

ADJUDICATION

In dispute between

BILFINGER BERGER CIVIL UK LIMITED, SIEMENS PLC and
CONSTRUCCIONES Y AUXILIAR DE FERROCARILES S.A.

Referring Party

and

tie LIMITED

Responding Party

1. The Referring Party consists of Bilfinger Berger Civil UK Limited "BBCUK", a company incorporated in England, Siemens plc also a company incorporated in England "Siemens" and Construcciones Y Auxiliar de Ferrocarriles S.A. "CAF" a company incorporated in Spain. The Responding Party is tie Limited "tie" a company incorporated in Scotland.
2. On 14 May 2008 BBCUK and Siemens entered into a contract with tie whereby they agreed to carry out works authorised by the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 including provision of services and supply and installation of plant machinery and equipment necessary to deliver the Edinburgh Tram Network. On the same date they entered into a Minute of Variation with tie and CAF in terms of which CAF became a member of the consortium of BBCUK and Siemens and was confirmed as a party to the said contract, hereafter referred to as "the Infraco Contract." The combined parties are hereafter referred to as "Infraco".
3. In terms of clause 97 of the Infraco Contract any dispute shall be dealt with in accordance with the provisions set out in Schedule Part 9. The dispute not having been resolved by the Internal Resolution Procedure, the parties agreed on 21 June 2010 that it be referred to adjudication. On 9 July 2010 I confirmed acceptance of appointment as adjudicator and the Referral is dated 9 July 2010. The parties have agreed a 7 day extension of time.

4. The works to be carried out by Infraco are defined in the Infraco Contract thus: "Infraco Works 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."
5. This dispute relates to a structure, part of the Infraco Works, known as the Murrayfield Underpass (Structure S21C). It is a newly constructed reinforced concrete structure situated adjacent to an existing Network Rail underpass.
6. By letter dated 18 September 2008 Infraco intimated an Infraco Notification of tie change No. 109 to tie (INTC No. 109). It intimated INTC No. 109 on the basis that the Design as shown on the Issued for Construction Drawings relating to Structure S21C had been amended from the Design shown on the Base Date Design Information. The design principle in the latter was that temporary sheet piling be used to support the Network Rail embankment while a new vertical earth retaining structure was completed. Under the Issued for Construction Drawings the principle requires that permanent sheet piling isolate the existing Network Rail structure from potential effects.
7. On about 30 September 2009 Infraco submitted an estimate to tie for all additional costs arising from changes to Structure S21C of £134,296.71, being costs relating to changes to the scope of works due to amendments to design. tie has accepted, in its Position Paper dated 1 June 2010 that the amendments in the Design addressed in the estimate by Infraco constitute a Notified Departure. tie has agreed the estimate by Infraco insofar as it relates to new security gates. The

remaining elements of the estimate have not been agreed, but that matter is not within the scope of this adjudication.

8. On 19 March 2010, tie wrote to Infraco in the following terms:

“Edinburgh Tram Network-Infraco Contract
Clause 80.13 Instruction

You are instructed to commence, carry on and complete the following works with due expedition. In the event that any item of the said works is, becomes or is alleged to be the subject of a tie Notice of Change, an Infraco Notice of tie Change, a tie Change Order or a Mandatory tie Change Order, at any time, this instruction will be deemed to have been given and shall operate for such works pursuant to Clause 80.13.

We remind you that pursuant to Clause 108, this Agreement constitutes an entire Agreement and in particular refer you to the terms of Clause 34.1 regarding your compliance with instructions from tie’s Representative.”

The works referred to include the subject matter of INTC No. 109.

9. The issue for this adjudication is whether or not Infraco is obliged to comply with tie’s instruction contained in the above letter dated 19 March 2010 to carry out the works identified in INTC No. 109.

10. Clause 34 of the Contract contains inter alia the following provisions:-

34.1 The Infraco shall construct and complete the Infraco Works in strict accordance with this Agreement and shall comply with and adhere strictly to tie and tie’s Representative’s instructions on any matter connected therewith (whether mentioned in this Agreement or not) provided that such instructions are given in accordance with the terms of this Agreement and will not cause Infraco to be in breach of this Agreement ...

34.3 If in pursuance of Clause 34.1 (including for the avoidance of doubt any instructions of tie ... deemed to have been given pursuant or in accordance with Clause 34.1), tie’s

Representative shall issue instructions which involve the Infraco in delay or disrupt its arrangements or methods of construction or so as to cause the Infraco to incur cost then such instructions shall be a Compensation Event under Clause 65. If such instruction requires any variation to any part of the Infraco Works, tie shall be deemed to have issued a tie Notice of Change requiring such variation, which tie Change shall be a Mandatory tie Change.

11. Clause 80 includes the following provisions:-

80.1 ...If tie requires a tie Change, it must serve a tie Notice of Change on the Infraco.

80.2 A tie Notice of Change shall:

80.2.1 set out the proposed tie Change in sufficient detail to enable the Infraco to calculate and provide the Estimate in accordance with Clause 80.4 below:

80.2.2 subject to Clause 80.3 require the Infraco to provide tie within 18 Business Days of receipt of the tie Notice of Change with an Estimate ...

80.3 If, on receipt of the tie Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to tie within 18 Business Days, then the Infraco shall, within 5 Business Days ... of receipt of such tie Notice of Change deliver to tie a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties both acting reasonably.

80.4 As soon as reasonably practicable and in any event within 18 Business Days after having received a tie Notice of Changethe Infraco shall deliver to tie an Estimate

80.9 As soon as reasonably practicable after tie receives the Estimate the Parties shall discuss and agree the issues set out in the Estimate

80.10 Subject to Clause 80.15 if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.

80.13 Subject to Clause 80.15, as soon as reasonably practicable after the contents of the Estimate have been agreed tie may:

80.13.1 issue a tie Change Order to Infraco; or

80.13.2 except where the Estimate relates to a Mandatory tie Change, withdraw the tie Notice of Change, in which case Infraco shall be entitled to claim the reasonable additional costs incurred by the Infraco in complying with this Clause 80 in relation to that tie Notice of Change including the cost of any abortive works where tie has instructed Infraco to commence works prior to the agreement of the Estimate.

Subject to Clause 80.15 for the avoidance of doubt the Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order unless otherwise directed by tie.

80.15 Where an estimate has been referred to the Dispute Resolution Procedure for determination but it is deemed by tie (acting reasonably) that the proposed tie Change is urgent and/or has a

potential significant impact on the Programme ... tie may instruct Infraco to carry out the proposed tie Change prior to the determination or agreement of the Estimate by issuing a tie Change Order to that effect.

80.16 Where tie issues a tie Change Order under Clause 80.15, Infraco shall implement the tie Change and prior to the determination of the Estimate shall be entitled to claim Infraco's demonstrable costs in implementing the tie Change ...

80.20 If, having received instructions from tie, ...the Infraco consider that compliance with those instructions would amount to a tie Change, then the Infraco shall comply with the instructions and shall within 20 Business Days of any instructions being received, notify tie of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by tie of such an Estimate, Clauses 80.15 and 80.16 shall be deemed to apply mutatis mutandis to the work carried out by Infraco in complying with such instruction. If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a tie Change ... then the provisions of this Clause 80 (tie Changes) shall apply to such instruction.

80.21 Any failure by the Infraco to notify tie within 20 Business Days of instructions being received that it considers compliance with such instruction from tie ... would amount to a tie Change shall constitute an irrevocable acceptance by Infraco that any compliance with tie's instructions shall not constitute a tie Change under this Agreement.

12. On 23 March 2010 Infraco wrote to tie asking for confirmation that the reference in tie's letter dated 19 March 2010 correctly referred to Clause 80.13. On 25 March 2010 tie replied inter alia "We confirm the reference to Clause 80.13." On 2 April 2010 tie wrote to Infraco stating

inter alia “Our letter dated 19 March 2010 is clearly an instruction and thereby covered by the provisions of Clause 34.1. It has been issued in a properly authorised manner and does not cause you to be in breach of the terms of the Infraco Contract ...

We cannot and do not accept that our instruction implies or expressly confirms acceptance of any outstanding Estimates or alleged Estimates or post Estimates.”

13. On 21 May 2010 Infraco wrote to tie stating inter alia

“Infraco’s position is that in the absence of a tie Change Order or agreed Estimate in respect of the permanent/sacrificial sheet piling tie is not entitled to instruct Infraco under Clause 80.13 or 34.1 to commence, carry out or complete those works. tie are not entitled to issue the instruction in its letter of 19 March 2010 insofar as it relates to the requirement for permanent/sacrificial sheet piling.”

It proceeded in that letter to initiate the Internal Dispute Resolution Procedure in respect of the Dispute.

14. On 11 June 2010 tie wrote stating that pursuant to Clause 80.15 of the Infraco Contract it deemed that the tie Change in connection with the Murrayfield Stadium Underpass was urgent and had a potential significant impact on the Programme. It therefore instructed Infraco to carry out the proposed tie Change in connection with the Murrayfield Stadium Underpass prior to determination or agreement of the Estimate and enclosed tie Change Order (no. 120) to that effect. The letter concluded:- “The instruction set out in this tie Change Order is issued pursuant to Clause 80.15 of the Infraco Contract and does not supersede any other instruction or direction issued by tie or tie’s Representative to Infraco in relation to INTC No. 109 Section 5A Murrayfield Stadium Underpass.”

15. Against that background, the issue for determination in this adjudication is whether the letter from tie to Infraco dated 19 March 2010 constitutes an instruction which obliged Infraco to carry out the works referred to in INTC No. 109, it being common ground that at the time that letter was issued there was no agreed Estimate for these works. It is also common ground that the subject matter of the works constituted a Notified Departure, defined as a situation where the facts or circumstances differ in any way from the Base Case Assumptions. Such Notified Departure is deemed to be a Mandatory tie Change: and tie is bound to pay to Infraco where appropriate in respect of an Estimate made by Infraco in respect of the tie Notice of Change that tie is required by Clause 80.1 to serve on Infraco.

16. In terms of the Schedule Part 4 Clause 3.5 a Notified Departure will be deemed to be a Mandatory tie change requiring a change to the Employer's Requirements. Infraco on 18 September 2008 informed tie that INTC109 constituted a Notified Departure. tie did not then accept that the work in general constituted a Notified Departure. Infraco issued an Estimate in respect of the work on 30 September 2009. tie did not agree the figure in that Estimate. Although in its position paper dated 1 June 2010 tie accepted that the relevant work constituted a Notified Departure, at the time that the letter of 19 March 2010 was issued by tie there was no agreement as to the Estimate, nor as to whether the work was a Notified Departure.

17. In terms of Clause 34.1 Infraco is bound to comply with tie's instructions on any matter connected with the Infraco Works provided that such instructions are given in accordance with the terms of the Agreement and will not cause Infraco to be in breach of the Agreement. There is no question raised as to Infraco being in breach of the Agreement. The question is whether tie's instructions are given under this Clause and in accordance with the terms of the Agreement.

18. For Infraco it is contended that the letter dated 19 March 2010 did not constitute instructions given in accordance with the Agreement. A Notified Departure is deemed to be a Mandatory tie Change and tie is deemed to have issued a tie Notice of Change. In terms of Clause 80.24 where that is deemed to have happened the provisions of Clause 80 (tie Changes) other than Clause 80.19 shall apply. Accordingly the provisions applicable are to be found in Clause 80 and nowhere else. If the apparent reliance by tie upon Clause 34 is rejected, tie cannot rely upon Clause 80 because that is not the basis upon which the instruction was issued. The reference to Clause 80.13 in that letter is upon a contingent deeming basis not warranted by the Contract.
19. Further, assuming that contrary to the above Clause 80 was accepted to be applicable, Clause 80.4 requires Infraco within 18 Business Days after receipt of a tie Notice of Change (or a deemed receipt) to deliver to tie the appropriate Estimate, with provision for determination of the Estimate if not agreed. Failure to deliver the Estimate within the requisite period would be a breach of that Clause, giving rise to a claim against Infraco for implement of its obligations under Clause 80.4. Clause 80.15 empowers tie where a proposed tie Change is urgent and an Estimate has been referred to the Dispute Resolution Procedure to instruct Infraco to carry out the proposed tie Change prior to determination or agreement of the Estimate by issuing a tie Change Order.
20. For tie it is contended that they have a contractual entitlement to instruct or direct Infraco to execute varied work whether the variation is disputed or not in terms of Clause 34.1 and 80.13 and that Infraco are obliged to comply. In the first place 34.1 entitles tie to issue instructions to Infraco so long as they do not conflict with other provisions of the Infraco Contract and there was no conflict. Further 34.3 refers to instructions issued in pursuance of Clause 34.1. Further 80.13 enables tie to require Infraco to proceed with varied work in two ways, one by issue of a tie Change Order, the other being if they

“otherwise direct.” And 80.13.2 deals with the situation where tie instruct Infraco to proceed with work before an Estimate has been agreed and so before a tie Change Order has been issued. The argument by Infraco that tie is only entitled to instruct Infraco to proceed with varied work where the Estimate has been agreed (or in terms of 80.15 referred for determination) ignores the express wording of the Clauses 34 and 80 mentioned above, and is commercially absurd in that Infraco could hold up progress until this Estimate had been accepted or taken to the Dispute Resolution Procedure for determination.

21. Analysis of Clause 80.13 leads to the following conclusions:-

- (i) It is made clear that any provisions in this Clause are to be taken as subject to the provisions of Clause 80.15. This applies both to the initial provisions and (expressly) to the final sentence.
- (ii) The Clause expressly empowers tie to act after the contents of the Estimate have been agreed.
- (iii) The final sentence “for the avoidance of doubt” provides that Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order “unless otherwise directed by tie.”
- (iv) That last phrase “otherwise directed” clearly indicates that tie may issue some form of instruction to carry out work which is to be commenced notwithstanding the non-receipt by Infraco of a tie Change Order.
- (v) It does not follow that tie is empowered to issue instructions under this Clause except where the contents of an Estimate have been agreed. Clause 80.13 is to be contrasted with

Clause 80.15 which does in appropriate circumstances empower tie to instruct the carrying out of work prior to an Estimate, which has been referred to the Dispute Resolution Procedure for determination, having been determined or agreed.

22. It may be argued that this is an unduly restrictive view in that it is dependent upon Infraco having put forward an Estimate Only if that is agreed is tie able to instruct work to commence in the ordinary case, with the exception in Clause 80.15 for cases of urgency. It is, however, to be observed that in either case the Parties are protected in respect of financial consequences. In the case of the agreed Estimate the matter either goes ahead (80.13.1) or tie withdraws any Notice of Change which is not a Mandatory tie Change (80.13.2). In the latter case tie will in any event be deemed to have issued a tie Change Order, but again only after a lapse of time after the contents of the Estimate are agreed or determined. Matters are different under Clause 80.15 but (a) that is for tie to take the risk of financial uncertainty where it considers the matter urgent (b) it must act reasonably in taking that approach and (c) Infraco has some protection in its right of refusal under Clause 80.12.
23. Clause 80.16 is of relevance in this context. It provides that where tie issues a tie Change Order under 80.15, i.e. before an Estimate, referred to the Dispute Resolution Procedure for determination, has yet been determined, Infraco shall implement the tie Change, and shall be entitled, prior to any such determination, to claim its demonstrable costs in implementing the tie Changes calculated in accordance with Clause 80.6. Infraco is thus protected in respect of the financial consequences of having to carry out work under 80.15. There is no such provision in respect of Clause 80.13, and that is appropriate given that 80.13 is only operable after an Estimate has been agreed.
24. The above analysis leads to the conclusion that as an Estimate had not been agreed in respect of the relevant works at the time that the letter

dated 19 March 2010 was written by tie, tie was not empowered under Clause 80.13 to issue an instruction in respect of those works. The letter bears the heading "Clause 80.13 Instruction." Accordingly insofar as it bears to proceed under Clause 80.13 it is not a valid instruction and Infraco was not under any obligation to comply therewith.

25. It is important to bear in mind the terms of Clause 80.1, that tie Changes shall be dealt with in accordance with Clause 80, unless expressly stated in the Agreement. Clause 34.3 does refer to instructions which require any variations to any part of the Infraco Works, and provides that in that event tie shall be deemed to have issued a tie Notice of Change requiring such variations. The relevant tie Change is to be a Mandatory tie Change. But the consequence of application of that deeming provision is by virtue of Clause 80.1 to bring the relevant instruction within the operation of Clause 80. It follows that if the reference to Clause 34.3 in the letter dated 19 March 2010 has any significance it does not take the matter outwith the ambit of Clause 80, and in particular Clause 80.13.
26. In the course of the arguments for the parties I have been referred to the various authorities as to the proper approach to interpretation of this Contract. That approach is set out by Lord Morris of Borth-y-Gest in Wickman Tools .v. Schuler A.G. 1974 AC 235 at 25 as "to decide what was the intention of the parties as revealed by or deduced from the terms and subject matter of this contract." See also Chartbook Ltd .v. Persimmon Homes Ltd 2009 1AC 1101 per Lord Hoffmann paras 17-20 at pp 1112-3. I have sought to apply that approach to the construction of the contract here in question.
27. For the foregoing reasons I determine as follows:-
 - (1) There not having been an agreed Estimate in respect of the works referred to in INTC No. 109, the letter of the Responding Party to the Referring Party dated 19 March 2010 (Ref: INF

CORR4487) does not oblige the Referring Party to commence or carry out those works.

- (2) The Responding Party is liable for the whole of the Adjudicator's fees and expenses in connection with this adjudication.

Lord Dervaird
Adjudicator

7th August 2010