

tie Limited – Edinburgh Tram Network

**Summary of preliminary discussions with Helen Davies QC
in relation to the interpretation to be given to
Pricing Assumption No.1**

- 1 The starting point for interpretation is that the Design will not be amended in terms of design principle, shape, form and/or specification, other than amendments arising from the normal development and completion of design.
- 2 This starting point is then subject to an exclusion: the literal wording of the exclusion is that changes of design principle, shape and form and outline specification are excluded from normal design development.
- 3 The wording of Pricing Assumption No.1 ought to be interpreted in such a way as to give meaning to the concepts that the parties have deployed there: both the starting point of normal development and completion of design, and the exclusion from that concept of some types of change.
- 4 If the exclusion is given a very broad interpretation of the kind contended for by Infraco (such that any change of design principle, shape, form or specification – broadly understood – cannot be normal development and completion of design) then it would emasculate the initial premise: the exclusionary words would make the opening words of clause 3.4.1 empty of meaning.
- 5 It is unlikely, objectively speaking, to have been the intention of the parties that the wording should be interpreted in this way. It would deprive the opening words of the clause of any real meaning.
- 6 It is equally unlikely to have been the intention of the parties that the exclusionary words should be empty of meaning: the difficulty is in arriving at an interpretation which gives some content to those words in a way which reflects the way in which the parties intended to balance risk between them.
- 7 That is likely to involve the exercise of engineering judgement to some extent: the parties intended that to be the case in invoking the concept of normal development and completion of design, which inherently requires the exercise of that engineering judgement.
- 8 There is no "silver bullet": a line cannot be drawn in the sand to provide a definitive answer on what will or will not constitute a Notified Departure. Each example will need to be looked at individually.
- 9 One construction, which on our present view is the construction that is most likely to reflect the presumed intentions of the parties as objectively understood, is that an amendment does not give rise to a Notified Departure if the amendment is necessary to make the design work in a way that complies with stated (i.e. those stated in the contract), statutory or best practice requirements. A strength of this construction is that it fits with other contract terms and imposes an objective test of necessity which ought to minimise the scope for dispute. On this view, an amendment would give rise to a Notified Departure if it goes beyond what is necessary to make the design as set out in the BDDI work in accordance with contractual, statutory or best practice requirements.
- 10 An example of the foregoing construction fitting with other contract terms is as follows: clause 66.1 of the contract states that tie shall pay the Contract Price to Infraco for the carrying out and completion of the "*Infraco Works*". Clause 7.3 of the contract identifies the obligations that Infraco is required to fulfil in performing the *Infraco Works* (which include compliance with the Employer's Requirements, the Code of Construction Practice, applicable law, Good Industry Practice and so on). Carrying out the work in accordance with those standards thus forms part of the work for which the Contract Price is paid. The

contract further expressly envisages that the Design is to be developed in such a way that it meets these requirements. Clause 2.1.4 of Schedule Part 14 C at page 21 states that:

"detailed design takes the preliminary design forward to achieve a series of deliverables, which are tailored to obtain consents and approvals and to provide all information required to allow the Infraco Works to be constructed."

and at page 24 states that:

"Packages of design will be submitted to tie...with an associated Design Assurance Statement, which will detail how the design complies with statutory, stated and best-practice requirements."

- 11 It makes sense that the construction which provides that "normal development and completion of design" involves development of the BDDI designs that is necessary, as envisaged by Schedule Part 14C, so that those designs satisfy the requirements for the Infraco Works set out in clause 7.3 of the contract, for which the Contract Price is being paid.
- 12 Other provisions that fit well with this interpretation (and which are difficult to reconcile with the broad Infraco interpretation) include:
- (a) The provisions of clause 3.1 of Schedule Part 4 which state that the Construction Works Price is a lump sum, fixed and firm price;
 - (b) The provisions of clause 1.2 of Schedule Part 4, which state that the Construction Works Price is on a lump sum basis that is fixed until completion of the Infraco Works;
 - (c) The provisions of clause 3.5 of Schedule Part 4, which state that the Contract Price has been fixed on the basis of *inter alia* the Base Case Assumptions – emphasis added.
- 13 In summary, there is a sensibly arguable case that normal design development is constituted by Infraco developing the design and making changes necessary to meet the Employer's Requirements, Code of Construction Practice *etc.* In other words, normal design development means that which is required to be done to the BDDI in order to take it to the point of being issued for construction in line with the contractual requirements. It might be said that the change is in some way latent in the BDDI from the outset.
- 14 Another construction, which on our present view is also plainly arguable, is that an amendment does not give rise to a Notified Departure if the amendment was reasonably foreseeable to a reasonable contractor in the position of Infraco (or, to take Mr Wilson's slightly different approach,¹ was something that an experienced contractor in the position of Infraco ought reasonably to have expected). A strength of this construction is that it avoids difficulties in choosing between a range of amendments that might be made in order to comply with the contract requirements by asking which of the amendments is the one that a reasonable contractor would have foreseen/expected.
- 15 This is the construction which Robin Blois-Brooke (RBB) supports. This is a less objective test, but it is a test which the contract does envisage in other contexts, *e.g.*:
- (a) Clause 7.13 of the contract;
 - (b) 18.17A.1 of the contract;

¹ Alan Wilson in his adjudication decision stated: "As to "normal" development, I consider that this is the progression towards the Employer's Requirements as would be expected at para 101 by an experienced contractor and his designer. If this results in amendment of the design principle, shape, form and/or specification shown on the BDDI drawings then it becomes a Notified Departure."

- (c) Clause 50.6 of the contract;
 - (d) The Specified Exclusion at clause 3.3(c) of Schedule Part 4;
 - (e) Pricing Assumption No. 39.
- 16 Paragraph 3.8 of draft A of RBB's report sets out different categories of change using the reasonable foreseeability test. Category (b) is "*amendments that an experienced Design & Build Contractor could not reasonably have foreseen*" on the basis of the information that had been made available to him.
- 17 If the appropriate test is one of reasonable foreseeability, then changes which fall within RBB's category (b) would be the changes caught by the exclusionary words in Pricing Assumption No.1.
- 18 Applying the above tests to the bat box example: bat boxes are necessary to comply with the Employer's Requirements. Moreover, because the necessity for the bat boxes is capable of being discerned from the Employer's Requirements, an experienced design and build contractor ought reasonably to have foreseen that they would be needed. Under either test, therefore, the bat boxes would not constitute a Notified Departure.
- 19 Where a change is driven by reasons of buildability only in order to suit or benefit the contractor, then it may be that the change could not be said to be necessary. Under the 'necessary' test, such a change would therefore be capable of constituting a Notified Departure. A different result might apply in terms of the foreseeability test, depending on whether it can be said that the changes to suit the contractor's own purposes ought to be reasonably foreseeable to an experienced contractor, given that they are entirely and solely within his own control.
- 20 A further example can be taken from RBB's draft report in relation to Bankhead Drive Retaining Wall²: paragraph 4.8(1) notes that the overall length of the wall changed from 35 metres to 53 metres. The wall increased in length by about 12 metres westwards and by about 6 metres eastwards.
- 21 RBB considers that the change was necessary in order to give sufficient strength and integrity to the wall. If one applies the 'necessary' test, it therefore falls within the construction of normal development and completion of design first set out above.
- 22 RBB then considers whether this change was reasonably foreseeable. At paragraph 4.11 of his draft report, he states:
- "While some changes to the overall length, height and formation level for this retaining wall would be expected as the design was developed and completed, the particular changes that were made were on a scale that in my opinion that exceeded that which could reasonably have been expected by an experienced Design & Build Contractor based on the information in the Base Date Design Information."*
- 23 In other words, RBB concludes that an experienced D&B contractor ought reasonably to have foreseen some change in the dimensions of the wall – but the dimensions changed so much, that the extent of the change could not reasonably have been foreseen.
- 24 Accordingly, RBB considers that part of this change (the part which went beyond what Infracore might reasonably have expected) is capable of constituting a Notified Departure; RBB then considers at Appendix A of this draft report whether the change is a change in

² The issue of the Bankhead Drive retaining wall has moved on to some extent since draft A of the RBB report. However, in order to illustrate the particular point of principle, the example remains a valid one.

design principle, shape, form or specification – and concludes that it is a change in shape and form.

- 25 Whilst both the foregoing constructions of Pricing Assumption No 1 have much to commend them the prospects of a court upholding either one or other of them must be regarded as uncertain. It will be seen that both approaches require the application of engineering judgement on a case by case basis.

McGrigors LLP
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