



"4 Infraco Default" (e): Failure to produce Estimates - INTC 106

1.1 BDDI to IFC Changes for Murray Stadium Retaining Wall (S21B)

1.1.1 INTC 106 was issued by the Infraco on the 15/09/2008 circa 53 calendar days after IFC issue (Doc01)¹. This INTC was predicated on the Infraco's opinion that the BDDI – IFC drawing changes were outwith normal design development.

1.1.2 Consequent to and in accordance with clause 80.3 the Infraco requested a reasonable extension of time to the contract requirement of 18 business days to provide an Estimate². In response to that request, tie in its letter dated 30/09/2008 (amongst other things) granted the Infraco a further 14 business days (in addition to the contracted 18 days) to produce a competent estimate for INTC 106. As a consequence, the Infraco should have submitted an Estimate on or around the 27/10/2008.

1.1.3 On analysis however it appears that the Infraco revised its date for submission 7 times (defaulting each time) before finally submitting an estimate totalling £546,492.22 on 08/06/2010 (Doc02³). This Estimate was submitted 607 calendar days later than originally required under the Contract and 590 calendar days later than the extension of time granted by tie.

Comment [JQ1]: The letters and dates attaching to the 7 instances can be provided, if required.

1.2 Further background information which tie/McGrigors may wish to consider

1.2.1 In response to the Infraco's letter tie stated in a letter dated 07/07/2010⁴ that it did not consider that these works constituted a change. Subject to its opinion that the above noted changes (cited by the Infraco) did not constitute a Notified Departure, tie issued letters to the Infraco dated 13/10/2010 and 21/12/2010⁵. Pursuant to Clause 34.1 these letters instructed the Infraco to proceed with due expedition.

Comment [RB2]: See Acutus email to McGrigors of 28/01/11 at question '1'

1.2.2 In response to the foregoing, the Infraco reasserted that these changes did constitute a Notified Departure and clarified its position with regard to clause 34.1 in its letter dated 18/01/2011⁶. This letter stated that clause 34.1 was considered by Lord Dervaird in the Murrayfield Underpass adjudication and that:-

¹ Infraco letter reference 25.1.201.IO.497. That letter included INTC's 104, 105 and 106.

² Clause 80.2.2

³ Infraco letter ref: 25.1.201.IO.5928.

⁴ tie letter ref: INF CORR 5493.

⁵ Tie letters ref: INF CORR 6441/SC and INF CORR 6969/SBa

⁶ Infraco letter ref: 25.1.201/GA/7847



"It is clear from Lord Dervaird's Decision that following the occurrence of a Notified Departure, the only instruction which tie is permitted to issue prior to agreement of an Estimate is one under Clause 80.15. As such, your purported Clause 34.1 instruction is invalid.

Consequently, Infraco shall not carry out the associated works until we are instructed to do so pursuant to Clause 80.15 or following agreement/determination of our Estimate." (emphasis added)

1.2.3 From the information available to date, it would appear (in the first instance) that the Parties remain in dispute as to whether the works associated with the Infraco Estimate for INTC 106, constitute a Notified Departure. However, notwithstanding the above, recent discussions with tie's DRP team (on 22/02/2011) have indicated that its position in this regard may have developed and that the current issue attaching to INTC 106, may now centre on the 'valuation' of the change, as opposed to whether the change actually constitutes a Notified Departure. **Consequent to the above, clarification on this matter will be essential.**

1.2.4 In light of the foregoing, tie should consider the following matters in order to close out INTC 106:-

- 1) Sufficient dubiety attaches to tie's position on INTC 106, that a review of the core data underpinning its current opinion on INTC 106 is necessary.
- 2) Following discussions with tie's staff we are advised that if tie is of the opinion that INTC 106 is not a change, then the matter cannot be referred to the Dispute Resolution Procedure for determination, pursuant to clause 80:15. By way of explanation clause 80:15 states that:-
"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..."(emphasis added)
- 3) It is our understanding that Murrayfield Retaining Walls (S21B) is currently included in tie's forecasted DRP schedule. We are unclear as to the precise nature of this dispute, but it is mentioned (at this stage) for completeness /awareness.
- 4) Notwithstanding the above, it is relevant to note that as a consequence of ongoing discussions between the Infraco and tie with regard to INTC 625 there exists the possibility that the Estimate for INTC 106 has only interim validity. INTC 625 is likely to have an influence on the construction of the Murrayfield Retaining Walls (S21B) and as a consequence will (in all probability) affect INTC 106.

Comment [JQ3]: Refer to John Hughes' email dated 28/01/2011.