

OPINION OF SENIOR COUNSEL
for
TIE LIMITED
in re
EDINBURGH TRAM NETWORK
INFRACO CONTRACT
and
DISPUTE RESOLUTION PROCEDURE

1. I have been instructed on behalf of Tie Limited (hereinafter referred to as **tie**) with respect to a number of issues which have arisen involving the interpretation of the contract for the **Infraco Works** (which contract is hereinafter referred to as the Infraco Contract) and the dispute resolution procedure which has followed thereon. The principal issues concern the **Contract Price** for which provision is made in terms of Schedule Part 4 of the Infraco Contract.
2. For convenience of reference I set out here the issues which I am expressly instructed to address:
 - (1) Which interpretation of *Pricing Assumption 1 (paragraph 3.4.1 of Schedule Part 4)* put forward by the parties in the Adjudication process is to be preferred;
 - (2) What is the relevance of the Employer's Requirements and the Infraco Proposals to the concept of normal development and completion of designs in terms of *Pricing Assumption 1 (paragraph 3.4.1 of Schedule Part 4)*;
 - (3) What is the relevance of the Employer's Requirements and the Infraco Proposals to what is included in the Construction Works Price (*paragraph 3.1 of Schedule Part 4*);

- (4) Is the Construction Works Price (*paragraph 3.1 of Schedule Part 4*) limited to only what is depicted on the Base Date Design Information;
 - (5) Can it be said that a Notified Departure has occurred in the circumstances where an item of work is not depicted on the Base Date Design Information, but that item of work is nonetheless called for or required by the Employer's Requirements or referred to in the Infraco Proposals;
 - (6) Can it be said that the Infraco is entitled to an increase in the sums due to it under the Infraco Contract in the circumstances where an item of work is not depicted on the Base Date Design Information, but that item of work is nonetheless called for or required by the Employer's Requirements or referred to in the Infraco Proposals; and
 - (7) Is it the case that **tie** have the burden of demonstrating that the exceptions apply to defeat:
 - (i) what would otherwise be a Notified Departure; and/or
 - (ii) entitlement through evaluation of an Estimate.
3. Before dealing expressly with each question which has been posed I would propose to make a number of observations with respect to the terms of the Infraco Contract; more particularly the terms of Schedule Part 4; and the observations made concerning the interpretation of the relevant contract terms by the Adjudicator in the "Decision and Reasons for Gogarburn Bridge" dated 16 November 2009. For the purposes of the analysis which follows I shall assume an understanding of the contract structure and familiarity with the defined terms which are referred to.
4. Although the reasons given by the Adjudicator for his decision of 16 November 2009 may not be distinguished by their clarity they are readily to be construed as meaning that in the opinion of the Adjudicator the **Construction Works Price** is fixed by reference to the work identified in the **Base Date Design Information** with the result that any further work required to meet the **Employer's Requirements** will constitute a **Notified Departure** in accordance with Schedule Part 4 of the Infraco Contract. The Adjudicator's reasoning in respect of this issue is to be found at Paragraphs 7.17 to 7.23, which I set out below for ease of reference.

5.

- 7.17 My finding is that Schedule Part 4 was included because the design was incomplete and therefore some unknowns existed that were beyond the capabilities of the Responding Party to include within their price. In other words how the BDDI was to be developed to IFC could be known in respect of certain factors but not all factors and the unknown or insufficiently developed elements were captured by the provision of the wording in Schedule Part 4 pricing.
- 7.18 The parties are at one that the risk for normal developments to completion of design lies with the Responding Party. This is other than where that risk has been transferred to the Referring Party under one or more of the pricing assumptions set out in Schedule Part 4 Pricing.
- 7.19 My finding is that whilst the occurrence of a Notified Departure is a question of fact I concur with the Referring Party that the onus is on the Responding Party to demonstrate that which they claim falls within the exception set out in the contract.
- 7.20 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 development and completion of designs is outside of the normal course of developments of the detail shown in the initial design i.e. the Base Design Information, into the detail need 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 Part 4 and this 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.
- 7.21 My finding is that matters that will become Notified Departures are matters that fall outwith normal design development that could be construed from the information available to the Contractor 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.

- 7.22 The foregoing does not mean that each and every change becomes Notified Departure or that one can abandon the tests that must be satisfied in order to establish that a Notified Departure has occurred and I shall deal with these now.
- 7.23 My finding is that the first condition that must be satisfied in order to establish that a Notified Departure has occurred is a difference between the Base case assumptions and actual facts and circumstances applying to the Infraco Works. Such change has to fall within the definition set out at section 2.8 of Schedule Part 4 i.e. *“a Notified Departure is where now or at any time the facts or circumstances differ in any way from the Base Case assumptions save to the extent caused by a breach of contract by the Infraco, an Infraco Change or a change in law.”*
6. The Adjudicator’s analysis of the issue has at least a superficial attraction when one comes to consider the provisions of Schedule Part 4 and more particularly the definition of terms in that schedule. The analysis would appear to engage the following line of reasoning.
7. The **Contract Price** incorporates the **Construction Works Price**. (Paragraph 2.5 of Schedule Part 4).

In terms of Paragraph 3.5 the **Contract Price** is fixed on the basis of the **Base Case Assumptions**.

The **Base Case Assumptions** means the **Base Date Design Information** and also the **Base Tram Information**, the **Pricing Assumptions** and the **Specified Exclusions**.

The **Base Case Assumptions** do not include all elements of work required as specified in the **Employer’s Requirements** at Schedule Part 2.

The **Base Date Design Information** means (Paragraph 2.3 of Schedule Part 4) the design information drawings issued up to and including 25 November 2007 listed in Appendix H to Schedule Part 4. As it happens Appendix H lists no drawings under the heading Base Date Design Information and merely refers to “all of the Drawings available to Infraco up to and including 25 November 2007.”

The **Base Date Design Information** is not defined by reference to the **Employer’s Requirements** as set out in Schedule Part 2.

The **Base Date Design Information** does not extend to all work as specified by the **Employer's Requirements**.

It follows that such part of the **Employers' Requirements** as are not the subject of the **Base Date Design Information** cannot form part of the **Base Case Assumptions**.

Where the facts or circumstances differ in any way from the **Base Case Assumptions** there will be a **Notified Departure** in terms of paragraph 2.8.

In terms of Paragraph 3.5 a **Notified Departure** is deemed to be a Mandatory **tie Change**.

8. The result of the foregoing analysis would be that any part of the design of the Edinburgh Tram Network for work required in terms of the **Employer's Requirements** in Schedule Part 2 which was not incorporated in Design Information Drawings issued to Infraco up to and including 25 November 2007 would constitute a **Notified Departure** as defined in Schedule Part 4 and would therefore be deemed to be a Mandatory **tie Change** for the purposes of pricing. That conclusion, whatever its superficial attraction, is in my opinion wrong. I shall now endeavour to set out my own reasoning with respect to this issue.
9. The **Infraco Works** are defined by reference to the **Employers' Requirements** as specified in Schedule Part 2.

Paragraph 1.2 of Schedule Part 4 provides that,

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

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 is not subject to variation except in accordance with the provisions of the Agreement. (Paragraph 3.1 of Schedule Part 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**". The words underlined are in my opinion of significance. The **Contract Price** includes the **Construction Works Price**. The **Construction Works Price** is as noted above a lump sum fixed and firm price in respect of the **Employer's Requirements**. The **Base Case Assumptions** do not embrace all of the **Employer's Requirements**

but only such of those **Employer's Requirements** as are incorporated in design information drawings issued to Infraco up to 25 November 2007.

Paragraph 3.5 identifies a **Notified Departure** as a situation in which facts or circumstances "differ" from the **Base Case Assumptions**. The term "differ" signifies change... it is to make unlike, dissimilar or different. If some aspect of the specification in the **Employer's Requirements** at Schedule Part 2 was not incorporated in the **Base Date Design Information** and is thereafter the subject of design information, that cannot in my opinion constitute a **Notified Departure** for the purposes of paragraph 3.5. If some aspect of the **Employer's Requirements** was the subject of outline design in the **Base Date Design Information** and is then the subject of a design development which does not render it unlike, dissimilar or different to the outline in the **Base Date Design Information** then that again in my opinion would not constitute a **Notified Departure**.(This is subject to the express provisions of paragraph 3.4.1).

In my opinion this view is reinforced by the fact that any **Notified Departure** is deemed to be a Mandatory **tie** Change "requiring a change to the Employer's Requirements". If an element of the work required as specified in the existing **Employer's Requirements** was now to be made the subject of design information which did not alter the **Base Case Assumptions**, it would make little if any sense to deem that to be a matter requiring a change to the **Employer's Requirements**.

This conclusion also appears to me to be consistent with the terms of Schedule Part 2. I would refer in particular to Section 1.1 which provides that "the Infraco shall be fully responsible for the works and services described in these Employer's Requirements and in the Agreement"

and at Section 3.6.1 which provides that,

"the Infraco shall be responsible for the complete design of the Edinburgh Tram Network including the achievement of full compliance with the Employer's Requirements."

Furthermore it does not appear to me to make any clear commercial sense to arrive at a conclusion that the "lump sum, fixed and firm price" referred to in Paragraph 3.1 of Schedule Part 4 extends only to such part of the **Infraco Works** as may have been the subject of design information drawings issued up to 25 November 2007.

10. I would now refer back that the specific issues which have been raised in my instructions. I refer in particular at this stage to issues (3) to (6).

(3) What is the relevance of the Employer's Requirements and the Infraco Proposals to what is included in the construction works price (Paragraph 3.1 Schedule Part 4).

In my opinion the Employer's Requirements and the Infraco Proposals are conclusive as to what is included in the **Construction Works Price**.

As paragraph 3.1 provides, the **Construction Works Price** is a lump sum fixed and firm price for all of the specified work subject only to variation in accordance with Schedule Part 4.

(4) Is the Construction Works Price (paragraph 3.1 of Schedule Part 4) limited to only what is depicted on the Base Date Design Information?

No.

That appears to be the conclusion reached by the Adjudicator in terms of the reasons given for his decision of 16th November 2009. In my opinion such a conclusion ignores the precise wording of paragraph 3.5. This provision stipulates that the **Contract Price**, which includes the **Construction Works Price**, has been fixed on the basis of "inter alia", the **Base Case Assumptions**, and not upon those alone.

(5) Can it be said that a Notified Departure has occurred in the circumstances where an item of work is not depicted on the Base Date Design Information, but that item of work is nonetheless called for or required by the Employer's Requirements or referred to in the Infraco Proposals?

No.

In circumstances where an item of work is not depicted on the **Base Date Design Information** the facts or circumstances do not "differ" from those recorded in the **Base Case Assumptions**. This appears to me to be consistent with the wording of paragraph 3.4.1 which talks about the design of the Edinburgh Tram Network (page 248) " being amended from" the drawings forming the Base Date Design Information or "amended from" the scope shown on the Based Date Design Information and Infraco Proposals. If work required in terms of the **Employer's Requirements** has never been specified in the **Base Date Design Information** then the provision of design information for such items of work cannot on the face of it constitute an amendment from or from the scope of the **Base Date Design Information**.

(6) Can it be said that the Infraco is entitled to an increase in the sums due to it under the Infraco Contract in the circumstances where an item of work is not depicted on the Base Date Design Information, but that item of work is

nonetheless called for or required by the Employer's Requirements or referred to in the Infraco Poposals?

No.

For the reasons outlined earlier I do not consider that such circumstances would constitute a **Notified Departure** for the purposes of paragraph 3.5 of Schedule Part 4. This is subject to the item of work being consistent with the Pricing Assumptions in paragraph 3.4 of Schedule Part 4.

11. The first issue submitted for my opinion is as follow: **“Which interpretation of Pricing Assumption 1 (3.4.1 of Schedule Part 4) put forward by the parties in the Adjudication process is to be preferred?”**

In my opinion the interpretation put forward by Infraco is to be preferred to the interpretation put forward by **tie**.

12. For convenience I shall set out the respective arguments of the parties as recorded in my instructions:

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On the question of fact: the parties are at odds as to the true effect of the Notified Departure mechanism and *Schedule Part 4 (Pricing)* generally, as can be seen by the summary of the respective legal positions adopted by the parties set out below:

tie – (1) *Pricing Assumption 1 (paragraph 3.41 of Schedule Part 4)* is intended to shield Infraco only from the cost associated with the amendment to the Design prepared by the SDS Provider 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 “*normal design development*” being the evolution of design through the stages of preliminary to construction stage; and (2) the only risk which ought properly to be transferred to **tie** is where that evolution of design is outside of the normal course of development of the detail showing in the initial design (Base Date Design Information) into the detail needed to construct the Infraco Works as described, all to meet the Employer's Requirement; and

Infraco – “*If a change in design principle, shape and form or outline specification occurs between the drawings forming the BDDI and the IFC drawings then on a proper interpretation of this Pricing Assumption the changes are automatically*

out with the bounds of normal development and completion of design as defined in this Contract". The Infraco position is based entirely on a reading of Pricing Assumption 1 and giving effect to the final sentence in it. "

13. In my opinion the construction advanced by **tie** does not take full and proper account of the wording which appears in the last three lines of paragraph 3.4. It is stated there that,

"for the avoidance of doubt normal development in completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principles, shape and form and outline specification."

Those words of qualification or exclusion have necessarily to be read into the words which appear in parenthesis in the opening passage of paragraph 3.4.1 of Schedule Part 4. It follows that any change in design principle, shape and form or outline specification cannot constitute the normal development in completion of designs as that term is defined for the purposes of paragraph 3.4 and the application of the Pricing Assumptions.

For completeness I would note that in my opinion where the Design prepared by the SDS Provider involves an amendment from the drawings forming the **Base Date Design Information** or an amendment from the scope shown on the **Base Date Design Information** then the onus of proof will shift to **tie** to establish why this should not constitute a **Notified Departure**.

Parliament House
Parliament Square
Edinburgh
Scotland

14 January 2010

THE OPINION OF

RICHARD KEEN, QC

OPINION OF SENIOR COUNSEL

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TIE LIMITED

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