From: Anthony Rush [rush_aj@[redacted]
Sent: 20 December 2009 14:55
To: 'Fitchie, Andrew'
Cc: Steven Bell; Dennis Murray; 'Kilburn, Keith'; 'Bentley, Bruce'; Richard Jeffrey; Graeme Bissett (external contact)
Subject: RE: Changes - Fit for Purpose

Andrew,

Based on what I currently know I agree with **tie's** position on Schedule 4. My reasoning is based on my understanding that Schedule 4 was de facto a counter-offer made by Infraco – an ambiguous expression is construed against the interests of the party who has drafted it. Moreover, general words of exclusion may not cover negligence if there is another construction of the expressions which are not too fanciful or remote. Questions of meaning of expressions presuppose that a Court will be able to read the agreement by applying the ordinary meaning of the words in the absence of a defined meaning.

Schedule 4 proffers no meaning for design principles, shape or form and/or specification or outline specification. It does therefore stand to be defined at the expense of the proferens.

I give meaning to:

Design Principles

Designers must identify the criteria which guides or limits the design generation and serve as the basis for choosing between design alternatives. Design principles may be categorised under three broad headings:

- **Need** – all design begins with a clearly defined need;
- **Creative response** – all designs arise from a creative response to a need; and
- **Delivery** – all designs result in a system, product or project that meets the need

Design development is an iterative process. The process of developments may require the perceived needs to change. Evaluation of the initial concept requires a full understanding of the need as formulated, as well as the constraints (including those imposed by his agreement with **tie**) which affect the formulation of the design. On large-scale projects, such as ETN, the designer must lead the design without inhibiting creative thinking and without reducing the discipline needed to ensure that the final design is compatible with the perceived need.

Moreover the designer needs to take account of constraints arising from the construction or production processes in the design. The designer must make use of all necessary specialist advice, assembling and managing resources and team members with the necessary skills and knowledge needed to create an appropriate and efficient design.. External advice must be well coordinated by the lead designer, and its role in the design development understood. Therefore specialist consultants must be properly briefed by the lead designer on the total context and aims of the project, which should not be confused or compromised by individual disciplinary objectives.

Shape and Form

Anything that can be seen can be said to be a "form". It provides the main identification of the design purpose. Form is not just a visible shape, it has composition (size, colour, textures, material, specification etc). The way form is created can be said to define or design the structure of the required product.

Specifications

Its normal meaning - a detailed, exact statement of particulars, especially a statement prescribing materials, dimensions, and quality of work for something to be built, installed, or manufactured.

In my opinion the terms referred to in 3.4.1.1 can be said to apply to the broad requirements of the project – a tramway from Newhaven to Edinburgh Airport as described in Article F to the Agreement and not to individual elements which are required to achieve that basic concept. This is wholly compatible with the meaning proffered in the clarification footnote to Clause 3.4.1. The clarification does define design development as being a process "*through the stages of preliminary to construction stage*". "Preliminary Design Stage" is defined under Clause 2.4 of the SDS Agreement you attached. The definition under Clause 2.4.1 could be said to expand on what is meant by "shape and form".

It is common ground that if **tie** alters its requirements, this would be an alteration to the Employer's Requirements and necessitate a **tie** Change under Clause 80. You confirm that Infraco's interpretation of Clause 3..4.1.1 is that "normal design development and completion" is constrained only to things which are not changes in design principle, shape, form and specification. For this to mean anything other than I have articulated above, it would mean that the BDDI drawings were de facto fit for construction purposes. This is contrary to the meaning of "design development" attributed to it by the clarification. Moreover it is contrary to the normal meaning of design development:

"Transitional phase of an architect/engineer (A/E) services in which the design moves from the schematic phase to final phase. In this phase, the A/E prepares drawings and other presentation documents to crystallize the design concept and describe it in terms of architectural, electrical, mechanical, systems (and specifications)." (Business dictionary).

I understand it to be a matter of Law that SDS owed **tie** a duty of care in preparing the preliminary design reflected in the BDDI. That duty would appear to be admitted by Infraco to produce a preliminary design from which the final design could be developed. I understand that SDS was at all times in knowledge of the proposed terms of Agreement between **tie** and Infraco. It follows therefore that SDS did not prepare its preliminary design in knowledge of Schedule 4. Schedule 4 being a clarification of Infraco's Price, not the design or SDS's obligations.

I would think that the question of SDS's competency is therefore fundamentally decided by reference to Clause 2.4 of the SDS Agreement in particular and the whole agreement in general. Infraco was aware of this and I understand there were a number of "misalignments" identified and agreed. Moreover, the parties agreed on how these matters should be dealt with.

I doubt whether we will either get an agreed interpretation with Infraco other than one decided by the Courts. Therefore we need to settle on a clear interpretation for tie's project management team to adopt and fashion their Next Steps on. Such Next Steps may include making use of Clause 8.

Tony

Telephone [redacted]

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From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 18 December 2009 14:50
To: Anthony Rush
Cc: Steven Bell; Dennis Murray; Kilburn, Keith; Bentley, Bruce; Richard Jeffrey; graeme.bissett@[redacted]
Subject: RE: Changes - Fit for Purpose

FOISA Exempt and legally privileged

Tony

Trying to keep this to the right length for an e-mail, my responses are:

1. The Infraco adopts the position that pretty much any change to the BDDI drawings is a change which is encompassed in these words (*design principle, shape , form and specification*) because their interpretation of Clause 3..4.1.1 is that "normal design development and completion" is constrained only to things which are not changes in design principle, shape, form and specification. **tie's** position (i) on this technical point, is that within each concept - design principle - shape -,form - specification' - there are practical degrees of change which are quite normal, and the Parties intended this, to expect on D&B contracts and **tie's** expert evidence goes to this point (iii) on the legal point: once the opening of Clause 3.4.1.1 says that there is the concept of "normal design development and completion" within which changes to the BDDI set of Design do not trigger a **tie** Change (Notified Departure), it is a commercial nonsense to go on and read the provision using its final language " *for the avoidance of doubt etc...*" so as to find out that, actually, there is no such thing as 'normal design development'. **tie 's** view on interpretation position is endorsed by one Senior Counsel and qualified by another , whose written opinion we are awaiting.

2. If **tie** alters its requirements, this would be an alteration to the ERs and necessitate a **tie** Change under Clause 80.

3. SDS Provider's responsibility is not expressed as directly as a "fit for purpose" solution. This language often causes resistance to contract terms. I cannot summarise here the range of provisions which frame SDS Provider's responsibilities - but they are expressed variously as:

The SDS Provider shall produce a design which shall deliver overall system functionality, capability and achieve the performance requirements of the Edinburgh Tram Network.

The SDS Provider is responsible for ensuring that there are no gaps or omissions in the specification and design of the Edinburgh Tram Network

SDS Provider's principal duty to **tie** was and is to develop and produce a design and the technical specification (called the Functional Requirements Specification, eventually the ERs) using ***a reasonable level of professional skill , care, diligence to be expected of a a properly qualified and competent systems design services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity***. I have attached a PDF of the core duties provision from the SDS Provider's agreement (and is scope) with **tie**, as novated..

The difficult component here is to what extent SDS Provider would be able assert that its absolute liability for the production of a dovetailed design and output specification was (i) either discharged or in the event compromised by **tie's** decision during the procurement to take on the task of completing the Functional Design Specification itself, with this emerging progressively as the ERs (ii) never clearly incompetent at any time point in terms of timing for delivery because the design delivery programme arrangements throughout the commission may not have articulated with enough precision what was to be complete by when..

4. BDDI as a fit for purpose solution: SDS Provider are deemed to have full knowledge of the Infraco Contract, so that the function of BDDI is within their knowledge. I am not aware of how the concept of a design freeze was discussed with SDS in the autumn of 2007. We have had numerous recent discussions on the subject of: what is the contractual result of BDDI not being a mature design? Vis-a-vis Infraco: the Parties departed from the position of Infraco taking full responsibility for BDDI's immature state. How much financial responsibility decanted back to **tie** is at the heart is the dispute over Schedule Part 4, particularly para 3.4.1. It is our view that there must be an SDS breach of contract in instances when the BDDI design fell short of what could reasonably have been expected by **tie** to be ready ie a design without gaps - given that as at November 07 SDS Provider had been working on the ETN design for over 2 years.

The extension of this is that where the SDS design in BDDI is demonstrably inadequate against an objective standard (as opposed to requiring revisions), this is an Infraco breach, as they are responsible for SDS Provider performance pre and post novation). This argument has not been tested in the adjudications because there is no designers' opinion available on how good or bad BDDI was in the context of the ongoing SDS design commission for **tie**. It was as a protection against obvious SDS failings or collusion between SDS and Infraco that the Infraco Breach and Infraco Change exclusion to Notified Departure was negotiated into Schedule Part 4 paragraph 2.8 (definition of Notified Departure) and the practical operation of this protection relied upon policing what Infraco and SDS were doing by application of Clause 10 and Schedule 14 of the Infraco Contract.

5. 80.15 Correct: as soon an Estimate is in dispute, **tie** is at liberty to issue an instruction to proceed with 80.12 being the only argument INfraco might have to not doing so. What has happened is that Infraco have refused to produce a sensible and technically competent Estimate, in some case for many months - abusing Clause 80 by asserting that a Notified Departure is so complex no Estimate can be produced for periods of, in some case over a year. The reasons for this inability are directly linked -in my view- to Infraco's indifferent management for SDS and in some instance the fact that they had no sobcontractor to carry out the works.

I am ready to continue discussion when you would like.

kind regards

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Please consider the environment before printing my email

From: Anthony Rush [mailto:rush_aj@[redacted]
Sent: 18 December 2009 09:41
To: Fitchie, Andrew
Subject: RE: Changes - Fit for Purpose

No Rush

Telephone[redacted]

Replies will also be received on my blackberry

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 18 December 2009 09:39
To: rush_aj@[redacted]
Subject: Re: Changes - Fit for Purpose

Tony

Copy will follow when I reach desk this morning.

I will revert on your points.

Kind regards
Andrew Fitchie
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From: Anthony Rush <rush_aj@[redacted]>
To: Fitchie, Andrew
Cc: 'Steven Bell' <Steven.Bell@tie.ltd.uk>; Dennis.Murray@tie.ltd.uk <Dennis.Murray@tie.ltd.uk>; Richard.Jeffrey@tie.ltd.uk <Richard.Jeffrey@tie.ltd.uk>
Sent: Fri Dec 18 09:11:51 2009
Subject: Changes - Fit for Purpose

Andrew

I met up with Steven and Dennis yesterday and they gave me a copy of your latest "Report on Four Key Questions" – would you please be so kind as to let me have an ecopy?

When you and I met we discussed the natural meaning of "design principle, shape, form and/or specification". I am not fully aware of how the parties have acted yet, but I am minded that the natural meaning is very broad – de facto giving a meaning to "competency". I am working from the accepted principle that the "designer" is obliged to design a "fit for purpose" solution. Moreover, TIE can only "change" its "Requirements" - changes to drawings and the design being the responsibility of SDS (before novation) and Infraco (after novation).

The question I have in mind is whether the BDDI adequately defined a fit for purpose solution and if not were SDS obliged to in the knowledge that TIE was relying on it being the case. Moreover, to what extent should Infraco have "covered the deficiencies"

in design in their price. In normal circumstances a D&B Contractor takes on the liability of deficiencies in the pre-tender design and is left to recover his losses (not the Employer's) from the novated designer. To what extent does 3.4.1.1 change that?

I am also hearing that Infraco have refused to carry out work until the revised price is agreed. It seems to me that pursuant to Clause 80.15 (subject to the limitations in 80.12) they can instruct Infraco to carry on. Admittedly, TIE would have to adopt a disputed change on a without prejudice basis, but I am not certain that this would have negative consequences for them.

I have other matters today, but intend to revert to this over the weekend. Your comments would be appreciated – if I am off course please excuse my lack of knowledge as yet.

Tony

Telephone [redacted]

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