

**LEGALLY PRIVILEGED FOISA EXEMPT**  
**DISPUTE RESOLUTION PROCEDURE CASE 5A: INFRACO NOTIFICATION of tie**  
**Change Number 111 dated 16 September 2008 re IFC drawing for the Gogarburn Bridge**  
**COMMENT BY McGRIGORS IN RELATION TO tie's CASE**

**CONTEXT**

- 1 Reference is made to the Inventory of Documents and to the documents referred to therein.
- 2 The Dispute which tie intend to refer to the Internal Dispute Resolution Procedure is narrated in paragraph 2.1 of the Position Paper.

**ANALYSIS**

- 3 In order to come within the definition of a Notified Departure it would have to be established that the IFC drawings in question differed from the Base Case Assumptions and that this was not due to a breach of contract by the Infraco, an Infraco Change or a Change in Law.
- 4 Infraco say that they come within the above definition due to the changes in the drawings being outwith normal development and completion of design process.
- 5 In terms of the Pricing Assumptions, which forms part of the Base Case Assumptions, Infraco's contention is relevant and the issue turns on the facts.

Clause 3.4 of the Schedule Part 4 sets out the Pricing Assumptions and in the final paragraph of Clause 3.4.1 the following is stated:

"For the avoidance of doubt normal development and completion of deign 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".

- 6 Infraco have not thus far elaborated on their bald assertion that the IFC drawings go beyond the normal development and completion of design process. However, tie's position is that the drawings do not go beyond normal design development and in particular there are no changes of design principle, shape and form and outline specification.
- 7 The Estimate provided by Infraco appears on any consideration to be both late and deficient in terms of the requirements of Clause 80.4. The Estimate is simply a Bill of Additions and Omissions from the BDDI to the IFC drawings.

**CONCLUSION**

- 8 Whether a Notified Departure has occurred is a question of fact and specifically engineering judgement as to whether the IFC drawings represent normal design development and in particular do not reveal changes of design principle, shape and form and outline specification. In the context of adjudication or litigation proceedings expert engineering evidence would properly fall to be adduced and would be highly influential.
- 9 The Estimate only becomes relevant if a Notified Departure is established. However, the delay in providing the Estimate and its patent inadequacy in relation to the requirements of Clause 80.4 can be properly founded upon in defending any claim by Infraco for an extension of time and/or additional loss and expense.

McGrigors LLP  
24 August 2009

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