Draft text for a letter from tie to Infraco in relation to Pricing Assumption No. 1

A significant area of dispute between us concerns the interpretation to be given to Pricing Assumption No. 1 (Clause 3.4.1 of Schedule Part 4). This is evident from the adjudications that have taken place and those which are currently ongoing. In meetings you have requested that we set out our interpretation and we now do so in order that we can identify where common ground does exist and where we diverge.

Before turning to our interpretation it is helpful to consider your position.

We understand that your position is that Pricing Assumption No.1 ought to be interpreted in such a way as to mean that "[tie] *assumes the commercial risk for changes to design between the Base Date Design Information Drawings and Issued for Construction Drawings which fall into the categories of design principle, shape, form or specification*".[1]

The approach which you have taken has been to ascertain *"…whether each change between BDDI to IFC falls within one or more of the four categories of para. 3.4.1.1. - design principle, shape, form or specification. If a change falls within one or more of the above categories, then expressly by contractual definition, it cannot be normal development and completion of the design because para. 3.4.1 excludes these categories from what might otherwise be understood as normal development and completion of design*[2]".

We consider your approach to be fundamentally misconceived; that view is shared by our advisers and senior counsel.

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.

The Contract Price is defined in Schedule Part 4 as including the Construction Works Price.

Clause 3.1 of Schedule Part 4 states:

"*The Construction Works Price is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirement…and the Infraco Proposals…and is not subject to variation except in accordance with the provisions of this Agreement.*"

Clause 1.2 of Schedule Part 4 states that the Construction Works Price is on a lump sum basis that is fixed until completion of the Infraco Works.

Clause 3.2.1 introduces the Pricing Assumptions and explains that these arise as a consequence of the need to fix the Contract Price against the developing factual background. The Pricing Assumptions are said to "*…represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply.*"

Clause 3.5 is of central importance. It states:

"*The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions noted herein. If now or at any time the facts or circumstances differ in any way from the Base Case Assumptions (or any part of them) such Notified Departure will be deemed to be a Mandatory tie Change requiring a change to the Employer's Requirements and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the Contract Price and/or Programme…*"

[1] Paragraph 4.5 of your Referral Notice in the adjudication before Alan Wilson in relation to the Russell Road retaining wall no. 2 ("the Wilson Adjudication")

[2] Paragraph 5.8.8 of your Referral Notice in the Wilson Adjudication

The relevant part of Pricing Assumption No. 1 states:

"*The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs) in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information…For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification*."

The starting point for the interpretation of these words 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.

This starting point is then subject to an exclusion: applying the literal and wide interpretation which you have argued for the in the adjudications between us that have involved a consideration of Pricing Assumption No. 1 would mean that changes of design principle, shape and form and outline specification are excluded from normal design development.

That interpretation would emasculate the initial premise: the exclusionary words would, on your interpretation, make the opening words of clause 3.4.1 empty of meaning.

It cannot, objectively speaking, have been the intention of the parties that the wording should be interpreted in a way which wholly negates the initial premise that normal development and completion of design falls within Infraco's risk. The concept of normal development and completion of design requires to be given some efficacy and meaning.

Furthermore, the interpretation which you have contended for would produce a result where the provisions of the contract in relation to price referred to above are also deprived of meaning.

The Construction Works Price is a lump sum, fixed and firm price for delivering the Employer's Requirements and the Infraco Proposals. Your price was therefore required to take account of all matters which are stipulated in the Employer's Requirements, and no entitlement to additional payment should flow for delivering the Employer's Requirements.

You have previously relied on clause 3.5 of Schedule Part 4 in this context: that provides that the Contract Price has been fixed on the basis of *inter alia* the Base Case Assumptions: the words *inter alia* here are of crucial import.

The Contract Price is not fixed solely by reference to the Base Case Assumptions. The Construction Works Price – which is one element of the Contract Price – has also been fixed by reference to the Employer's Requirements and the Infraco Proposals. It has not been fixed solely by reference to that part of the Infraco Works which had been incorporated in the design information drawings issued up to 25 November 2007. That would, in any event. make no commercial sense.

Clause 3.5 of Schedule Part 4 provides that a Notified Departure:

"*will be deemed to be a Mandatory tie Change requiring a* ***change to the Employer's Requirements***..." [emphasis added]

Where the BDDI fails to take account of something in the Employer's Requirements it would make little sense for the resulting design change to be deemed to require a change to the Employer's Requirements: the essence of the issue is that the design is changed to take account of the Employer's Requirements, and there is no change to the Employer's Requirements. Your interpretation fails to make sense of the clause 3.5 wording.

Taking the example of change to the BDDI which occurs in order to provide for something which is required by the Employer's Requirements (such as the provision of bat boxes at [3]Gogarburn Bridge) but which was not shown on the BDDI: the Construction Works Price was fixed on the basis that it would deliver all elements of work required as specified in the Employer's Requirements.

To take a further example, the interpretation that you contend for would lead to the proposition that you would be entitled to be paid for changes which you yourselves have promoted – for example, to improve buildability. Such a change would be wholly within your control and for your own benefit: no reasonable person would conclude that it was intended that you would be entitled to be paid for this type of amendment to the BBDI.

It is evident that even on your interpretation, you have accepted that there must be some departure from the literal meaning of the exclusionary words. During the course of the Wilson adjudication, your engineering expert (Mr Hunt) conceded that if a change was *minor* or "*reasonable*" and "*comprising normal development and completion of designs*", then this would not give rise to a Notified Departure.

That would therefore appear to lead to some common ground that the exclusionary words cannot be interpreted in a literal way; we accept that, equally, it cannot have been the intention of the parties that the exclusionary words should be empty of meaning.

Pricing Assumption No.1 requires to be interpreted in such a way as to give meaning to all 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. This should be done in such a way as to reflect the way in which the parties objectively intended to balance risk between them.

Infraco's general obligations in relation to the Infraco Works are set out at clause 7.3 of the contract: those obligations include compliance with the Employer's Requirements, the Code of Construction Practice, applicable law, Good Industry Practice and so on.

The Design is to be developed in such that 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.*"

In arriving at the Construction Works Price, you should have taken into account any amendments to the BBDI which were necessary to meet the Employer's Requirements etc and which could reasonably have been foreseen by a civil engineering contractor experienced in design and build contracts on the basis of the information that was available to you at contract formation.

Normal design development is constituted by you developing the design in order to meet the Employer's Requirements, Codes 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. Accordingly construing Pricing Assumption No 1 objectively in the context of the contract 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 (ie those stated in the contract), statutory or best practice requirements.

In any event consideration requires to be given to whether a reasonably experienced design and build contractor in your position could reasonably have foreseen the amendment on the

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[3] Adjudication decision of John Hunter dated 16 November 2009 at p27

basis of the information that it had at contract formation. If it could reasonably have been foreseen, then you ought to have taken account of it in your price.

Applying these tests to the above mentioned 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. The bat boxes would not therefore give rise to a Notified Departure.

In conclusion our interpretation of Pricing Assumption No. 1 is that you are required to develop the design in terms of design principle, shape, form and/or specification from the drawings forming the BDDI to completion such as is necessary to meet the Employer's Requirements, Codes of Construction Practice etc and in doing so a Notified Departure is not triggered. There is in any event the question of what could reasonably have been foreseen as is mentioned above.

We would invite your comments on the foregoing.

Yours faithfully