DLA PIPER SCOTLAND LLP

OVERVIEW OF ADJUDICATOR'S DECISIONS

relating to

the works authorised by the *Edinburgh Tram (Line One) Act 2006*

and the *Edinburgh Tram (Line Two) Act 2006*

ADJUDICATOR'S DECISIONS DATED 16 NOVEMBER 2009 IN CONNECTION WITH GOGARBURN BRIDGE AND CARRICK KNOWE BRIDGE

18 November 2009

1. INTRODUCTION

1.1 This paper is an overview of each of the Adjudicator's Decisions dated 16 November 2009 in respect of disputes which had arisen in connection with:

1.1.1 Gogarburn Bridge; and

1.1.2 Carrick Knowe Bridge.

2. OVERVIEW OF ADJUDICATOR'S DECISIONS

2.1 Gogarburn Bridge

2.1.1 The table below repeats the redress sought by **tie** in respect of the Adjudication concerning Gogarburn Bridge, together with the Adjudicator's decision in respect of each redress.

Redress sought	Adjudicator's Decision
Paragraph 7.1 - The Referring Party requests the Adjudicator to find and declare that the matters further particularised in the Infraco Notification of **tie** Change are not a Notified Departure under the Infraco Contract and therefore the Infraco Notification of **tie** Change and the Estimate have no effect under the Infraco Contract and fall to be disregarded and ignored	I refuse the redress sought by the Referring Party at paragraph 7.1
Paragraph 7.2 - The Referring Party requests the Adjudicator to find and declare that the Responding Party are not entitled to any relief and/or additional payment and/or an extension of time and/or compensation in consequence of or in any way connected with the matters further particularised in the Infraco Notification of **tie** Change and the Estimate	I therefore refuse the redress sought by the Referring Party at paragraph 7.2
Paragraph 7.3 - The Referring Party requests the Adjudicator to find and declare that the Responding Party are not entitled to any (1) extension of time or relief from liquidated and ascertained damages under the Infraco Contract; or (2) additional loss and expense incurred by the Responding Party to the extent that completion of the Infraco Works are delayed beyond the Planned Sectional Completion Date(s) as a consequence of or in any way connected with the date of issue by the Responding Party of the Infraco	I therefore refuse the redress sought by the Referring Party at paragraph 7.3

Notification of **tie** Change and/or the date of delivery to the Referring Party by the Responding Party of the Estimate in respect of the Infraco Notification of **tie** Change and/or the absence of a **tie** Change Order in response to the Estimate	
Paragraph 7.4 - The Referring Party requests the Adjudicator to find and declare that the Responding Party are obliged without further instruction, pursuant to the Infraco Contract, to proceed with the carrying out and completion of the works depicted on the Issued For Construction drawings in connection with the structure known as "S29 Gogarburn Bridge".	I therefore refuse the redress sought by the Referring Party at paragraph 7.4
Paragraph 7.5 - The Referring Party requests the Adjudicator to order that the Responding Party is liable for the whole cost of the Adjudicator's fees and expenses in relation to the Adjudication as determined by the Adjudicator, or such other sum as the Adjudicator considers that the Responding Party is liable for	I hereby order that notwithstanding the joint and several liability of the parties the Referring Party shall bear responsibility for my fees and expenses

2.2 Carrick Knowe Bridge

2.2.1 The table below repeats the redress sought by **tie** in respect of the Adjudication concerning Carrick Knowe Bridge, together with the Adjudicator's decision in respect of each redress.

Redress sought	Adjudicator's Decision
Paragraph 7.1 - The Referring Party requests the Adjudicator to find and declare that the only facts or circumstances notified in the Infraco Notification of **tie** Change which constitute a Notified Departure are those which relate to the Galleries pursuant to Pricing Assumption 3.4.1.1.3.	I refuse the redress sought by the Referring Party at paragraph 7.1
Paragraph 7.2 - The Referring Party requests the Adjudicator to find and declare that the Estimate is to contain only those items of work which relate to the Galleries	Having answered the first redress sought in the negative I refuse the redress sought at paragraph 7.2
Paragraph 7.3 (as amended in the Reply to the Response) - The Referring Party requests the Adjudicator to find and declare that the Estimate is to be in the amount of SEVENTY EIGHT	Having answered the first redress sought in the negative I refuse the redress sought at paragraph 7.3

THOUSAND ONE HUNDRED AND NINETY FIVE POUNDS AND FORTY TWO PENCE (£78,195.42) STERLING EXCLUDING VAT (comprised the Referring Party's initial assessment of £71,757.37 less £2,299.00 double-count on anti-pigeon mesh plus £3,250.20 for inspection hatches and £5,486.85 for the additional length of the movement joint) or such other sum as the Adjudicator considers is the true and proper valuation of the works comprised in the Galleries taking into account the whole of the Infraco Contract	
Paragraph 7.4 - The Referring Party requests the Adjudicator to order that the Responding Party is liable for the whole cost of the Adjudicator's fees and expenses in relation to the Adjudication as determined by the Adjudicator, or such other sum as the Adjudicator considers that the Responding Party is liable for	I hereby order that notwithstanding the joint and several liability of the parties the Referring Party shall bear responsibility for 75% and the Respondents of 25% of my fees and expenses

3. COMMENTARY ON ADJUDICATOR'S DECISIONS

3.1 There follows a brief commentary on the material findings and reasoning of the Adjudicator as set out in *section 7.0* of each of the Adjudicator's Decisions in respect of Gogarburn Bridge and Carrick Knowe Bridge. The findings and reasoning of the Adjudicator in each adjudication are broadly similar and therefore the brief commentary set out below applies to both adjudications.

3.2 The Adjudicator concurs in some respects with the position put forward by **tie** (paragraphs 7.18, 7.19 and 7.20) in that:

3.2.1.1 the risk for normal development to completion of design lies with Infraco;

3.2.1.2 the onus is on Infraco to demonstrate that which they claim falls within the exceptions set out in the Infraco Contract (albeit the Adjudicator later contradicts this by finding that **tie** are to prove if any of the exceptions to a Notified Departure as defined apply);

3.2.1.3 the risk transferred to **tie** is where development and completion of designs is outside of the normal course of development of the detail shown in the initial design i.e. Base Date Information, into the detail needed to construct the works as described all to meet the Employer's Requirements; and

3.2.1.4 the entirety of responsibility for the design of the Edinburgh Tram Network sits with Infraco.

3.3 Where the Adjudicator departs from the position put forward of **tie** (and, we think, that of Infraco) is that the Adjudicator is of the view that the Employer's Requirements have to be sufficiently well developed "*within the BDDI procedure*" as a baseline in order to allow the Notified Departure mechanism to operate (paragraph 7.20). Whilst it is not entirely clear, the Adjudicator appears to be saying that the Construction Works Price is limited to only what is depicted on BDDI. He acknowledges the Employer's Requirements but appears to be saying that the priced obligation is to meet them only to the extent that they shown on BDDI. On the Adjudicator's analysis, normal development and completion of the design is then framed by reference to only what is depicted on BDDI, and will not include items necessary to meet Employer's Requirements, which are not shown on BDDI. In the words of the Adjudicator "*if something is not in any way addressed on the drawing* [BDDI] *then I cannot see how it can subsequently be developed*".

3.4 The Adjudicator's finding in this regard is summarised at paragraph 7.21 where he states "*matters that will become Notified Departures are matters that fall outwith normal design development that could be construed from the information available to* [Infraco] *contained within the BDDI. These matters may have been alluded to in the Employer's Requirements as an obligation but because of the lack of complete design had not been sufficiently developed in terms of specification to become part of the price*."

3.5 It is on that point which we are of the opinion that the Adjudicator has fallen into two separate errors - both on substance and procedure. Firstly, to the extent that we can understand his reasoning, we do not agree with it. Secondly, this additional step taken by the Adjudicator is one of his own making and not one which was put forward by either party during the Adjudication proceedings (which point is relevant to potential challenge of the decisions, as discussed further below).

3.6 In turning to comment on the significant findings and reasoning of the Adjudicator.

3.7 *Paragraph 7. 7* - It is important to note that the Adjudicator has not been persuaded by the submissions of Infraco in regard to the pre-contractual factual matrix, at least it is not part of his explicit reasoning although the tenor of Infraco's submissions was that this is a very unusual contract and that, to paraphrase: "the normal rules on what a contractor would be expected to price, do not apply".This might have influenced the adjudicator to look for a radical interpretation but his reasoning is ostensibly based on construing the whole contract, in line with **tie's** submission as to how the Infraco Contract should be interpreted.

3.8 *Paragraph 7.10* - Here the Adjudicator affirms what Infraco have admitted in respect of its manifest obligations concerning responsibility for the design of the Infraco Works.

3.9 *Paragraph 7.12* - It is at this paragraph that the Adjudicator begins to go wrong. This is only his view of the Referral Notice, and does not reflect the position put forward by **tie**, in that the issue before the Adjudicator is not the question of Infraco's design obligations, but instead Infraco's obligation to construct to the Infraco Works and the price for those works.

3.10 *Paragraph 7.13* - Again the Adjudicator wrongly focuses on design obligations, whereas the issue ought properly to be the clear and entire obligation to deliver the Infraco Works in accordance with the Employer's Requirements.

3.11 *Paragraph 7.17* - It is trite to observe that there will be always be an element of incomplete design in respect of a design and build contract. The real issue is whether the design and build contractor can understand what he is to deliver for a price. Very often pricing assumptions or qualifications are included in a design and build form of contract - here there are the forty three contained in *Schedule Part 4 (Pricing)* and incomplete design was not the only reason for their inclusion as part of the Infraco Contract (others for example - ground conditions). It is incorrect to say that incomplete design is the sole function of schedule Part 4. Arguably it isn't even the main function.

3.12 *Paragraph 7.19* - The Adjudicator here agrees with **tie's** position, but he does qualify this later on in his decision.

3.13 *Paragraph 7.20* - The first part of this paragraph reflects the position put forward by **tie** in the Adjudication, being almost a repetition of **tie's** submission on this point. Having said that, the Adjudicator does note that the design is incomplete, which is odd as, again, it would not be design and build if the design were complete. He seems to believe that this is some sort of shortcoming leading to an impossibility in pricing - see para 3.14 below. The Adjudicator then does acknowledge the Employer's Requirements, but only so far as reflected in the Base Date Design Information and acknowledges that the Infraco is obliged to design and build to the Employers' Requirements, but has only priced what is reflected in the Base Date Design Information.

3.14 *Paragraph 7.21* - A core assumption of the Adjudicator is that if the design is not sufficiently developed it cannot be priced - either on a provisional basis or otherwise - it has to be in some way extra. This does not reflect the reality of a design and build form of contract or this contract.

3.15 *Paragraph 7.26* - The Adjudicator here repeats the contractual definition of "*normal development and completion and designs*", but the overall effect of *Pricing Assumption 3.4.1* is not agreed on between the parties.

3.16 *Paragraph 7.27* - The Adjudicator does not agree with Infraco's narrow interpretation of "*normal development and completion and designs*" as meaning only a change in shape, form or outline specification.

3.17 *Paragraph 7.29* - A keystone to the Adjudicator's thinking is, again, that the Infraco cannot price something or extrapolate anything which is not depicted in the Base Date Design Information - everything beyond Base Date Design Information is additional.

3.18 *Paragraph 7.30* - This paragraph is a restatement of the Adjudicator's incorrect thinking.

3.19 *Paragraph 7.45* - Whilst we can agree with the first sentence of that paragraph, again being a repeat of **tie's** submissions in the adjudication, we cannot agree with the second sentence, which represents the Adjudicator's own thinking.

3.20 *Paragraph 7.46* - It is noted that the Adjudicator does not attempt any analysis of the effect of *Clause 4.3*. It is in any event the case that *Clause 4.3* has not been used by Infraco to argue a disconnection between its obligation to design and its payment for that design.

3.21 The Adjudicator at *section 8.0* of his decision then proceeds to apply the findings set out *section 7.0* of his decision to the particular facts and circumstances. Those facts and circumstances are not considered further, as they are principally of a technical nature, but the following comments can be made.

3.22 At a high level the Adjudicator generally finds favour with the approach taken by Ian Hunt (the expert appointed by Infraco). It does not appear that the Adjudicator has been influenced by the pre-contract background submitted by Infraco. Ostensibly the Adjudicator is interpreting the whole of the Infraco Contract.

3.23 In this regard going forward we would need to consider:

3.23.1 the amount of time to be given to any expert (engineer or otherwise) to form an opinion on issues in dispute;

3.23.2 the attitude of the expert (engineer or otherwise) to the concept of the difference between design development and change (in order to guide his opinion on each item in question and to give weight to it in the mind of the adjudicator); and

3.23.3 the willingness of the expert to state as a matter of principle a "rule" as to what is design development, which Bob McKittrick has so far refused to do. An attempt to state a rule (albeit from a legal perspective only) was included in the submissions, but this was not reflected in Bob McKittrick's expert report and (please note) is also not reflected in Bob McKittrick's expert report in respect of the dispute concerning Russell Road Retaining Wall 4.

4. WAY FORWARD AND POTENTIAL GROUNDS OF CHALLENGE

4.1 Going forward, it is more likely than not that Infraco will seek to rely upon the Adjudicator's findings as they are favourable to Infraco's position. This may be manifested in Infraco seeking to lodge copies of the Adjudicator's decision or extracts therefrom in any future proceedings or the current RRRW adjudication, albeit whilst the Adjudicator's findings should not be binding in subsequent proceedings, they could be persuasive.

4.2 Setting aside possible future application of the Adjudicator's decisions, the decisions of Adjudicator's can be challenged in certain circumstances. Two routes are generally available to a party who wishes to challenge an Adjudicator's decision:

4.2.1 a petition for judicial review (in the Court of Session); or

4.2.2 defending an action for enforcement of an Adjudicator's decision. Note here that, as the Adjudicator has not made any declaration as to valuation, it is thought likely that Infraco would only seek to enforce the Adjudicator's Decision if **tie** subsequently refused to acknowledge and accept a value for those matters which the Adjudicator declared were Notified Departures. That might be an application for evaluation of the Estimate through DRP.

4.3 There are a number of areas of the Adjudicator's Decisions where a Court may well find differently from the Adjudicator, but that of itself is not sufficient grounds for challenging the Adjudicator's Decision. An Adjudicator can be wrong in fact or law, but that is not of itself a ground for challenge.

4.4 As to the grounds for challenge, those may be summarised as:

4.4.1 want of/exceeding jurisdiction; or

4.4.2 breach of natural justice.

4.5 In the circumstances here we are of the view that there are the following potential grounds of challenge, which should be considered:

Breach of Natural Justice

4.5.1 In the case of *Cantillon Ltd. V Urvasco Ltd. 27 February 2008 [2008] EWHC 282 (TCC)* it was observed that "*It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd. -v- The Camden Borough of Lambeth, [2002] 16 BLISS 1, was concerned comes into play . It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.*"

4.5.2 With that principle in mind the Adjudicator at *paragraph 7.20* finds:

> "*My finding is that this position is best summed up as follows. The risk which ought properly to be transferred to the Referring Party is where the development and completion of designs is outside the normal course of development of the detail shown in the initial design i.e. the Base Date Information, into the detail needed to construct the works as described all to meet the Employer's Requirements. I would go one step further and clarify that the Employer's Requirements have to be sufficiently well developed within the BDDI procedure as a baseline for proceeding in such a manner. I include this further step as it is clear to me that the Employer's Requirements have in terms of the price for the works been clarified in section 3.1 of Schedule 4 and thus limited by the BDDI and the Schedule Part 4 agreement in respect of the agreed price. I find that to arrive at any other conclusion would, in my view, make Schedule Part 4 meaningless.*"

4.5.3 The first sentence is almost verbatim **tie's** submission in the Adjudication. The words underlined above represent the Adjudicator's own thinking, but fundamentally that thinking materially differs from both **tie's** and Infraco's submissions in the Adjudication (which principally concerned the interpretation and application of *Pricing Assumption 3.4.1*) and does not reflect the legal basis upon which both **tie** and Infraco presented its case in the Adjudication proceedings. In summary, the words underlined represent a critical new legal proposition which neither party put to the Adjudicator and neither party was given the opportunity to consider or comment upon.

4.5.4 It is accepted that Adjudication, as with all proceedings where a decision maker is called upon to make a decision, requires that both parties are given an opportunity to fairly state their case. Whilst the Adjudicator is then free to come to his own conclusions on a legal basis of the dispute, if that legal basis materially differs from how the parties have presented their case or is a point

on which neither party have made submissions on, the Adjudicator is required to give the parties the opportunity to consider and comment on those conclusions, otherwise the parties are being denied the opportunity to fairly state their case. We should note here that the Adjudicator has not merely been silent on Infraco's case whilst awarding in their favour - he does appear to have rejected their view of interpretation of Pricing Assumption 1.

4.5.5 In the circumstances here the Adjudicator should have communicated his own legal proposition to each of the parties and allowed them the opportunity to comment or lead new evidence. This could easily have been done by the Adjudicator, but he chose not to do so.

4.5.6 In our view this mistake in the process by the Adjudicator is a legitimate grounds for challenge - it not being a challenge to the Adjudicator's legal reasoning, but instead a challenge to the fairness of the proceedings.

Jurisdiction

4.5.7 It is also accepted in Adjudication that the Adjudicator as decision maker must exhaust his jurisdiction by answering fully the questions which were put to him.

4.5.8 In the circumstances here the Adjudicator was asked to decide upon the issue of delay in administration of the change mechanism (the delay in the provision of an Estimate in respect of Gogarburn Bridge) and to declare a value of an admitted Notified Departure (the Galleries in the case of Carrick Knowe Bridge).

4.5.9 It is at least arguable that the Adjudicator did not fully apply his mind or answer either of the foregoing questions which were put to him, the Adjudicator deciding that he could not make a declaration in either respect. This failure by the Adjudicator could also form legitimate grounds for challenge, as by not answering all the questions put to him, he is not fulfilling his duty as decision maker.

4.6 In light of the foregoing we strongly recommend as a first step that the potential grounds for challenge of each of the Adjudicator's decisions identified above be explored with senior counsel in order to ascertain the relative merits and strengths of any grounds for challenge. An opinion of counsel on those issues would then form the basis for any future steps which may be taken.

DLA Piper Scotland LLP

18 November 2009