

**tie Limited  
Edinburgh Tram Project  
General Contractual Issues**

**Introduction**

- 1 A number of Notified Departures submitted by the Infraco have highlighted the question of whether, and to what extent, there is a link between the Employer's Requirements and the Infraco Proposals on the one hand, and the Base Date Design Information (BDDI), on the other.
- 2 The purpose of this paper is to consider that issue, and assess the relevance it may have to claims made by Infraco.
- 3 The paper also examines the requirements of a Notified Departure.

**Is there a link between the Employer's Requirements/Infraco Proposals and the BDDI?**

- 4 Infraco's obligation is to deliver the Infraco Works<sup>1</sup> for the Contract Price<sup>2</sup>. Infraco's obligations to carry out work are not contractually linked with, or defined by reference to, the Base Case Assumptions, although the Contract Price has been fixed on the basis of, amongst other things, those Base Case Assumptions<sup>3</sup>.

- 5 The Infraco Works are defined<sup>4</sup> as:

*"...the EAL Works and all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it, all in accordance with this Agreement and the Employer's Requirements."*

- 6 The Contract Price includes the Construction Works Price, which is in turn defined<sup>5</sup> as:

*"...a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as Schedule Part 31 and is not subject to variation except in accordance with this provisions of this Agreement."*<sup>6</sup>

- 7 The introduction to the Infraco Proposals<sup>7</sup> states:

*"1.1 BBS Proposals for Civil Works are the SDS Design, to be developed and finalised to Issued for Construction (IFC) status under the Design Management Plan..."*

*1.2 The Design is, at present, incomplete or not issued to BBS for some Sections of the Works..."*

*1.4 The Design will, where possible, be developed and finalised in accordance with Section 3.4, Pricing Assumptions..."*

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<sup>1</sup> Clause 7.3 of the Agreement

<sup>2</sup> Clause 66.1 of the Agreement

<sup>3</sup> Clause 3.5 of Schedule Part 4

<sup>4</sup> Schedule Part 1

<sup>5</sup> Clause 3.1 of Schedule Part 4

<sup>6</sup> That definition appears to contain a typo: the Infraco Proposals are at Schedule Part 30. Schedule Part 31 consists of around 22 drawings showing the land available to Infraco.

<sup>7</sup> Schedule Part 30

- 8 The Base Case Assumptions consist of the following:
- (a) The BDDI;
  - (b) The Base Tram Information;
  - (c) The Pricing Assumptions;
  - (d) The Specified Exclusions;
- 9 The BDDI, which is the SDS design, is defined<sup>8</sup> as "*the design information drawings issued to Infraco up to and including 25<sup>th</sup> November 2007*". The Agreement was entered into on 14 May 2008. There was therefore effectively a freeze on the BDDI some months before contract formation. The information consisted of drawings available to the Infraco in a data room, which gave named Infraco personnel access to live design information. In addition, design information was issued weekly on CD's. Initial investigations by tie are understood to indicate that the data room information is identical to the CD information, although that has still to be confirmed definitively.
- 10 The BDDI is then subject to normal design development: the BDDI which undergo normal design development are intended to yield the Issued for Construction (IFC) drawings. The definition of IFC drawings is "*those Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure*". That Review Procedure is set out in Schedule Part 14, which describes the process of design review.
- 11 What constitutes normal design development will depend in on the nature of each item of design: the design development envelope is an elastic one, but generally the less developed an element of design in the BDDI, the greater the extent of that envelope. If an element of design is already extensively developed at BDDI stage, this is likely to mean that less is required to develop that design to its completed, IFC, form.
- 12 The Notified Departure mechanism uses the Base Case Assumptions, including the BDDI, as a base line, and not the Employer's Requirements and/or the Infraco Proposals. A Notified Departure will entitle the Infraco to a Mandatory tie Change<sup>9</sup>, with the consequent entitlements in terms of time and money.
- 13 A Notified Departure is defined<sup>10</sup> as:
- "Where now or at any time the facts and circumstances differ 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."*
- 14 Drawing the foregoing strands together the linkage between the Employer's Requirements/Infraco Proposals and BDDI appears, at least in respect of the Civil Works, to be via the reference in the introduction to the Infraco Proposals to the SDS Design which is to be developed and finalised to IFC under the Design Management Plan which applies to Deliverables (which includes BDDI). However, the base line from which change is measured under a Notified Departure is the BDDI.

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<sup>8</sup> Clause 2.3 of Schedule Part 4

<sup>9</sup> Clause 3.5 of Schedule Part 4

<sup>10</sup> Clause 2.8 of Schedule Part 4

### Analysis of other contractual provisions which may be relevant

15 There are a number of further contractual provisions which require to be considered. These include:

- (a) Clause 4.4 of the Agreement;
- (b) The provisions of the SDS Novation Agreement;

These are considered in turn below.

#### Clause 4.4 of the Agreement

16 Clause 4.4 of the Agreement provides that:

*"The Infraco confirms that it has studied in detail the Employer's Requirements and each document comprised therein and has satisfied itself that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco's Proposals. The Infraco acknowledges that it accepts all risks arising from any discrepancies, errors or omissions that subsequently appear within or between such documents and that, subject to Clause 4.2, 4.3 and 4.5, it shall not be entitled to make any claim against tie for an extension of time, additional payment, any relief or otherwise in respect of any such errors, discrepancies or omissions."*

17 The first sentence of Clause 4.4 effectively constitutes a warranty by the Infraco that they have checked the Employer's Requirements for internal inconsistencies, and checked for any inconsistencies between the Employer's Requirements and the Infraco Proposals.

18 The second sentence of Clause 4.4 passes the risk "arising from any discrepancies, errors or omissions that subsequently appear within or between such documents", subject to inter alia Clause 4.3, to Infraco in terms of time and money. Arguably the reference to "such documents" links back to "each document comprised" in the Employer's Requirements in the first sentence. However, even if it is construed more broadly so that it covers the Infraco's Proposals Clause 4.3 would prevail. It states:

"Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing)".

19 Furthermore the Infraco will be able to rely on the provisions of clause 3.4 (3) of Schedule Part 4 in this respect, which contains a Pricing Assumption that *"the Deliverables prepared by the SDS Provider prior to the date of this Agreement [which includes the BDDI] comply with the Infraco Proposals and the Employer's Requirements."*

20 Accordingly, to the extent that the BDDI does not *"comply with"* the Infraco Proposals, there will be a change in the *"facts or circumstances"* of the Pricing Assumptions which may mean that there has been a Notified Departure.

#### SDS Novation Agreement

21 Prior to contract formation, it was recognised that there were areas of inconsistency, or misalignment, between the BDDI produced by the SDS Provider and the Infraco Proposals.

22 Clauses 4.6 to 4.8 of the SDS Novation Agreement provides for a series of post contract formation Development Workshops at which this misalignment would be resolved.

23 Clause 4.8 of the SDS Novation Agreement makes reference to payment being made by tie to the SDS Provider for *"the work required for the Development Workshop"*. That would appear to be a clear reference to the design work to be carried out by the SDS Provider. The clause continues:

*"For the avoidance of doubt, the Infraco and tie agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in [the report which is the product of the workshops] will be a Mandatory tie Change under the Infraco Contract, and a Client Change under the SDS Agreement."*

- 24 The Deliverables in relation to each of the misalignment matters listed in Clause 4.7 of the Novation Agreement as at 14 May 2008 (the date of the Novation Agreement) is the base line for amendment. It is a question of fact whether in relation to each misalignment matter the Deliverables were still as per BDDI or whether they had been further developed.
- 25 The question arises as to whether the Notified Departure provisions have any application to the product of the Development Workshop. It is helpful to consider this question by considering Trackform which is one of the identified misalignment matters. The Infraco Proposals contain a Rheda City design solution which is therefore included in the Construction Works Price. The Rheda City solution is not shown in the BDDI. The Deliverables in respect of the civils element of Trackform as at 14 May 2008 comprised the BDDI. The product of the Development Workshop was IFC drawings which adopt the Rheda City solution. This is clearly an "amendment to the Deliverables completed prior to the date of this Agreement" the Deliverables being in this case the BDDI. The consequence is Mandatory tie Change which is the same consequence as a Notified Departure (Clause 3.5 of Schedule Part 4).
- 26 The Rheda City solution is a simpler solution from a civils perspective both in terms of design and construction than the solution set out in the BDDI. The valuation of the tie Change would result in a saving or a credit. Infraco will no doubt challenge this since the Rheda City solution formed part of the Infraco Proposals and was therefore "provided" for in the Construction Works Price. However the position could have been different if the Rheda City Solution was in fact more expensive.
- 27 What does emerge from the foregoing is that to the extent the Deliverables as at 14 May 2008 (which in the case of Trackform was the BDDI) to IFC does involve amendment (Clause 4.8 of the Novation Agreement) a Mandatory tie Change occurs which triggers a valuation in terms of Clause 80.6. This could lead, depending on the facts, to an increase or to a decrease.
- 28 Beyond any amendment of Deliverables as at 14 May 2008 arising as a product of a workshop in respect of any of the misalignment matters resulting in a mandatory tie Change it would also be possible to get to this position via a Notified Departure by virtue of a specific Pricing Assumption having been departed from. This is well illustrated by roads which is one of the listed misalignment matters and which is also the subject matter of a specific Pricing Assumption, namely Clause 3.4.14. In valuing the Change the Pricing Assumption would be taken into account along with the Deliverables as at 14 May 2008 as the base line comparators for considering the design which was arrived at via the workshop.

#### **Conclusion in relation to other contractual provisions**

- 29 In relation to all matters **other** than those misalignment matters identified in Clause 4.7 of the Novation Agreement the foregoing contractual provisions do not alter the base line (BDDI) from which change is to be measured. In relation to the misalignment matters the base line in terms of Clause 4.8 of the Novation Agreement is the Deliverables in their form as at 14 May 2008 subject to any specific pricing assumptions.

#### **Notified Departure**

- 30 A Notified Departure will only arise if the Infraco can bring themselves within all the relevant criteria, and in those circumstances the Infraco will be entitled to a Mandatory tie Change. Those criteria may provide the basis for a challenge to the existence of a Notified Departure. The principal areas are (i) that the facts or circumstances (*i.e.* the IFC drawings) do not differ from the Base Case Assumptions; (ii) design development; (iii) an Infraco breach; (iv) and Infraco change.

**No change in facts and circumstances**

- 31 The Notified Departure mechanism is only triggered where the facts or circumstances differ from the Base Case Assumptions.
- 32 It may be open to tie to establish that there has not been any difference: where BDDI is relatively high level and undeveloped, there may be more scope for tie to show that the IFC design does not *differ* from the original design.

**Design Development**

- 33 "The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):

*1.1 in terms of design principle, shape, form and/or specification be amended from the drawings forming the BDDI...*

*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."*

- 34 The Infraco will therefore not be entitled to a Mandatory tie Change where the change has arisen as a result of design development of the BDDI produced by the SDS Provider. Whether change falls within design development (using the guidelines in Schedule Part 4 referred to above) will be a question of fact, and in particular, engineering judgement<sup>11</sup>.

**Infraco breach**

- 35 There will be no Notified Departure where the change has arisen as a result of a breach of contract by the Infraco. The Infraco will not be held to be in breach of contract simply because their Proposals are not the same as the BDDI – provided that the Infraco Proposals do comply with the Employer's Requirements.
- 36 Separately, the issue of deficiencies in the BDDI has been raised, in the context of whether a breach by the SDS Provider in relation to its obligations in respect of the BDDI would also constitute a breach on the part of the Infraco.
- 37 There may well be instances where the BDDI is defective, and as a consequence of this the movement between that BDDI and the IFC design is considered to go outwith the parameters of normal design development.
- 38 There does not appear to be any provision of the Agreement nor the SDS Novation Agreement which would constitute a warranty by the Infraco in relation to the BDDI.
- 39 Clause 11.3 of the Agreement provides that "*the Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement*". That does not constitute a warranty in relation to the BDDI: indeed, the Infraco could be said to be complying with its obligations under this clause in procuring that the eventual IFC design is compliant, eliminating any deficiencies which had existed at BDDI stage.
- 40 Accordingly, in terms of the Notified Departure mechanism, an SDS breach in relation to BDDI does not of itself automatically constitute an Infraco breach. If the SDS Provider was professionally negligent in producing the BDDI, that would constitute a breach by them of their obligations under the SDS Agreement, and would in turn expose them to liability under it. However, absent any warranty by the Infraco in respect of the BDDI it is difficult to see what the Infraco breach could be said to be.

<sup>11</sup> See McGrigors' comment papers on DRP cases 5A, 5B and 5C

- 41 If the SDS breach does not translate into an Infraco breach, then this will not fall within the exception to the Notified Departure mechanism, with the resulting financial consequence for tie. tie may have recourse against SDS in relation to that financial exposure via the SDS collateral warranty, if<sup>12</sup> negligence on their part can be established.
- 42 However, in relation to SDS breaches at IFC stage, an SDS breach may well constitute an Infraco breach if the IFC drawing is defective or the design fails to meet the Infraco's obligation to minimise costs<sup>13</sup>. For example, if SDS produce an IFC design which is over engineered, and results in unnecessarily high construction costs, that may constitute an Infraco breach. In this event the cost consequences should be borne by Infraco to the extent that they have been caused by an Infraco breach resulting from a breach by SDS. This would be achieved by founding on the Infraco breach exception in the definition of Notified Departure.

### **Infraco Change**

- 43 There will be no Notified Departure where the change has been caused by an Infraco Change, which is defined as "*a change proposed by the Infraco in accordance with Clause 81.1 and approved by tie in accordance with Clause 80 (tie Changes) or Clause 81 (Infraco Changes).*"
- 44 A change proposed by the Infraco in accordance with clause 81.1 will occur "*If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2)*". The Infraco Works are in turn defined by reference to the physical works (as quoted above).
- 45 It will therefore be open to tie to argue that where the BDDI changes as a result of changes proposed by the Infraco then there will be no Notified Departure.
- 46 If the change to the BDDI is treated as an Infraco Change, then the provisions of clause 81 will apply. tie are required to serve a tie Notice of Change. Where the change will result in lower costs for the Infraco, then tie may require a reduction to the Contract Price. Where there is an anticipated increase to Infraco's costs, "*there shall be no variation to the Contract Price unless otherwise agreed by the Parties*".<sup>14</sup> Where the Infraco considers that a change could effect an indexed saving of £20,000 or more, the Infraco is required (at tie's option) to produce a value engineering report which addresses, amongst other things, the Infraco's proposals for a lump sum reduction to the Contract Price<sup>15</sup>.

### **Conclusion**

- 47 The base line comparator for determining whether the IFC drawings constitute a Notified Departure is the BDDI save in relation to those misalignment matters indentified in the Novation Agreement where the comparator is the Deliverables in the form in which they existed as at 14 May 2008 subject to any specific Pricing Assumptions. In a number of the misalignment matters, such as Trackform, the BDDI remained the Deliverables as at 14 May 2008 and the product of the workshop was the IFC drawings. In these cases a Mandatory tie Change is triggered without having to go through the tests laid down in relation to a Notified Departure.
- 48 Both the Notified Departure route and the amendment of the Deliverables in the case of misalignment matters lead to Clause 80. The valuation of the Change may result, as is set out in Clause 80.4.10, to an increase or decrease in any sums due to be paid to Infraco.

**McGrigors LLP**  
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<sup>12</sup> Clause 2.1 and 2.2 of the SDS collateral warranty

<sup>13</sup> Clause 7.5.5 of the Agreement

<sup>14</sup> Clause 81.2.2 of the Agreement

<sup>15</sup> Clause 81.3. of the Agreement

