

LEGALLY PRIVILEGED FOISA EXEMPT
DISPUTE RESOLUTION PROCEDURE CASE 5c: INFRACO NOTIFICATION of tie Change
Number 146 dated 14 October 2008 re Russell Road Retaining Wall
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 The position in respect of 5c turns on the same issues which have been commented upon in relation to 5a and 5b. As in the case of 5b a Notified Departure is accepted in part. In the case of 5c only two items of work relating to Foundations and Contamination respectively are accepted as properly constituting a Notified Departure. The former by virtue of Clause 3.4.1.3 of Schedule Part 4 (amendment of drawings as a consequence of the requirements of any Approved Body) [to be further verified] and the latter by virtue of Clause 3.3 c) of Schedule Part 4 (contaminated material is one of the Specified Exclusions from the Construction Works Price).
- 4 Certain revisals to the Position Paper were discussed and agreed:
 - Para 2.1 is to be broadened to encompass the challenge to the Notified Departure as well as to the Estimate so as to correlate with the Required Redress in Para 5.
 - Para 3 is either to incorporate the further comments in Para 6 or will contain cross references to Para 6.
 - Para 6.22 and 6.23 which appear in square brackets are to be deleted. The issue highlighted here may require to be addressed depending on the way in which Infraco develop their case.
- 5 It is intended to invoke Clause 80.15. However, it is recognised that Infraco may argue (on a literal interpretation) that Clause 80.15 is only applicable where a Notified Departure is accepted and it is only the Estimate that has been referred to the DRP for determination.
- 6 With regard to everything other than the Foundations and Contamination it is disputed that there is a Notified Departure. It is also disputed that the Estimate satisfies the requirements of Clause 80.4. The comments in respect of 5a apply equally here.

CONCLUSION

- 7 The comments in respect of 5a are entirely applicable and are not narrated again. See in particular comments at Para 8 in relation to expert engineering evidence.
- 8 It may be difficult to successfully invoke Clause 80.15 in respect of those items which are not accepted as constituting a Notified Departure if Infraco challenge this for the reasons set out in paragraph 5 above.

McGrigors LLP
4 September 2009

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