posed by **tie** project management[1] concerning **tie's** best legal and contractual arguments on key aspects of the range of disputes which have arisen with the Infraco. Some of these issues are subject to recent adverse Adjudication findings have been made. Many of the analyses and conclusions in this paper draw directly from our earlier advice notes. We do not examine extensively here the Infraco's counter arguments as presented in the Gogarburn and Carrick Knowe Bridge adjudications[2] and also Russell Road Retaining Wall. In reporting our opinion on the strengths and weaknesses of **tie's** contractual arguments and factual/technical positions, we take account of what we know to be the Infraco's position and, where relevant, how particular points did or did not find favour with Adjudicator Hunter[3].

Wherever appropriate, each section contains on Executive Summary with our main conclusions and a short set of recommendations. This Report does not provide strategic advice on the future conduct of DRPs.

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[1] Steven Bell, Project Director email to Andrew Fitchie received on 8th December 2009

[2] Please see our advice note of 8th December 2009.

[3] This is contained in Section [ ] of this Report

QUESTION ONE : ***How do the various terms of the Infraco Contract combine to establish that pricing of design changes should be by reference to the Employers Requirements/Infraco*** **Proposals and** ***amended if appropriate by the permitted variation mechanisms within Schedule Part 4 and clause 80?***

Executive Summary

At the core of **tie's** argument is that the Infraco contracted (on the basis of a fixed price lump sum agreement) to design and construct the Infraco Works being the Employers Requirements as responded to by the Infraco proposals.

If permitted we will recast the question slightly. We do not believe that the contract terms establish that design changes are priced with reference to Employer's Requirements or Infraco Proposals. Pricing of the Infraco Works is with reference to ERs and IPs and pricing of changes which qualify as Notified Departures to the Infraco Works Works is with reference to the Base Case Assumptions (and provisional sums and Misalignment). There is a connection within Schedule Part 4 in that a completed ETN design to meet ERs and IPs is the goal of "normal development and completion design" and those two central contract documents (defining the scope of the Infraco Works) therefore give meaning to the concept of "normal design development" and help distinguish it from real change.

This very simple point has caused much confusion, even in Challenge sessions with disagreement as to the correct "start point". The start point for pricing the Infraco Works (in fact the whole statement of that lump sum price) is what is required to meet the ERs and IPs (clause 3.1 in Schedule Part 4). The start point for price adjustment is Base Case Assumptions, setting aside misalignment and provisional sums for now. The difference between tie and Infraco is:

- **tie says that there cannot be a Notified Departure through design change if either there is normal design development which introduces change or change is introduced because no design was there previously.**

- **Infraco do not agree that there are two stages to this (price and adjustment to price) as they take the view that, once a design change has happened, the price for the work comprising the design change is a straightforward remeasure, identified just by reference to the difference between BDDI and IFC and without reference to ERs and IPs. This is simply another way of recognising that Infraco do not see any role for "normal design development" and therefore do not see any significance in the fact that IFC will have been developed to meet ERs and IPs.**

To the extent that question asks for our view combination of contract terms on Infraco Works pricing and price adjustment, the answer is:

WORKS PRICING

Infraco are required to design, construct, test, commission, operate and maintain the Infraco Works. They accept this.

Infraco Works are defined with reference to all work elements to deliver the whole ETN, in accordance with the whole contract and the ERs. This includes design production. The ERs are part of the contract and this specific reference was for emphasis. The fixed price lump sum for the Infraco Works is for all elements required as specified in ERs and IPs.

CONNECTIONS TO PRICE ADJUSTMENT

The specific connections are clause 3.5 in Schedule Part 4 and clause 80.24 in the conditions which bring the Base Case Assumptions into the Clause 80 mechanism as Notified Departures: to form the subject of Estimates and to comprise Mandatory tie Changes.

Some Pricing Assumptions are initiated by physical conditions changing from the Base Case Assumptions. Where Notified Departure is initiated by change to the design itself, Pricing Assumptions 1 and 3 cover it.

PA 3 affirms that the SDS Provider Deliverables prepared by SDS Provider comply with the Infraco Proposals and Employers' Requirements. In PA 1, a price adjustment may arise where BDDI is amended and this comprises a change in design principle, shape, form or specification but this must not have arisen from "normal development and completion of design".

There are clear arguments with Infraco about both of these - the interpretation of PA1 and how PA 3 works when Infraco are responsible for SDS output. Nevertheless, it is our view that the Contract has a two stage process (price and adjustment to the price on agreed triggers), that the two are connected since ERs and IPs are the goal of normal development of design but that there is intentionally no connection between BDDI and the price of the Works, as opposed to price adjustment because design change. BDDI represents early design for part of the Works and is the baseline for design change and for price adjustment in PA1 and (for tie purposes in this question, at least) in PA3.

Importantly, Infraco have now [4]asserted that BDDI is all they have ever priced. This exposes them to explaining how they consider Schedule Part 4 supports this (it does not) and what they used the Employers Requirements for, when they tendered.

1. Analysis

We have endeavoured to re-cast our views contained in a number of the advice notes provided to **tie**, both before and during the DRP Challenge sessions.

When examining how the Infraco Contract provisions deal with design changes, we believe that the function of the Design within the scheme of the Infraco Contract is important. In our view, this perspective has been overlooked almost entirely by Adjudicator Hunter and ignored by the Infraco because it is convenient for their arguments (regarding the effect of Schedule Part 4) to do so.

Three questions remain central[5]:

(i) What is the original scope of work contracted?

(ii) Is that scope fully in line with a fixed price? i.e. is the stated fixed price entitlement, a price for the original scope of work, nothing more or less?

(iii) Is that scope (and price, if aligned) fully in line with the start point/baseline for price adjustment for changes?

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[4] Adjudication hearing 15 December 2009

[5] DLA Building Blocks paper 15 September 2009

2. Contracted Scope of Works

In the Infraco Contract conditions, clause 7.1 provides that:

tie *hereby appoints the Infraco in accordance with the terms of this Agreement and the Infraco hereby accepts full responsibility and agrees to carry out and complete the Infraco Works fully and faithfully in accordance with this Agreement.*

The term "Infraco Works" represents the scope of works here, as evidenced by its definition:

means 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.

The original scope of works is therefore defined very widely. It is not comprised only of the Employers Requirements: the scope of works is described in this definition - everything required to deliver the Edinburgh Tram Network and to maintain it and all of this to be done in accordance with the Agreement and the Employer's Requirements (ERs).

At clause 7.4 of the Infraco Contract, the Infraco *"undertakes and warrants that the Infraco's Proposals shall meet the Employer's Requirements."* Under clause 11.3, the Infraco undertakes that it *"shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement."* clause 4.2 provides that the Employer's Requirements in any event have priority over the Infraco Proposals.

We do not consider these provisions leave any dubiety as to what the Infraco is obliged to construct. Nor, from a reading of their adjudication submissions, does Infraco.

3. What Infraco have priced and what did they think they had priced?

Our view is that Infraco have priced the Infraco Works, as originally scoped in accordance with the definition of Infraco Works. Senior Counsel has taken the view that the Infraco may assert legitimately that the Construction Works Price is the price for the work specified in the Employer's Requirements and Infraco Proposals (Schedule Part 4, paragraph 3.1). In full, that paragraph states:

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 as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with the provisions of this Agreement.

We agree with Counsel's view and say that the "work required" is as specified in ERs, which cannot be other than the defined Infraco Works. Infraco says that BDDI is the enclosed pricing. But if it were: why does Schedule Part 4 not say this explicitly? How is the entirety of ERs <u>not</u> shown on BDDI priced in the Contract Price?

4. Connection to Base Case Assumptions and BDDI

Schedule Part 4 is clear that 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*". It is also clear from Schedule Part 4 (paragraph 3.5) that the Contract Price (which incorporates the Construction Work Price) is founded on the Base Case

Assumptions (meaning "*the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions*").

In summary, we therefore have in Schedule Part 4 paragraph 3.5 a connection between two expressions of the fixed price and both the Employer's Requirements and Infraco Proposals on the one hand, and the Base Case Assumptions on the other, although that is not a very strong connection: At one end the fixed price is the price for the Works but at the other, the price is only "founded on" the Base Case Assumptions. In other words, this looks like a simple acknowledgement of the "fixed" aspect of the fixed price and not a connection between the Base Case Assumptions and the calculation of the price itself. One baseline for change does connect with the priced scope: Pricing Assumption No.3 is:

"The Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco Proposals and the Employer's Requirements".

which is in our view, an explicit connection between the scope of works and a baseline for evaluation of change since the Deliverables represent all of the design and related work produced by the SDS Provider pre-contract. On its own, this is straight forward to understand: the contractor will accept adoption of the design frozen immediately before entering into the construction contract on the basis (following due diligence or with a warranty) that the design immediately pre-contract complies with Employers Requirements and Infraco Proposals. In this case, it has to be acknowledged that Pricing Assumption No. 1 makes reference to BDDI frozen in November 2007 and not at contract formation in May 2008.

5. Much argument has centred around the interpretation and effect of paragraph 3.4.1 of Schedule Part 4 and these arguments are evaluated later in this report. In opening, it is important to note that it is central to **tie's** argument and to a complete and objective understanding of the Infraco Contract that:

It is not accidental that there is no intentional and explicit stated connection anywhere in the Infraco Contract made between Base Date Design Information and the full scope of works required to respond to the contract specification (the Employer Requirements). The Infraco warrants[6] that the Infraco Proposals will meet the Employers Requirements; it does not warrant just that the works which they proposed to correspond with BDDI will meet the Employers Requirements. Without this express connection[7], it is impossible to underpin a logical contractual proposition that BDDI was mean to, and does , represent the entirety of what the Infraco intended to price and state as comprising its composite Construction Works Price.

Factually, at 25 November 2007, BDDI represented a set of information and design drawings (predominantly civils works) out of the total scope of the SDS design mandate.

Contractually, what BDDI represents is the base line the Parties agreed upon from which changes to that particular design set ought to be analysed in order to ascertain in the future[8], if

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[6] Infraco Contract clause 7.4

[7] There is connection made by the language in the lead in to Schedule Part 30 between BDDI and Infraco Proposals, but the Employer's Requirements are what must be designed and built and therefore priced.

[8] Senior Counsel has drawn a distinction between amendment to BDDI triggering Notified Departure and an addition to BDDI (ie a new ER related feature not triggering Notified Departure).

there should be an Infraco entitlement to a price adjustment arising from an amendment to what is shown on those particular drawings.

What BDDI does not represent, and cannot be shown plausibly[9] represent, is a completed design to deliver the ERs. Why would the February 2008 BSC a due diligence report have been necessary if the design had been completed? If further design adds elements which go beyond BDDI (as opposed to features/elements already in BDDI being altered by developed design work - which may attract Pricing Assumption 1 to protect BSC from pricing one thing and finding later that they must build another) - in our opinion, this is not the development of the set of design represented by BDDI, it is production of more Design by the SDS Provider to achieve the Employer Requirements: Infraco's fundamental and already price obligation.

To summarise: production of a design which will comply with and deliver the Employers Requirements is the undisputed and unequivocal obligation of the Infraco under the Infraco Contract. Mere production of design cannot trigger a Notified Departure. The Infraco has expressly included in its price for " *all elements of work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as Schedule Part 31.*". This means that a claim (on the basis of Schedule Part 4 Pricing Assumption 1) for payment for a feature further design work has included in order to deliver the Employer Requirements would be an Infraco claim that would be defeated plainly by paragraph 1.4 which forbids double recovery: the feature has already been priced.

tie arguments need to be stated stage by stage through the scheme of the Infraco Contract which deals with pricing adjustment for design change. The following nine sub sections do this. Using a Beaufort Scale (1-12), we have given our opinion on the strength of **tie's** arguments, both legal/contractual and technical (factoring in how these have been assessed by adjudication to date).

6 **What is the contractual mechanism for the pricing of design changes? tie contends:**

The starting point is to ask what was Infraco's price for the specified works? This is answered by Schedule Part 4 at paragraph 1.2.

"The Construction Works Price is on a lump sun basis that is fixed until completion of the Infraco Works and not subject to variation except in accordance with the provisions of this Agreement."

This central statement is affirmed at paragraph 3.1 of Schedule Part 4.

"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 as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with the provisions of this Agreement."

tie's arguments can be stated stage by stage:

6.1 the Construction Works Price is not circumscribed just by what is depicted on the Base Date Design Information. If it were so defined, *Schedule Part 4* would have to say so, and it does not; B scale [10];

[9] This is where Adjudicator Hunter's decision departs from what is in the Infraco Contract, as opposed to what is hinted at in Infraco's submissions

6.2 on the basis of Schedule Part 4, Infraco's price for the Infraco Works 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; B scale [12].

6.3 the Pricing Assumptions and Specified Exclusions are agreed derogations from that lump sum price; B scale [12];

6.4 the design carried out by 25 November 2007 (the Base Date Design Information) represents only an interim design of part of the Design of the whole of the Infraco Works, which part of the design was to be developed and completed alongside other Design to meet the Employer's Requirements; [10]B scale [9];

6.5 the Infraco has warranted that the Infraco Proposals shall meet the Employer's Requirements. The Infraco has priced the Infraco Proposals and therefore the Infraco has priced not just the Base Date Design Information, but full delivery of the Employer's Requirements as at 14 May 2008; B scale [8]; and

6.6 the Infraco position, in referring to Employer's Requirements being "*clarified*" or "*based upon*" Base Date Design Information is vague (we think, deliberately so) and does not attempt to be definitive.

7 Does the addition of items into the design of the works, which were not showing in the Base Date Design Information, trigger a Notified Departure? tie contends:

7.1 the Construction Works Price is not contractually defined by what is depicted on the Base Date Design Information; B scale [10];

7.2 *Pricing Assumption 1* only applies to the Base Date Design Information, not to the whole of the works required to meet the Employer's Requirements required by the Employer's Requirements; B scale [8];

7.3 to have application *Pricing Assumption 1* requires the design feature to show on the drawings as the assumption is only concerned with "*amendment*" to the drawings forming the Base Date Design Information - a thing cannot be amended if it is not firstly shown; B scale [8];

7.4 *Pricing Assumption 1* only has application in the case of amendment to the drawings forming the Base Date Design Information, that does not include "*additions to*" or "*additional detail within it*" or "*development of it*"; B scale [6]; and

7.5 because the Infraco Contract is a design and building contract, *Pricing Assumption 1* is only relevant to that part of the Infraco Works which happens to be covered by the design prepared by the SDS Provider as at 25 November 2007 and to give assurance to Infraco that, as it stands as an interim design, it would not develop in an unexpected way beyond what is required by the Employer's Requirements, and if it did then Infraco would be shielded from that; B scale [9].

8 Which party carries the burden of proving an alleged Notified Departure? tie contends:

8.1 the question of whether or not there has been a Notified Departure is not self evident. In order for **tie** to be able to assess whether there has been a Notified Departure and,

[10] Schedule part 4 deals with changes to that part of the designs, not everything remaining to be designed.

if so, the consequences of that Notified departure, **tie** must be given full information; B scale [12];

8.2 the words "*save to the extent caused by*" in the definition of a Notified Departure Schedule Part 4 para. 2.8 require investigation and explanation of the whole underlying facts and circumstances. If the change in facts and circumstances is caused by one of those excepted matters[11], it cannot be a Notified Departure; B scale [12];

8.3 an announced change in design from work which was intended to be capable of meeting Employer's Requirements naturally begs the question as to what drove the change. It is an obvious matter of practical fact that a party alleging that a Notified Departure has arisen, must explain it as having arisen legitimately; B Scale [8]; and

8.4 if Infraco has simply permitted the SDS Provider to redesign the works, for the benefit of Infraco, Infraco is in breach of its obligation to manage the SDS Provider properly. This is at the core of the issue. **tie** needs the evidence of this failure by BDS, to manage SDS provider; B Scale [10].

9 Does *Pricing Assumption 1* apply to any difference whatsoever from what is depicted on the Base Date Design Information when compared against what is depicted on the Issued For Construction? tie contends:

9.1 the same arguments as are set out above apply equally and hold good for this issue; average B scale 8.5; and

9.2 Infraco's position required an extreme interpretation of Pricing Assumption 1 (by Adjudicator Hunter).

10 What meaning is to be given to the words "*normal development and completion of designs*" referred to in *Pricing Assumption 1*? tie contends:

10.1 Infraco must have expected that the Base Date Design Information would be developed and completed to meet the Employer's Requirements (insofar as the Employer's Requirements were actually represented in the Base Date Design Information); B Scale 12;

10.2 by interpreting the whole *Pricing Assumption 1*, the proper meaning is to be found through understanding what the parties have provided and how they attempted to clarify what they provided. The parties' intention is set out within *Pricing Assumption 1* up to and including the three numbered subparagraphs. The words following that are expressly "*for the avoidance of doubt*", in other words to clarify what has been provided. Legally, words used expressly to clarify what is already a whole provision cannot be construed to change it. In this case the "*clarifying*" words patently failed to clarify, so the simple question is whether the provision itself is complete and whether it can be understood without them. It is complete (the opening words of the final paragraph confirm this) and it is easily clear enough on its own. The failed clarification is of no effect as it does not even try to add or change that provision; B Scale [6];

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[11] breach by Infraco, Infraco Charge, Charge in law

10.3 the interpretation proposed by Infraco leads to a commercially absurd result. Applying Infraco's interpretation, changes introduced by Infraco (or SDS Provider) for its own purposes, as opposed to being necessary to meet the Employer's Requirements, would always constitute a Notified Departure; B Scale 7; and

10.4 *Pricing Assumption 1* is intended to only shield Infraco from amendment (to the Design prepared by the SDS Provider by 25 November 2007) in terms of design principle, shape, form and/or specification from the drawings forming the Base Date Design Information, except in the circumstances where that amendment arises as a consequence of the evolution of design through the stages of preliminary to construction stage to achieve the Employer's Requirements; B Scale 10.

11 What is the meaning and effect of core condition *clause 4.3*? tie contends:

11.1 *Schedule Part 4 (Pricing)* with all its conditions and qualifications, regulates Infraco's entitlement to additional relief or payment on the matters set out in it. It is those conditions and qualifications which require to be interpreted and applied; B Scale 12;

11.2 *paragraph 1.4* of *Schedule Part 4 (Pricing)* provides that no provision within *Schedule Part 4 (Pricing)* entitles Infraco to more than one payment for any item or other entitlement under the Infraco Contract; B Scale 12; and

11.3 *Clause 4.3* does not express a separate entitlement to be paid in all circumstances but refers to a "*right*" found elsewhere in the Infraco Contract (*Schedule Part 4 (Pricing)*). This "*right*" is created by the contract and can only be understood through interpretation of the whole of the Infraco Contract[12] which creates it. In creating it, the Infraco Contract itself circumscribes it with the exceptions to what constitutes a Notified Departure and the operation of clause 80. To say that nothing in a contract shall prejudice a right in the same contract is circular and meaningless.[13]

12 The effect of paragraphs 1.2 and 3.1 Schedule Part 4 ; tie contends:

The proper construction of Section 4.3 of the Infraco Contract is also impacted by a close reading of Schedule Part 4 paragraph 1.2 and paragraph 3.1.

These two paragraphs state separately and twice, that the Construction Works Price is not subject to variation except in accordance with the provisions of "*this Agreement*". The language of Schedule Part 4 has been carefully crafted. The reference to "*this Agreement*" expressly reintroduces the entire Infraco Contract and all its provisions to the context of variation of Contract Price using Schedule Part 4.

If paragraphs 1.2 and 3.1 had said "in accordance with this Schedule Part 4", the Infraco's argument for the primacy of Schedule Part 4 by virtue of clause 4.3 would have more force. But the choice of language is deliberate in paragraphs 1.2 and 3.1 and re-subjects all of Schedule Part 4 to the entire provisions of the Infraco Contract; B Scale 9.

[12] Entire agreement provision (Clause) and Clause 4.2

[13] Clause 4.3 was the subject of tense negotiations, as to how BSC wanted to introduce Schedule Part 4 into the contract.

13 Recommendation

This interpretation is used to strengthen **tie**'s argument that Schedule Part 4 is not insulated from the core provisions.

14 Do works which could have been reasonably foreseen by an experienced civil engineering contractor in the knowledge of the ground investigation reports referred to in *Specified Exclusion 3.3 (c)* constitute a Notified Departure? tie contends:

the whole of *Specified Exclusion 3.3 (c)* is to be given effect to, not just the last sentence; B Scale 5.

15 Are the Pricing Assumptions and Specified Exclusions to be read as a whole? tie contends:

15.1 the various Pricing Assumptions and the Specified Exclusions are concerned with assumptions and exclusions which the Referring Party has made in arriving at its price for the works specified in the Employer's Requirements - they are derogations from *Paragraph 3.1* of *Schedule Part 4 (Pricing)*; B Scale 5; and

15.2 nothing in *Schedule Part 4* supports the Infraco's position. B Scale 4.

16 Are the facts and circumstances comprised in the Base Case Assumptions mutually exclusive of each other? tie contends:

16.1 to put this question in context. *Specified Exclusion 3.3 (c)* refers to certain ground investigation reports. Those ground investigation reports form part of the Base Case Assumptions. Infraco say that a Notified Departure has occurred on the basis of *Pricing Assumption 1* in respect of changes to foundations and piling. In support of that, Infraco rely upon those same ground investigations referred to in *Specified Exclusion 3.3 (c)*. Infraco do not rely upon new ground investigation reports or a change in the facts and circumstances. Instead, Infraco say that they need do no more than identify a change from the Base Date Design Information. Infraco are interpreting information that was part of the Base Case Assumptions; B Scale 6; and

16.2 a Notified Departure, *paragraph 2.8* of *Schedule Part 4 (Pricing)*, is defined by reference to a difference in the facts and circumstances from the Base Case Assumptions (which comprises the whole of the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions) and it is the whole facts and circumstances which require to be considered; B Scale 8.

17 How does clause 80 interact with Schedule Part 4? tie contends:

Executive Summary

Schedule Part 4 engages clause 80 directly (clause 80.24) as the proper and only means for valuation of a Notified Departure. This is not in dispute. What is in dispute is the timely and correct provision of information for tie to determine if a Notified Departure has occurred.

QUESTION TWO: How do the responsibilities and obligations of the SDS Provider and compliance with the contractual obligations such as the Design Review Process fit with the issues within the answer to Question One?

Executive Summary

It has been our view for a considerable time (since early 2006) that SDS Provider performance of its design mandate has had profound and negative impact on tie's ability to run its procurement and let a contract. It is, in our view, time for SDS Provider to be on notice that it must shoulder its responsibility for the true loss its wholly indifferent performance has caused.

18. ANALYSIS LIABILITY FOR DESIGN PRODUCTION[14]

This section looks at the role of SDS Provider in the production of an ETN system design which meets the Employer's Requirements and what liabilities Infraco and SDS have for deficient discharge of that responsibility. In order to understand how SDS Provider responsibilities fit into the **tie** - Infraco relationship, it is necessary to study the effect of May 2008 novation. As factual background, it is also relevant to understand that throughout its mandate to **tie**, SDS Provider's design production rate had been well below that required to achieve design completion (or anything near to it) at novation[15]. To what extent this lethargic performance was in fact formally challenged by **tie,** alongside concerns about quality of SDS Provider production will be very important in evaluating the strength of **tie's** legal recourse against SDS Provider.[16]

19. UNDER THE SDS NOVATION AGREEMENT

tie released the SDS Provider from further performance under the existing SDS Agreement. The SDS Provider accepted the Infraco as its client in place of **tie** in terms of the vesting of all rights and remedies, together with all relevant obligations and liabilities. The only scope of ETN design work not novated to the Infraco was in relation to utility diversions design, where SDS Provider's client remains **tie** and express provisions deal with this. **tie** released the retention bond provided by the SDS Provider as a condition to the novation.[17]

At novation, the SDS Provider warranted to the Infraco that it shall be liable for any loss or damage suffered by the Infraco arising from the poor performance by the SDS Provider of its obligations prior to the date of novation. This reflects full contractual assumption by Infraco of design responsibility for all SDS Provider's work product, pre and post novation.[18]

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[14] We refer also to our advice notes of 25th June and 3 July 2009 on these issues.

[15] The original SDS Agreement let in Autumn 2005 may have lacked a programme with sufficient precision but, whatever its limitations, the rate of progress of SDS Provider appears to have fallen well short of the contractual standard: that of an experienced and competent design.

[16] In the spring of 2007 we had advised **tie** in connection with the grounds for and process in issuing SDS Provider with formal notice of serious and persistent breach and possible termination of SDS Agreement.

[17] **tie** also held a parent company guarantee underwritten by a pooled funding commitment at PB USA Group level. We have no information on the status of this instrument following novation.

[18] This contractual point has been reviewed and confirmed by Callum McNeill QC

The SDS Provider's liability to the Infraco pursuant to the SDS Agreement[19] is not affected by the Infraco's assumption of design liability under the Infraco Contract. (This is to preserve Infraco rights against SDS provider).

tie provided a warranty to the Infraco (as comfort that **tie** had discharged its monetary obligations as client) that there is no dispute or claim[20] subsisting at the date of novation, nor any circumstances existing which might give rise to any dispute or claim by the SDS Provider against **tie**.

Intentionally, this warranty does not include any limb in respect of circumstances which might give rise to a claim by **tie** against the SDS Provider for past and future SDS Provider performance. **tie's** rights in this regard are unambiguously preserved in the separate Collateral Warranty Agreement.

The Incentivisation Payment payable by **tie** under the Novation Agreement[21] is reduced by £8,928.57 for each failure by SDS Provider in achieving the relevant date for provision of an Issued for Construction Drawing. No reductions can be made to that payment by way of counterclaim. In order to have the IFC relevant dates extended, any claim for an extension of time must also entitle the Infraco to an extension of time under the Infraco Contract, and it must also be in circumstances which constitute a **tie** Change.[22]

tie would need to advise how this provision in the Novation Agreement has been administered.

20 VARIATIONS TO THE SDS AGREEMENT AT NOVATION

As part of the Novation, amendments to the SDS Agreement were made. The relevance of these adjustments to **tie's** novated position is that:

(i) Infraco will look to the strength of its recourse entitlements when assessing whether to pass down liability to SDS Provider in the context of any action taken by **tie** against Infraco for Infraco breach because of SDS Provider failings (ii) SDS Provider can only defend **tie's** action client against Infraco using those defences which are available to it under the revised SDS Agreement. This would therefore be borne to reveal SDS Provider complaints against Infraco.

The provisions include an undertaking by the SDS Provider not to cause the Infraco to be in breach of the provisions of the Infraco Contract and an acknowledgement of SDS Provider's full awareness of the relevant obligations of the Infraco. These provisions enhance the Infraco's argument of SDS Provider liability vis-à-vis any breaches of the Infraco Contract by the Infraco due to failures of the SDS Provider. The SDS Provider agrees unconditionally to indemnify the Infraco against any such losses.

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[19] Novation, Clause 4.4

[20] In the context of tri-partite negotiations on the novation, the settling by **tie** of SDS Provider financial claims became time critical.

[21] Clause 8.8

[22] During the July 2009 mediation, Infraco were pressed on their use of the liquidated damages provision on SDS Providers. They said it had not been applied "for relationship reasons".

The amendments also include the substitution of a new extensions of time clause into the SDS Agreement. The replacement clause fits with the Infraco contract drafting and includes circumstances which entitle the Infraco to an extension of time.

The SDS Provider will have a prima facie extension of time claim, whenever the Infraco has a valid extension of time claim under the Infraco Contract.

A valid extension of time or compensation event claim requires that the SDS Provider not have been at fault, whether in managing the interface with CEC and other Approval Bodies, identifying when instructions are required, or using reasonable endeavours to adjust the order or sequence of the design services. Following novation, the SDS Provider must satisfy the Infraco that these obligations have been satisfied, rather than **tie** having any oversight.

The liquidated damages drafting was introduced as part of the novation amendments, and mirrors the incentivisation wording in a number of ways. Each failure to hit an Issued for Construction Drawing delivery date results in SDS Provider liability to the Infraco of just under £9,000, matching the figure subtracted from the incentivisation package. The SDS Provider's liability is limited to a maximum of £1 million and is reduced to the extent that the failure to achieve the requisite date is brought about by the failure of **tie** or CEC to approve an SDS submission in the timescales required by the programme. **tie** is not currently aware if Infraco has applied liquidated damages to SDS Provider in any instance.

The amended clause clearly states that if it is agreed or determined that the Deliverable which was submitted by the SDS Provider was not submitted in accordance with the SDS Agreement in terms of packaging, process, or the content or quality was inadequate or insufficient, the liquidated damages limits will not apply. This provision is of importance if **tie** elected to pursue Infraco in relation to the quality of SDS Provider design. Our view remains that an SDS Provider breach is an Infraco breach[23]: SDS Provider is an Infraco Party producing design; Infraco is liable for the performance of all Infraco Parties and for the production programme and quality of the entire Design, irrespective of its origin.

21 SDS AGREEMENT - LIABILITY LIMITS

The relevance of these limits is that they apply to SDS Provider's liability under the **tie** Collateral Warranty. Under the SDS Agreement, the following summarises the operation of clause 27 *(Indemnity by SDS Provider, Liability and Sole Remedy)*:

- The SDS Provider has given a general indemnity to the Infraco for any acts, omissions, breach, non-performance or delay in the performance of the SDS Provider's obligations;
- This liability is limited to a sum of £10 million in respect of each and every claim and, for pollution or contamination claims, £10 million in the aggregate;

[23] This opinion is also held by Callum MacNeill QC.

- No limits are applicable to liability for death, personal injury, fraud, breach of warranty on specific topics or, in the case of the SDS Provider, for breach, delict or other liability arising prior to termination of the SDS Agreement.

These remedies provide a wide-ranging ability for the Infraco (as they provided to **tie**, as original Client) to recover monies from the SDS Provider for delays and poor quality of design.

We can surmise with some confidence that the Infraco has never chosen to pursue the SDS Provider unless it is suffering losses which it cannot recover, or allege it can recover, from **tie**. That choice may well have resulted from the Infraco abrogating its responsibility to manage SDS correctly early on in the contract and simply passing off or concealing poor quality/inefficient SDS Provider work as a Mandatory **tie** Change.[24] In the normal course, **tie** would pursue Infraco for clear failures in design production or quality, so that the Infraco would then act to recover loss against the SDS Provider as its subcontractor.

22 DESIGN REVIEW PROCESS

In order to provide **tie** with continuing control after novation over how the Infraco (and its subcontracted SDS Provider) were going about design evolution and production, the Infraco Contract contains specific provisions concerned with design management responsibility[25] and the process by which any ETN design put forward by Infraco is approved.[26]

Failure to manage SDS Provider effectively (i.e. by using the provisions of the revised SDS Agreement) or by permitting non compliance with Schedule Part 14 would be a breach of contract by Infraco. Depending upon the facts, the importance of this breach is that it would trigger a prohibition on the Infraco asserting a Notified Departure on grounds of a design change to BDDI. **tie's** main protection against SDS Provider and Infraco simply colluding to conceal design production failings (in either camp) or to alter design to suit their preferences depends upon the operation of the Design Review Process to detect a failure by SDS Provider and Infraco's management of SDS Provider.

Equally, if it could be shown that a design drawing within BDDI was deficient to the extent that no competent designer should have produced it (based upon the information in the Employer's Requirements[27]) and no competent contractor should have accepted it or permitted its production, the Infraco breach would bite to prevent Notified Departure and SDS would have broken its duty of care owed to **tie**.

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[24] This correlates with what we understand was Infraco's frequent early commentary to **tie** project management team that it was not responsible for SDS Provider and with Infraco's refusal to produce properly substantiated Clause 80 Estimates (because they had no design revisions or no idea when they would get these to support their claims).

[25] Clause 11.3 and 11.4

[26] (Clause 10.1 to 10.18) [Schedule Part 14]

[27] The original Employer's Requirements were produced by Parsons Brinkerhoff, developed from outline specifications produced by Mott McDonald and Faber Maunsell for the ETN Bill Promotion. A claim by tie against SDS Provider founded in incompetent design at BDDI would likely be met by an assertion that SDS Provider was not in control of the Employer s Requirements during the bid process.

Recommendation

In order to establish plausible grounds for running the above arguments for Infraco breach, **tie** would require to audit (1) how the administration of clause 10 and Schedule Part 14 has been operated and what level of manifest and serious non compliance there has been during design development from BDDI to IFC and (2) what patent deficiencies (which could be said to be a breach of contract or negligence by SDS Provider under the SDS Agreement) in BDDI or its evolution have resulted in changes to design principle, shape, form and specification post contract award. Both matters cause **tie** loss.

Without this factual and technical analysis and understanding, it is not possible to state the precise grounds for recourse or what the likelihood of success could be.

A review (technical and legal) is instigated to assess the strengths and weaknesses of this aspect of contract administration.

23. SDS COLLATERAL WARRANTY

In the event that **tie** wish to consider direct action against the SDS Provider, the terms of the collateral warranty in favour of **tie** which the SDS Provider signed at novation are cardinal.

The collateral warranty includes a conventional warranty from the SDS Provider to **tie** that it will exercise a reasonable level of professional skill, care and diligence. The SDS Provider acknowledges that that it owes a duty of care to **tie** in carrying out all its obligations under the SDS Agreement after novation and that it has carried out all its duties up to novation under the same duty of care. This duty of care would be at the heart of a case against SDS Provider. The rights and benefits of **tie** under the collateral warranty are in addition to any other remedies that **tie** may have against the SDS Provider, such as delictual claims (ie wider acts of negligence). We recommend that SDS Provider is put on notice now that **tie** has grounds to pursue recovery of loss against SDS Provider.

The collateral warranty drafting provides that the revised SDS Agreement shall determine the liability of the SDS Provider to **tie** in all respects. If **tie** elected to make a claim under the collateral warranty, the SDS Provider can seek to rely upon any defence, right, limitation or exclusion in the revised SDS Agreement. The SDS Provider's liability under the collateral warranty cannot exceed its liability under the revised SDS Agreement.

A collateral warranty of this type is normally intended to be used (i) during a step-in by the employer (**tie**) to the role of Client under the SDS Agreement following an Infraco Contract termination, or (ii) for **tie** claims direct against the SDS Provider in respect of the utilities diversion design works.

It would be unusual, but not legally prohibited, for **tie** to take action *directly* against the SDS Provider in respect of the main ETN infrastructure design production mandate (rather than seeking recourse against the Infraco). The decision to operate the Collateral Warranty in this way would need to be founded on clear and strong evidence. We do not understand that **tie**

audit under clause 104.3 of the Infraco Contract established yet either evidence or clear leads to such evidence[28]. Progress on this evidential necessity is very important.

24. ESTABLISHING SDS PROVIDER LIABILITY AND tie's LOSS

- **tie** would need to establish factually whether there have been breaches of the design production and quality obligations contained in the SDS Agreement resulting from failure by the SDS Provider. Taking action against the Infraco would relieve **tie** from having to establish fault as between the SDS Provider and the Infraco's management of the SDS Provider as its subcontractor. **tie** should also look carefully at what SDS performance failed to achieve prior to novation.

- The liability levels attributed to and to be enforced against SDS Provider in respect of late delivery of specified Issued for Construction Drawings are clear, namely ca £8,900 per incidence.

- The Infraco has a significant options which allow it to recover from the SDS Provider. Cap on liability of £10 million will apply in most cases. If the Infraco has simply ignored its ability to recover from SDS Provider for poor performance and passed the consequence through to tie, this is a breach of contract by Infraco.

- The collateral warranty can be used by **tie** to claim direct against the SDS Provider for deficiencies in the obligations in relation to utilities diversion design. Similar terms and limits on liability as those which apply to a claim by the Infraco against the SDS Provider under the revised SDS Agreement will be applicable.

- **tie** entered into Settlement Agreements with SDS Provider at the time of the Novation Agreement. The terms of these agreements (in so far as they go beyond settlement of SDS Provider financial claims) would be very relevant to any SDS Provider liabilities for deficient performance prior to novation.

- The crux of any case on **tie** incurring loss because of delayed design production is likely to revolve around whether the SDS Provider is entitled to an extension of time in respect of the delayed design elements, and whether, and to what extent, other parties have contributed to the delays. Where the Infraco have managed to obtain an extension of time (whether contractually or otherwise), it will be difficult for **tie** to pursue the SDS Provider, as the Infraco are likely to have passed down any concessions to the SDS Provider as subcontractor.

There are two basic heads of loss which would flow naturally from SDS Provider being late with ETN design and being either delinquent or inefficient in its production: the Infraco is delayed and claims against **tie** as a result of IFC drawings not being available; the quality of the SDS Design results in Notified Departures, whether because SDS Provider's initial design was poor or because its decision as to how the design should evolve to deliver the Employer's Requirements is challengeable on grounds of inadequate professional judgement. SDS Provider is deemed contractually to have knowledge of the Infraco Contract terms.

[28] We had understood that **tie** considered at one point that SDS Provider had failed to carry out certain surveys which resulted in delay and prolongation claims from CUS under MUDFA.

Claims by **tie** against Infraco

Given the attitudes demonstrated to date, it is certain that even a strong claim (based on SDS Provider failings) against the Infraco will be fought, rather than swiftly passed down to the SDS Provider through the subcontracting structure. This is especially likely to be the case where the Infraco anticipates that the SDS Provider could argue that the Infraco is responsible for clear failures of instruction or late changes that have contributed to the delay in or poor quality design production, even if the **tie** claim is clearly directed at SDS Provider fault.

Recommendation

Test cases are constructed swiftly against SDS Provider where the considered technical judgement is that the Deliverable or work product was not of the requisite standard[29] and that this has caused loss to **tie** either because the deficiency has unnecessarily triggered a Notified Departure or it has delayed the production of IFC drawings. The arguments in the case are constructed so as to extract a position in which either SDS Provider must defend its design work against technical arguments and is put in a position that draws out what role Infraco had in managing and supporting (or neglecting to manage and support) the efficient production of competent design.

The status of the ETN design at November 2007 and at May 2008 is examined against what SDS Provider's contractual duties were.

As advised previously, SDS provider may seek to contend that in relation to the utilities design remit (kept under the novation arrangements as a **tie** mandate), any claim is subject to a three month time bar from the time that **tie** could reasonably have known of the existence of a claim. (DRP Schedule Part 9)

The exercise in opening a case against SDS Provider will require intensive **tie** and DLA resourcing. This cannot be the same personnel engaged on the DRPs, although close co-ordination would be vital. We would deploy two solicitors led by a partner.

25. QUESTION THREE: How any contractual exposure associated with the Misalignment processes and obligations fits with any design change exposure?

Executive Summary: We take the question (as for Q1) is about design change itself as the initiator, not design change consequent on other Base Case Assumptions being triggered. This is therefore the operation of PA1 and PA3[30].

Misalignment sits alongside tie's exposure for design change in PA1 and PA3; but it is not the same thing and cannot be selected by either party as alternative means by which price can be adjusted. The parties have pre-selected certain items to be taken through Misalignment. There is a mutual obligation to carry that through and neither party may put new items into Misalignment.

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[29] We note here that Challenge sessions have discussed the fact BDDI was design in evolutionary stage and that breach would be difficult to establish. We consider that as at May SDS Provider had been under mandate from **tie** to produce an ETN design since 19th September 2005. Whatever SDS Provider sought to argue regarding its design production programme obligations, the maturity of the design as at May 2008 (and indeed November 2007) caused **tie** serious difficulties in letting the Infraco Contract.

[30] The analysis of the effect of misalignment is far from easy.

Misalignment does not therefore "mix" with the Pricing Assumptions. It operates within a particular stage of design development and items selected for Misalignment may additionally be subject of Pricing Assumptions triggers both before the start and after the finish of that stage.

Specifically, this might be the period between BDDI in Sept 07 and the SDS design at contract close in May 08 - and the period between conclusion of Misalignment and production of IFC, if the Misalignment process does not itself produce IFC.

Misalignment essentially has the same function as Pricing Assumptions, in that it produces (expressly) a Mandatory tie Change. Our advice is that the items selected for it are "ringfenced" or in other words: Misalignment is neither simply another Pricing Assumption nor interchangeable with such.

On this question, as many others, please note that this summary is a very short distillation of the advice. Strategic commercial thinking is still needed on whether tie should be arguing for this ringfencing, given there is dispute about the extent of price adjustment from implementation of the mandatory tie charge, or whether tie are better to refuse to sign off the post-exercise reports and argue for a good result within Misalignment or consider it abortive and elect for Pricing Assumptions, specifically arguing the results of Misalignment are Infraco Changes.

26 ANALYSIS EXPOSURE ARISING FROM MISALIGNMENT

This section summarises the best (most advantageous) arguments available to **tie** on Infraco entitlement arising from Misalignment. There is analysis of strength and summary of more obvious counter-arguments. This aspect is not intended to be comprehensive, since no adjudication position has been taken by Infraco on this issue as yet.

The section is in two parts:

1. The case to say that the items identified for Misalignment are dealt with entirely within that exercise and are not additionally (and may not be chosen instead to be) something else; and

2. The case to minimise Infraco entitlement within or outside of Misalignment.

There are strategic questions to settle as the idea of ring-fencing Misalignment entitlement within the express words of the Novation Agreement may not be the better (cheaper) option if it involves concession that the implementation of changed work is a Mandatory **tie** Change.

27 Misalignment Case One:

i) Deed of Novation cl. 4.8 (which deals with alignment of Deliverables immediately pre-contract with Infraco Proposals) provides that the post-workshop reports will detail the changes "determined" at the workshops, and will append **tie** Change Orders or instructions. Payment to SDS Provider is confirmed and amendments to Deliverables will be a Mandatory **tie** Change and a Client Change. It must be acknowledged that this appears intended to address design cost and the further words could be read as going on to deal with implementation cost.

tie's best argument remains that this intends to formalise the extra design cost and to authorise the implementation. In favour of that argument, the parties would have had to agree later for **tie** Changes to be issued so that the actual works would match ERs, read with the change register. Against this argument, this reading of the clause means

that it deals exclusively and finally with entitlement for implementation but does not express it clearly. The idea that the Infraco entitlement is fully and unambiguously dealt with here, is a narrow line to take.

ii) On this line, entitlement will depend entirely on what is and is not to be understood from the post-workshop reports. The DoN does not provide that the reports will be agreed but that they will be signed by both parties (which we consider amounts to the same intention). Nor does the DoN direct that the report is to be drafted by the contractor, as has been the practice. We need to look at how this followed through in two situations:

a) If the report was agreed then we are primarily interpreting this new agreement to identify Infraco entitlement and the question (beyond full exclusion in (i) above) is how far any entitlement shall reach in terms of changes consequential on the changes expressed in the reports. If Infraco take the view that all consequential work is affected by the expressed change, this might be on the view that this is necessary (and in the contemplation of the parties) to align that further work with ERs. Note: a **tie** Change is defined as a change to Infraco Works, not to ERs. There is no express contractual requirement to amend the ERs following the Misalignment exercise. If more narrowly the exercise creates misalignment within IPs between M&E and Civils for example, this is Infraco's problem.

b) If the report was not agreed, then the misalignment process is stalled indefinitely. There being no obligation on **tie** to agree or otherwise resolve the listed items (aligning Deliverables with Infraco Proposals), **tie** can leave matters where they are and require that the Employer's Requirements are complied with through the Infraco Proposals unless Infraco wants to propose some Infraco Changes through clause 81.

28 Misalignment Case 2:

i) Infraco priced the Employer's Requirements and the Infraco Proposals. The Infraco Proposals have not changed through Misalignment exercise - the SDS Provider Deliverables have changed to match them. Question whether this is the case however: on both trackform and OLE, the item as described in cl. 4.7 refers to existing Infraco Proposals and the task to allow them to be implemented (which supports this argument) but the exercise is described generally in DoN cl. 4.7 as determining the development of Infraco Proposals and consequential changes to Deliverables. As a matter of fact, did the Infraco Proposals change from contract issue date?

ii) Infraco are not arguing for entitlement on the express words of DoN cl. 4.8 Mandatory **tie** Change but, we believe, on Pricing Assumption 3. This is not applicable, if changes consequent to the Misalignment exercise are agreed to be dealt with exclusively under cl. 4.8. Infraco will rely upon clause 4.3. The DoN does not have the same priority as the Conditions but **tie's** approach to 4.3 remains the same: it cannot be said that Infraco entitlement under Schedule Part 4 remains intact in all circumstances. Apart from the limitations within that Schedule which take us back to core conditions, the Schedule does not work where the contract does not take us into it.

iii) The Misalignment acknowledged an Infraco problem - that, at contract, the Infraco Proposals did not conform to ERs (presuming it is correct to say that the ERs are

represented by the Deliverables developed to contract date) thus in breach of their warranty on compliance in Clause 4.4. That takes us into questions on disqualification of a Notified Departure because of Infraco breach. If this amounts to an Infraco breach, **tie** also have process to deal with it in clause 10.9 which provides that if any Deliverable shall be found not to comply with the contract, Infraco will amend it at Infraco's expense.

iv) There is no presumption in the contract that the workshops will result in agreement to amend Deliverables to match IPs - in contrast to the prior agreement to align Deliverables with ERs which is set out in a letter. The exercise is to examine and "determine" the development of IPs (not Deliverables) although it is anticipated that Deliverables may change to accommodate the IPs. Without any requirement on **tie** to agree anything they could have simply refused to allow discrepant IPs to remain and to require that they are corrected. This supports the idea of the common intention that **tie** are not required here to agree more expensive solutions. Without this exercise, any "better" solution represented in IPs would have to be presented as an Infraco Change.

v) Note the effect on claims for Notified Departure based on Pricing Assumption No.1: The ND mechanism is a way of generating a Mandatory **tie** Changes (Sched Part 4 para 3.5) As stated above, the DoN already creates this position so the ND mechanism does not apply to the Misalignment exercise. Also, the exercise (if completed) creates a new baseline for change and there cannot be any ND for change between BDDI and IFC.

tie's best position is the argument that the entitlement in relation both to design work and cost of implementation is exclusively within DoN cl. 4.8 (strong) and that the references to Mandatory **tie** Change bring no money but are simply to clarify necessary administration of the agreed change to keep the change register up to date (weak). If the likely position on both points is found, **tie** needs to consider whether to try to argue for a narrow reading of the close-out reports to exclude "consequential" work or a wider reading on the basis that the consequential changes are a saving against the extra cost in the expressly-changed work.

The question must also look for the contractual provisions which deal with any discrepancies which might have arisen in the further development of the Deliverables beyond BDDI as against the further development of either or both of Employers Requirements and Infraco Proposals. This issue was recognised in the contract, in the provisions generally known as "Misalignment". There are two distinct parts to Misalignment, to deal with misalignment which may have arisen between the developed Deliverables and both Employers Requirements and Infraco Proposals, respectively.

This is important because the exercises were agreed in order to bring about alignment and if they were completed successfully - a question for **tie** - this should have created the explicit connection between the baseline for change in Pricing Assumption No. 1 (BDDI) and the priced scope of the Works. Acknowledging that these things are not the same (otherwise the provisions would not be necessary), the Misalignment process intends to produce records which detail each change to the Deliverables in order to achieve compliance and provide expressly for the extent of contractor entitlements arising from those changes.

29 This takes us to what we understand to be the Infraco submissions for additional money and time entitlement based on alleged Notified Departures arising from this second part of the Misalignment process - the alignment between Deliverables and Infraco Proposals. As we understand it, Infraco have based their entitlement on Pricing Assumption No. 3 (Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco

Proposals and the Employers Requirements). We take the view that if this is the express basis of entitlement in the Infraco submissions, it is the wrong one. The existence of the Misalignment exercise in the Novation Agreement is in our view a clear indication that the parties did not intend that Pricing Assumption No. 3 would cover the misalignment items identified to be dealt with in that process. We take the same view on Pricing Assumption No 1, to the extent that changes from BDDI were covered in the Misalignment exercise. Instead, we take the view that:

1. In relation to aligning the Deliverables with Employers Requirements, the Infraco must have entitlement arising from implementation of the changed or additional work set out in the letter referred to in Part A of Appendix Part 7; and

2. Infraco's entitlement in relation to the alignment of Deliverables and Infraco Proposals will depend on those amendments to Deliverables which will have been set out in the report referred to in clause 4.8 of the Novation Agreement above. They will be Mandatory **tie** Changes. The best view is that any other consequential changes, not included in the reports still have to be presented by Infraco for approval and would constitute Infraco Changes.

In our view, the extent of the items listed in the **tie** letter and the reports, will be the determining factors, whether Infraco currently see this or not. On that basis, discussion of the provisions dealing with discrepancy and priority, should not come into it.

Conclusion

1. The original scope of works is described in the definition of Infraco Works - which are required to be carried out and completed in accordance with the entire Agreement, which of course includes the Employer's Requirements and the Infraco Proposals.

2. The explicit connection between price and scope is paragraph 3.1 of Schedule Part 4.

3. The Contract Price is the total price for all of the works required under the Agreement.

4. Paragraph 3.5 of Schedule Part 4 states that the Contract Price has been fixed on the basis of inter alia the Base Case Assumptions.

5. The disconnection between the priced scope and BDDI may have been gathered up in the contract in the Misalignment process although that process is a general alignment and not confined to the period between formation of BDDI and formation of the contract. The key questions remain: exactly what it covered and whether it was successfully completed:

   i) In selecting the items for alignment, did this include all items of Deliverables known to have been developed since BDDI?

   ii) Were the reports produced and agreed?

Recommendation

One day is set aside for this topic to be scoured and our report updated accordingly.

30 ADJUDICATOR HUNTER'S DECISIONS

We are instructed to give an opinion on the strengths and weaknesses Adjudicator Hunters' findings. We have based this part of the report on the analysis we provided to **tie** on 18 November 2009.

Executive Summary

The adverse findings in the Gogarburn Bridge and Carrick Knowe Bridge result from:

1. The adjudicator's view that BDDI is to be preferred to the exclusion the Employer's Requirements as the sole contractual means of determining whether or not normal design development has occurred.

2. Adjudicator Hunter found the Infraco's technical expert's evidence more persuasive regarding what was and was not within the ambit of normal design development, as he assessed that concept.

3. The adjudications are non binding and can be challenged though court proceedings without immediate threat of time bar.

Recommendations

Following our own analysis and the consultation with Richard Keen QC[31], lessons learned have been absorbed and where possible inserted into the RRRW adjudication submissions. We do not recommend that any form of challenge is mounted to the Adjudicators, decisions at this time. Our reasons are:

1. The grounds for challenge are limited although, in our opinion, valid. They are fairness - in that the Adjudicator has relied on an argument that he was never asked to consider; and completeness - he has not answered a question on InfraCo's failures put to him by **tie**. The precise value of a Court's judgement in **tie's** favour on these narrow grounds is not easily assessed, since at present Infraco have not relied squarely on the findings which are vulnerable to challenge (see paragraph 6 in the main analysis below).

2. **tie's** strategy in commencing DRPs was based upon a decision to drive certainty out of known disputes and to secure ability to issue clause 80.15 instructions. A challenge to Adjudicator Hunter's decision will not deliver further clarity in the sense that the findings under challenge do not affect the findings on the ambit of normal design development as seen by this Adjudicator or the valuation of the Notified Departures.

3. The time, resource and cost investment in attacking the findings by court action would, in our view, be disproportionate to the commercial benefit of a positive outcome in **tie's** favour.

4. There remains in tact **tie's** secondary line of argument on evaluation of the Notified Departures.

5. Senior Counsel was, at best, lukewarm regarding challenge on these adjustications.

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[31] Senior Counsel's opinion is awaited early week commencing 14th December

6. There is no contractual time bar on any challenge through the Courts although undue delay would be prejudicial as a merits point.

7. At present, **tie** has imperatives concerning the defence of Russell Road Retaining Wall and the pursuit of the further adjudications.

32 Analysis

The section reviews the material findings and reasoning of the Adjudicator Hunter as set out in *section 7.0* of each of the Adjudicator's Decisions in respect of Gogarburn Bridge and Carrick Knowe Bridge. The findings and reasoning of the Adjudicator in each adjudication are broadly similar and therefore the commentary set out below applies to both adjudications.

5.1 The Adjudicator concurs in important respects with the position put forward by **tie** (paragraphs 7.18, 7.19 and 7.20) in that:

5.1.1 the risk for normal development to completion of SDS Provider design lies with Infraco;

5.1.2 the onus is on Infraco to demonstrate that which they claim falls within the exceptions set out in the Infraco Contract (though the Adjudicator later contradicts this by finding that **tie** are to prove if any of the exceptions to a Notified Departure as defined apply);

5.1.3 the risk transferred to **tie** is where development and completion of design is outside of the normal course of development of the detail shown in the initial design i.e. Base Date Information, into the detail needed to construct the works as described all to meet the Employer's Requirements; and

5.1.4 the entirety of responsibility for the design of the Edinburgh Tram Network sits with Infraco and that the Infraco agrees with that (paragraph 7.10).

5.2 Where the Adjudicator departs from the position put forward of **tie** (and, we consider, that of Infraco) is that the Adjudicator is of the view that the Employer's Requirements have to be sufficiently well developed "*within the BDDI procedure*" as a baseline in order to allow the Notified Departure mechanism to operate (paragraph 7.20). The Adjudicator appears to be saying that the Construction Works Price is limited to only what is depicted on BDDI. He acknowledges the Employer's Requirements but his logic that the priced obligation is to meet them only to the extent that they shown on BDDI. On the Adjudicator's analysis, normal development and completion of the design is then framed by reference to only what is depicted on BDDI, and will not include items necessary to meet Employer's Requirements, which are not shown on BDDI. In the words of the Adjudicator "*if something is not in any way addressed on the drawing* [BDDI] *then I cannot see how it can subsequently be developed*".

5.3 The Adjudicator's finding in this regard is summarised at paragraph 7.21 where he states "*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 BDDI. These matters may have been alluded to in the Employer's Requirements as an obligation but because of the lack of complete design had not been sufficiently developed in terms of specification to become part of the price.*"

DLA Piper opinion

5.4 It is on that point (5.3 and 5.4 above) which we consider that the Adjudicator has fallen into two separate errors - both on substance and procedure. Firstly, to the extent that we can understand his reasoning, we do not agree with it. Secondly, this additional step taken by the Adjudicator is one of his own making and not one which was put forward by either party in submissions (this point is relevant to potential challenge, as discussed further below).

33. Strengths and weaknesses of Adjudicator Hunter's Findings

5.5 *Paragraph 7. 7* - It is important to note that the Adjudicator has not explicitly taken account of the submissions of Infraco in regard to the pre-contractual factual matrix. His reasoning is ostensibly based on construing the whole contract, in line with **tie's** submission as to how the Infraco Contract should be interpreted.

5.6 *Paragraph 7.12* - Here the Adjudicator misrepresents **tie's** position. This is only his view of the Referral Notice. The issue before the Adjudicator was not the question of Infraco's design obligations, but instead Infraco's obligation to construct to the Infraco Works and the price for those works. This error however has very limited bearing on his findings on normal design development.

5.7 *Paragraph 7.13* - Again the Adjudicator wrongly focuses on design obligations, whereas **tie's** case relies upon the clear and entire obligation to deliver the Infraco Works in accordance with the Employer's Requirements.

5.8 *Paragraph 7.17* - It is trite to observe that there will be always be an element of incomplete design in respect of a design and build contract. The real issue is whether the design and build contractor can understand what he is to deliver for a price. Very often pricing assumptions or qualifications are included in a design and build form of contract - here there are the forty three contained in *Schedule Part 4 (Pricing)* and incomplete design was not the only reason for their inclusion as part of the Infraco Contract (others for example - ground conditions). It is incorrect to say that incomplete design is the sole function of schedule Part 4. Arguably it isn't even the main function. ***We consider that this finding is weak.***

5.9 *Paragraph 7.20* - The first part of this paragraph reflects the position put forward by **tie** in the Adjudication, being almost a repetition of **tie's** submission on this point. Having said that, the Adjudicator does note that the design is incomplete, which is odd as, again, it would not be design and build if the design were complete. He concludes that this is a shortcoming leading to an impossibility in pricing. The Adjudicator then does acknowledge the Employer's Requirements, but only so far as reflected in the Base Date Design Information and acknowledges that the Infraco is obliged to design and build to the Employers' Requirements, but has only priced what is reflected in the Base Date Design Information. He says this because" the ERs have to be sufficiently developed within the BDDI procedure as a baseline for proceeding in such a manner". We do not understand this key finding -the relegation of the ERs - which is not supported by the Infraco Contract and is contradicted directly by Schedule Part 4 para 3.1. ***We consider that this finding is weak.***

The finding, in our view, appears to misunderstand the function of Pricing Assumption 1, which is to protect Infraco from change to BDDI, not to supplant the ERs as the contractual specification.

5.10 *Paragraph 7.21* - A core assumption of the Adjudicator is that if the design is not sufficiently developed it cannot be priced - either on a provisional basis or otherwise - it has to be in some way extra. This does not reflect the reality of a design and build form of contract or this contract. This point requires examination by **tie's** experts to ensure that it is not capable of development by Infraco. ***We consider this finding is weak and would not necessarily be followed by another adjudicator.***

5.11 *Paragraph 7.27* - 7. 29 - The Adjudicator does not agree with Infraco's narrow interpretation of "*normal development and completion and designs*" as meaning only a change in shape, form or outline specification. This finding is based on Adjudicator Hunters' interpretation of Pricing Assumption 3.4.1. ***It is reasonable.***

5.12 *Paragraph 7.30* - A keystone to the Adjudicator's thinking is, again, that the Infraco cannot price something or extrapolate for pricing anything which is not depicted in the Base Date Design Information - thus, everything beyond Base Date Design Information is additional. ***We consider that this finding is weak.***

5.13 *Paragraph 7.46* - The Adjudicator does not attempt any analysis of the effect of *clause 4.3*.[32] It is in any event the case that *clause 4.3* has not been used by Infraco to argue a disconnection between its obligation to design and its payment for that design. ***We consider this finding is neutral and not mature***.

34 Factual and Technical Findings

5.14 The Adjudicator at *section 8.0* of his decision then proceeds to apply the findings set out *section 7.0* of his decision to the particular facts and circumstances. Those facts are principally of a technical nature, but the following comments can be made.

5.15 At a high level the Adjudicator generally finds favour with the approach taken by Ian Hunt (the expert appointed by Infraco) and he is mildly critical of tie's expert's approach.

5.16 In this regard going forward we recommend:

5.16.1 planning the amount of time to be given to any expert (engineer or otherwise) to form an opinion on issues in dispute;

5.16.2 exploring in greater depth the attitude of the expert (engineer or otherwise) to the concept of the difference between design development and change (in order to guide his opinion on each item in question and to give weight to it in the mind of the adjudicator); and

5.16.3 seeking out the willingness of the expert to state as a matter of principle a "rule" as to what is design development. An attempt to state a rule (albeit from a legal perspective only) was included in the submissions, but this was not reflected in the expert report and (please note) is also not reflected in the expert report in respect of the dispute concerning Russell Road Retaining Wall 4.

[32] Neither Senior Counsel agree with the Adjudicator's view on this provision.

35 POTENTIAL GROUNDS OF CHALLENGE

6.1 Infraco now relies upon the Adjudicator's findings as they are favourable to Infraco's position in the current RRRW adjudication. Though the Adjudicator's findings are not be binding in subsequent proceedings, they could be persuasive. **tie** will need to use the oral hearing to attack this approach by the Infraco.

6.2 The decisions of Adjudicator's could be challenged in certain circumstances. For completeness we analyse these Two routes are generally available to a party who wishes to challenge an Adjudicator's decision:

6.2.1 a petition for judicial review (in the Court of Session); or

6.2.2. defending an action for enforcement of an Adjudicator's decision. Note here that, as the Adjudicator has not made any declaration as to valuation, it is thought likely that Infraco would only seek to enforce the Adjudicator's Decision if **tie** subsequently refused to acknowledge and accept a value for those matters which the Adjudicator declared were Notified Departures. That might be an application for evaluation of the Estimate through DRP.

6.3 There are a number of areas of the Adjudicator's Decisions where a Court may well find differently from the Adjudicator, but that is not sufficient grounds for challenging the Adjudicator's Decision. An Adjudicator can be wrong in fact or law, but that is not a ground for challenge.

6.4 As to the grounds for challenge, those may be summarised as:

6.4.1 want of/exceeding jurisdiction; or

6.4.2 breach of natural justice.

6.5 we consider that, on a purely legal view, there are the following potential grounds of challenge, which should be considered:

Breach of Natural Justice

6.5.1 In the case of *Cantillon Ltd. V Urvasco Ltd. 27 February 2008 [2008] EWHC 282 (TCC) it was observed that "It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd. -v- The Camden Borough of Lambeth, [2002] 16 BLISS 1, was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."*

6.5.2 With that principle in mind the Adjudicator at *paragraph 7.20* finds:

"*My finding is that this position is best summed up as follows. The risk which ought properly to be transferred to the Referring Party is where the development and completion of designs is outside the normal course of development of the detail shown in the initial design i.e. the Base Date Information, into the detail needed to construct the works as described all to*

meet the Employer's Requirements. I would go one step further and clarify that the Employer's Requirements have to be sufficiently well developed within the BDDI procedure as a baseline for proceeding in such a manner. I include this further step as it is clear to me that the Employer's Requirements have in terms of the price for the works been clarified in section 3.1 of Schedule 4 and thus limited by the BDDI and the Schedule Part 4 agreement in respect of the agreed price. I find that to arrive at any other conclusion would, in my view, make Schedule Part 4 meaningless."

6.5.3 The first sentence is almost verbatim **tie's** submission in the Adjudication. The words underlined above represent the Adjudicator's own thinking, but fundamentally that thinking materially differs from both **tie's** and Infraco's submissions in the Adjudication (which principally concerned the interpretation and application of *Pricing Assumption 3.4.1*) and does not reflect the legal basis upon which both **tie** and Infraco presented its case in the Adjudication proceedings. In summary, the words underlined represent a critical new legal proposition which neither party put to the Adjudicator and neither party was given the opportunity to consider or comment upon.

6.5.4 It is accepted that Adjudication, as with all proceedings where a decision maker is called upon to make a decision, requires that both parties are given an opportunity to fairly state their case. Whilst the Adjudicator is then free to come to his own conclusions on a legal basis of the dispute, if that legal basis materially differs from how the parties have presented their case or is a point on which neither party have made submissions on, the Adjudicator is required to give the parties the opportunity to consider and comment on those conclusions, otherwise the parties are being denied the opportunity to fairly state their case. We should note here that the Adjudicator has not merely been silent on Infraco's case whilst awarding in their favour - he does appear to have rejected their view of interpretation of Pricing Assumption 1.

6.5.5 In the circumstances here the Adjudicator should have communicated his own legal proposition to each of the parties and allowed them the opportunity to comment or lead new evidence. This could easily have been done by the Adjudicator, but he chose not to do so.

6.5.6 In our view this mistake in the process by the Adjudicator is a legitimate grounds for challenge - it not being a challenge to the Adjudicator's legal reasoning, but instead a challenge to the fairness of the proceedings.

Jurisdiction

6.5.7 It is also accepted in Adjudication that the Adjudicator as decision maker must exhaust his jurisdiction by answering fully the questions which were put to him.

6.5.8 In the circumstances here the Adjudicator was asked to decide upon the issue of delay in administration of the change mechanism (the delay in the provision of an Estimate in respect of Gogarburn Bridge) and to declare a value of an admitted Notified Departure (the Galleries in the case of Carrick Knowe Bridge).

6.5.9 It is at least arguable that the Adjudicator did not fully apply his mind or answer either of the foregoing questions which were put to him, the

Adjudicator deciding that he could not make a declaration in either respect. This failure by the Adjudicator could also form legitimate grounds for challenge, as by not answering all the questions put to him, he is not fulfilling his duty as decision maker.

6.6 In light of the foregoing we strongly recommend as a first step that the potential grounds for challenge of each of the Adjudicator's decisions identified above be explored with senior counsel in order to ascertain the relative merits and strengths of any grounds for challenge. An opinion of counsel on those issues would then form the basis for any future steps which may be taken.

36 Parties' Intention and Circumstantial evidence and 'common sense' points

Within Question One, we are asked whether, beyond the Infraco Contract, there are other matters which have been, or could be, brought to bear either for of against **tie's** contentions.

As reported, we do not conclude that Adjudicator Hunter was unduly influenced by the Infraco's description of the Parties' mindset at the time the Infraco Contract was settled and closed or by **tie's** response on this. Our opinion is that any future adjudicator or Court would arrive at similar position namely: only matters that assist in giving the terms and provisions of the contract meaning - or in determining that a provision did not in fact have any proper meaning- would be admissible in argument and ought to be taken in account by an adjudicator or Court in reaching its decision.

However, in contrast to an adjudicator, we consider that a judge would be considerably more inquisitive and rigorous (and potentially competent) about what evidence has been presented that it would be right for the Court to analyse and accord weight when formulating its views on both the legal and factual differences between the parties and the merits of the opposing cases.

We consider that the following two straightforward propositions have been ignored by Adjudicator Hunter in his determination to establish the commercial interest behind Schedule Part 4:

A. Schedule Part 4 was prepared by the Infraco. If the Infraco had thought that they were only pricing BDDI and nothing else, **here** was the place to express that in very direct language. The reason this is not expressed is because they did not think that they were pricing only BDDI. The Infraco's preparation and proper presentation of its proposals was, from our perspective as advisers, beleaguered with delay and obfuscation. If Infraco had stated that BDDI was all that they had priced , it would have been an utter contradiction to write in Schedule Part 4 that the Construction Works Price is the agreed financial offer for the entirety of the ERs, subject to the Pricing Assumptions. There is no pricing assumption which says that BBDI is the equivalent to the ERS and the Infraco Works.

B. The end result of Adjudicator Hunter's proposition that Infraco could not price design is that that BSC would have been in a superior position not having any design whatsoever as at 14th May 2008.

QUESTION FOUR: How should the contractual condition preventing the Infraco from being paid twice for Works be referenced and deployed?

37 Executive Summary

We consider the provision in question has straightforward and potentially appreciable beneficial application for **tie** in the valuation of Infraco's Estimates for the cost and time entitlements of Notified Departures. We have not yet seen its application by **tie** in relation to an INTC.

38 Analysis

Schedule Part 4 contains a single important introductory provision at paragraph 1.4:

"No provision within this Part 4 of the Schedule shall entitle the Infraco to more than one payment for any item or other entitlement under the Infraco Contract."

In our view, this important provision has contractual application as follows:

- wherever Infraco has recovered an entitlement through the operation of another set of contract provisions (e.g. a Compensation Event or an earlier agreed Estimate), no recovery for the same event or circumstance is permissible through any of the Schedule Part 4 Pricing Assumptions. If this were to happen, the Infraco would have received double payment and the duplicated recovery is contractually refundable to **tie**;

- we are not currently aware of any reimbursement claim raised by **tie** on grounds of paragraph 1 of Schedule Part 4.

Where the Infraco has included in its Construction Works Price for any element of the Infraco Works and subsequently seeks (by Notified Departure or other operation of Schedule Part 4) to be paid again for that same element of the Infraco Works, paragraph 1 should be operated by **tie** to prevent the claim for repeat payment. So that: if Infraco asserts that it should be paid additional monies in order to execute works necessary to deliver a feature for the Employer's Requirements that did not appear on BDDI, **tie** should refute this element of a claim on the grounds that the Infraco's Construction Works Price is a lump sum fixed price for all elements of the Employer's Requirements and the Infraco Proposals and Infraco has already priced the feature.

Thus, even if the adjustment of the BDDI drawing in question qualifies as a change in design principle, if the feature was called for expressly by the Employer's Requirements or had been allowed for elsewhere, there would be no entitlement to payment for construction because of paragraph 1.4 of the Schedule Part 4.

Recommendation

The provision at paragraph 1.4 of Schedule Part 4 should be deployed by tie at all stages of the evaluation of any claim for entitlement arising from a Notified Departure or any other claim pursued through the operation of Schedule Part 4. This should be done in conjunction with clause 121 of the Infraco Contract (No Double Recovery).

DLA Piper
14 December 2009