

tie Limited – Edinburgh Tram Network

**Summary of discussions with Richard Keen QC (RSKQC) on 19 August 2010
in relation to the adjudication decision of Lord Dervaird
in connection with Murrayfield Underpass – INTC 109**

Decision

- 1 There does not appear to be anything in the decision or Infraco's submissions which renders tie's arguments in relation to clause 80.13 any less stateable. Indeed, the decision fails to address one of tie's principal arguments, namely in relation to the meaning to be given to the words "*as otherwise directed*".
- 2 However, the prospects of tie's position being upheld by the court must be considered to have been diminished to some extent, given that an experienced legal mind has found against it.
- 3 By contrast, the issue of Clause 34.1 appears to be entirely untouched by the decision. Indeed, on one analysis, tie's position may be strengthened by it. The decision places emphasis¹ on the protection afforded to Infraco by clause 80.16 in relation to an instruction issued pursuant to clause 80.15. This is contrasted with the position under clause 80.13, where it is suggested there is no such protection. Clause 34.3 would provide the corresponding protection in relation to instructions issued pursuant to clause 34.1.
- 4 The factual background to the dispute may have coloured the adjudicator's approach: tie may not have been assisted by the length of time which elapsed before they raised issues in relation to the Estimate, nor the change in position in relation to whether the work in question constituted a Notified Departure (particularly given that tie's arguments are likely to be stronger in relation to the situation where it is not accepted that a change constitutes a Notified Departure). There did not appear to be a detailed correspondence trail in terms of which tie were regularly and consistently either requesting Infraco to proceed with the work, or in relation to the Estimate. This type of factual material would reinforce the real importance of the issue to tie, as well as demonstrate a consistency of approach.

Next steps

- 5 tie ought to proceed to DRP on Clause 34.1 sooner rather than later – failure to do so might be perceived by Infraco as weakness, and it would also serve to underline to an adjudicator (and judge) the importance of the issue to tie.
- 6 In order to proceed to DRP, one or more clear examples of disputed Notified Departures should be identified, in relation to which tie consider their position to be strong. The instruction should then be issued pursuant to clause 34.1, in clear terms. A strong document trail needs to be in place in relation to that disputed Notified Departure, and the instruction. Infraco should be reminded of their obligation to proceed with the work instructed pursuant to clause 80.20²
- 7 Whilst Infraco's position is likely to be that they do not require to comply with the clause 34.1 instruction, they are clearly at considerable risk if they fail to do so.
- 8 Where it is accepted that there has been a Notified Departure, and there is no Estimate, RSKQC agrees with Brandon Nolan's comments at paragraph 9 of his note of 9 August 2010: Infraco should be put on notice of the consequences of their failure to produce an Estimate

¹ Paragraph 23 of the decision

² Added by RSKQC on 22 September 2010

- 9 Similarly, where there has been no Estimate or an Estimate has been disputed, tie should ensure that there is written evidence of regular and frequent requests for the Estimate to be produced, or missing information provided.

Conclusion

- 10 Infraco might be said to have won the adjudication "on points", but the decision offers no knock out blow - tie live to fight another day. However, tie should do so on the basis of a clear and strong factual matrix, selected carefully by them, where there is strong documentary support.

**McGrigors LLP
20 August 2010**

Approved by Richard Keen QC on 22 September 2010