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DRAFT ADVICE NOTE

TIE LIMITED

Report on Six Key Questions

16 January 2010

INTRODUCTION

This paper addresses a set of six specific questions posed by **tie** project management¹ concerning **tie's** best legal and contractual arguments on issues pertinent to the current disputes with Infracore on programme and delay.

This paper does not analyse individual detailed facts and circumstances but lays out the principles which govern the operation of the applicable contract mechanics.

¹ Steven Bell, Project Director email to Andrew Fitchie received on 11 December 2009

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QUESTION ONE

How do the various terms of the Infraco Contract combine to establish contractual responsibility for programme delay and associated costs, including responsibility to mitigate delays and accelerate the programme (including responsibility for payment of such measures).

The primary and conventional clauses in the Infraco Contract which deal with programme, delay and progress of the works are:

Clause 60 - Programme

Clause 61 - Rate of Progress and Acceleration

Clause 62 - Liquidated and Ascertained Damages

Clause 64 - Relief Events

Clause 65 - Compensation Events

Schedule Part 4 also permits relief and compensation for proven disruption and prolongation by reason of Notified Departure.

The scheme of the Infraco Contract is straightforward. The Infraco is under an obligation: *"to progress the Infraco Works with due expedition and in a timely and efficient manner without delay to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme."*

Additionally, the Infraco is to: *"complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion in respect of each Section or Certificate of Service Commencement (as appropriate) to be issued in accordance with Clause 44 (Notification of Sectional Completion)² and Clause 45 (Notification of Service Commencement)."*

In the event that the Infraco is not able to meet the Sectional Completion Dates which achievement is its sole responsibility, the Infraco will be subject to the application of liquidated damages for delay calculated in accordance with Clause 62. Where the Infraco is expected to be late in achieving

² Sectional Completion dates given at the date of the Contract are: A:25.03.10; B: 23.04.10; C: 17.01.11; Section D Completion: 17.07.11. D is full service commencement.

substantial completion of any Section (in the reasonable opinion of **tie's** representative) and has no entitlement to time relief, **tie** may elect³ to require the Infraco to expedite progress in order to make up the delay and achieve completion to an adjusted Programme. The cost of all measures to do so (which are to be approved by **tie**) are to the account of Infraco.

The obligation to accelerate at its own cost is distinct from the Infraco's contractual obligation to mitigate delay. Infraco's obligation to mitigate delay has different components:

- The obligation to progress the works with due expedition and in a timely way and efficient manner **without delay**.
- The obligation to do so in order to perform all of its other obligations under the Agreement in accordance with Programme.
- The obligation to use reasonable endeavours to maximise productivity by reference to Good Industry Practice⁴ and to minimise costs in carrying out the Infraco Works⁵.
- The obligation to propose mitigation measures when estimating the impact of any **tie** Change/Notified Departure/Compensation Event⁶.
- The obligation to inform **tie** at the earliest opportunity of any delay due to Infraco and to accelerate to avoid delay⁷.
- The overriding obligation⁸ to mitigate "*any delay to the progress of the Infraco Works*".

QUESTION 2

How has failure to mitigate the effects of delay to the progress of the Infraco works (clause 60.9) allowed Infraco concurrent delay events (which DLA's paper of 16 October 2009 states should be ignored by tie) to be masked by any Employer delays and in so doing, moved the culpability

³ Clause 61

⁴ Clause 7.5.1

⁵ Clause 7.5.5

⁶ Clauses 80.4.8, and 65.2.2.3, 65.2.2.4 and 65.8.2

⁷ Clause 65.10

⁸ Clause 60.9



for delay from Infraco to tie. How do the provisions of the contract protect tie from such a scenario.

A failure by Infraco to mitigate the effect of delay (arising from a blend of reasons connected to Infraco shortcomings and tie delay) will have permitted Infraco to mask its inadequate state of readiness to commence works. This is a question of factual analysis in each case. If Infraco's presentation of its need and entitlement for extension of time for completion has been based upon a global claim which does not expose individual responsibility for delay events and their immediate and knock-on consequences, that claim may be vulnerable to proof that it is not competent to sustain financial entitlement.⁹

The main protection in the Contract for tie against the Infraco attempting to conceal its own culpable delay is Clause 60 and in particular the operation by tie, as Client, of:

- Clause 60.2: which requires Programme update by Infraco in accordance with the specifics set by tie in the Employer's Requirements.
- Clause 60.4: which provides for the review and acceptance/rejection of any revised Programme by tie and the iteration of this process until tie finds the reviewed Programme submitted by Infraco satisfactory and declares its acceptance.
- Clause 60.7: under which tie is entitled to require the Infraco to produce a new Programme to reflect actual progress of the Infraco Works (as opposed to notional, but not achieved, progress) and what is required to achieve the relevant Sectional Completion dates.

Clause 60.8 makes it clear that tie's acceptance of the Infraco's programme or revised programme does not release Infraco from any of its contractual responsibilities.

QUESTION 3

Does the treatment of concurrent delay differ under Clause 80 from that under Clause 64/65?

In short; no.

Clause 80 comprises the contractual change mechanic which is triggered by Notified Departure. Clauses 64 and 65 deal with entitlement to time relief and time and cost reimbursement for Infraco in

⁹ Jurisprudence provides strong support to attack on global claims of.

respect of non-culpable delay. All three clauses require Infraco to provide detailed analysis of the time implications of the event asserted to impact progress of the works. So that:

- it is the Infraco's works sequencing on the Project on which it has to rely to assert inability to commence activity in an efficient manner;
- where a **tie** Change impacts work progress, in simple terms adjusted works execution against the accepted programme ought to demonstrate how much the **tie** Change will create additional delay.

Under Clause 80.4, the Infraco is required to provide its opinion on relief from obligations, impact on performance of the Infraco Works and upon Programme and to state its requirement for extension of time. The Infraco is also required to update the Programme after the issue of a Change Order. The operation of Clause 80 does therefore provide for the impact of delay from **tie** Change to be factored into the Programme so that the Infraco would need to reveal and assess what it regards **tie**'s contribution to delay and where **tie** delay has dominant cause in preventing or prolonging works activity.

Clause 64 comprises the scheme under which Infraco may assert and establish entitlement to time relief.

[◆]

QUESTION 4

Where Infraco has intimated a Change under Clause 80, who is culpable for the delay in providing an Estimate to tie?

Where, regarding its obligation to deliver on Estimate, the Infraco fails to provide **tie** with a formal request under Clause 80.3 (taking account of Clause 80.11 if SDS design work is needed in relation to any **tie** Change eg Notified Departure) for a reasonable extension of time **within five days** of issue of Notice of **tie** Change, Infraco is in breach of contract. Consequently, **tie** - acting reasonably and taking account of the circumstances¹⁰ -should determine an extension of time in order to discharge tis obligations to act reasonably and in accordance with its duty of public accountability to manage the contract properly. If Infraco is unhappy with this, it can raise a dispute from the starting point of having embarrassed **tie** by failing respect the contract terms. Where no extension of time is asked for

¹⁰ One of which is that in the case of an INTC, it is ilnfraco who has had first knowledge of the need for a tie Change, not tie

or agreed voluntarily by **tie**, a court would examine the facts and determine a period within which Infraco, as a competent contractor, ought to have produced the Estimate. Any additional lapse in time outwith that determination would be delay for which Infraco is solely responsible, as would all delay consequent upon that unexcused delay.

QUESTION 5

What is the contractual remedy for tie in the circumstances where Infraco fail to provide any proposals for mitigation or acceleration and deny tie the option of instructing such measures?

The contractual remedy for **tie** is:

- to analyse and calculate the mitigation measures and acceleration activity which **tie** considers in its reasonable estimation it would have been reasonable for Infraco to deploy in order to discharge its obligations under Clauses 60.9 and 80.4.8;
- to factor the time and cost implications of taking such action into **tie's** evaluation of Infraco claims for additional time and costs; and
- to set these calculated amounts off against payment applications (using Clause 69.3) as saving and efficiency loss and expense sustained by **tie** by reason of Infraco's breach of contract.

QUESTION 6

Is tie obliged to pay SDS Provider an incentivisation payment for delivery of IFCs? Can Infraco successfully assert Compensation Event claims for revisions to IFC drawings? Can Infraco successfully assert Compensation Event claims for late delivery of IFC not contained in the Design Programme at contract award?

(i) SDS claim for incentivisation

It was settled commercially at the time of novation that SDS Provider would be financially incentivised to achieve programme target dates for production of IFC drawings. The bonus was set at £1 million and was to be paid by **tie**.

This position is reflected in Clause 8.8 of the SDS Provider Novation Agreement dated 14th May 2008. SDS Provider were given a further protection in that this bonus payment entitlement is financially inviolable, except where SDS is late in delivery for any reason other than a **tie** Change entitling Infraco to an extension of time.

Analysis

tie will require corroboration from Infraco as to date of delivery of the final IFC Drawings. Since these design elements dictate progression of the works, their comprehensive state of readiness is to be implied in the expression 'last' and in each case of delivery.

tie will be liable to make the incentivisation bonus payment 14 days after the last required Issued for Construction Drawing has been provided by SDS Provider, less an amount of £8,928.57 for every occasion when IFC drawings have been provided after the dates specified in the Decision Delivery Programme¹¹. Key questions are therefore: has the last required IFC been delivered in proper state for use and what instances of late delivery are recorded?

tie will have contractual grounds for either refusing or delaying payment to SDS Provider, if delivery of the relevant full suite of SDS drawings has been made by SDS provider late and without any influence or fault of **tie** or involvement of an Approval Body.

Pursuant to Clause 10.18 in the Infraco Contract, **tie** reserved the right to instruct early IFC release at no risk in relation to later change to IFC Drawings up to a financial cap of £1,500,000 (uncapped where change is required as a result of breach by SDS Provider or the Infraco of their obligations in respect of design content or quality). Instruction by **tie** under this provision has the potential to create a balancing recovery from Infraco in relation to IFC Drawings but not a contra-charge under the SDS Novation Agreement Clause 8.8.

We are not aware if **tie** has sought to operate these clauses.

Claim for Compensation Events by Infraco

Infraco has asserted claims under Clause 65 as a result of IFC drawings being revised.

Compensation Event (t) would be triggered by a failure of SDS to achieve release of the relevant IFC Drawings by the date indicated in the Programme (Contract Programme) for their release, but not¹² if Infraco's Design had not been submitted to the SDS Provider in accordance with the Consents Programme and Schedule Part 14.

¹¹ This is the programme appended to the SDS Novation Agreement.

¹² Clause 19.19

Compensation Event (u) could be triggered if the reason for IFC Drawings being revised is because SDS Provider was in breach of its obligations to Infraco in terms of the quality of the relevant Deliverables (IFC Drawings).

It is for the Infraco to establish the facts that support triggering the Compensation Events and to comply with the provisions of Clause 65 when demonstrating that the alleged event is the direct cause of delay, additional cost or inability to proceed.

Additionally, if the Compensation Event asserted by Infraco is:

Compensation Event (t)¹³ then £8,928.57 is to be deducted (in relation to each event of late IFC Drawings up to a cap of £1,000,000 from Infraco's claim; or

Compensation Event (u)¹⁴, then all amounts recoverable from SDS Provider by Infraco are deductible from Infraco's claim against **tie** (capped at £10,000,000 each and every event).

DLA Piper

16 January 2009

AF/EDIDP/310299/15/UKM/28086887.1
20 January 2010 D1V2

¹³ late delivery of IFC Drawings

¹⁴ deficient IFC