

T. Gordon Coutts, QC., FCI Arb.,
6 Heriot Row,
Edinburgh, EH3 6HU.

Tel. 0131 [REDACTED]; Fax 0131 556 5947

Email tgordoncoutts@ed.ac.uk [REDACTED]

24 . 5. '10

Attention S. Bell, Project Director,
Tie Limited
65, Haymarket Terrace,
Edinburgh,
EH12 5HD.

Fax 0131 623 8601

Dear Sir,

Edinburgh Tram Network
Tie Limited v Infraco
Adjudication Section 7A – Track Drainage

Herewith my decision in the above . My fee notes have been separately sent to the principals.

[REDACTED] T. Gordon Coutts , QC.,
Chartered arbitrator

CC Martin Foreman
infraco

copied to Frank McMillan / Alex Gillenpie, Glasgow. [REDACTED]
Keith Kilburn

DECISION

in
Adjudication between

tie LIMITED Referring Party

and

**Billfinger Berger Civils LIMITED and
Others** Responding Party

Section 7A Track Drainage

DECISION

Having considered the written material and submissions for the parties, as supplemented by oral argument at meetings, my decision, the time for which was extended by agreement, is to Find and Declare in respect of the matters depicted on the Issued for Construction Drawings numbered ULE9130-07-DNE00001 to 00009 inclusive in respect of "Section 7 Track Drainage" to which the revised estimate relates; that;

as agreed by the parties

- A (i) The amendment consisting of crossovers of carrier drains comprising part of the drainage between chainage 71000 to 710400 is a Notified Departure (1). The value of the works contained in that Notified Departure is £23,983.23.
- (ii) The amendment consisting of "V" to filter drains comprising part of the drainage between chainage 710000 to 710400 constitutes a Notified Departure (2). The value of the works contained in that Notified Departure is £136,340.61.
- (iii) The amendment consisting of a carrier drain to two "V" ditches comprising part of the drainage between chainage 710400 and 710420 constitutes a Notified Departure (3). The value of the works contained in that Notified Departure is -£1817.90.

- (iv) The amendment consisting of one landfill carrier drain to one filter drain comprising part of the drainage between drainage 710000 to 710400 constitutes a Notified Departure (6)
- B
 - (i) The amendment consisting of one carrier drain and two "V" ditches to one filter drain and two "V" ditches comprising part of the chainage between 710420 and 710650 constitutes a Notified Departure (4). The value of the works contained in that Notified Departure is £10,742.63.
 - (ii) The amendment consisting of one carrier drain and two "V" ditches to three filter drains and two "V" ditches constitutes a Notified Departure (5)
 - (iii) The value of the works contained in that Notified Departure is £72,820.06.
- C The drainage between chainage 710900 to 712579 depicted on the Issued for Construction Drawings numbered ULE91030-07-DNE0003 to 0009 constitutes a Notified Departure.
- D The referring party shall pay 80% of the adjudicator's fee and expenses and the responding party 20% of the adjudicator's fee and expenses. Partners are jointly liable for the fee of the adjudicator's assessor.



T. Gordon Coutts QC FC1 (Arb)
Adjudicator

REASONS/

REASONS

Introductory

Of the various matters which were referred to me arising from an Infraco notification of a tie change (No. 315) dated 24th June 2009 (referring Party production 6) and the procedures following thereupon, there remained to be decided by me after agreements and amendments to the referral of the following: the evaluation of two agreed Notified Departures and whether there was in fact a Notified Departure in relation to a certain portion of the drainage in Section 7A of the overall length of the Edinburgh Tram Network.

Notified departure is defined in the contract as "Where now or at any time the facts and circumstances... differ in any way from the Base Case Assumption, in turn defined as the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions.

That involved some consideration of the Infraco contract and in particular Schedule 4 (Pricing) para 3. My remit is, I consider, restricted to the question of how these provisions in the contract apply to the Section 7A drainage issue before me; and I do not proffer any general view as to the interpretation of the contract as a whole.

Relevant Background

Parties proffered a body of material of some bulk which dealt with the way in which parties arrived at the formula they set out in the Infraco contract in relation to pricing. While of interest, those prior negotiations do not materially assist in the interpretation of the particular provisions as they apply to this dispute. They may provide an explanation of the confusion in and the incompleteness of the material before me. It suggests that the description "novated design and build contract" is not an adequate description of what was agreed but could mislead parties when attempting to resolve differences. What was apparent, however, was that the agreement between the parties was not a typical design and build contract with novated design as at one time was suggested to me in argument. Further, it was agreed not only that at a chosen relevant date (25 November 2007) there were unresolved and incomplete design features but also that at the date the contract was signed, the factual situation and any consequent assumption might have altered. Accordingly pricing the work involved in Section 7A could not be achieved or pricing arrived at solely by simple reference to specific drawings. The contractor did not have any detailed plan for Section 7A. As at 25th April 2007 the STS provider was engaged by tie and reported to tie.

The parties agreed to operate from a snapshot of the design situation at 25/11/07. They thereby created artificially, for pricing purposes an unreal primary concept namely that design details would not be amended. In addition they neither specified nor agreed any order or other matter relating to the precedence of various drawings. Not was there any agreement about the relative importance of or the nature or extent of the design detail they had depicted. All that gave rise to substantial difficulties and permitted parties to

provide me with alternative interpretations which, on their face, (apart from the meaning of "amended" which is dealt with below) could be respectably and responsibly argued from their different standpoints. So where, as here, there were differences between plans illustrating sections and a drainage plan, there was not in terms of the actual written contract any specific means of resolving the difficulty. Neither Party provided any citation of authority.

The Contract

It is noted that the whole contract, of which the disputed section is a small part both in volume and value, was geared to the achievement of a project vision (preamble F). I see the question here as being what can be derived from the incomplete material in areas of the pricing within the construction works price. That involves consideration of para. 3 of Schedule Part 4. The Construction Works Price, optimistically, was said to be a fixed and firm price for all elements of work as specified in the Employers Requirements and the Infraco proposals in schedules part 2 and 31 and not subject to variation (3.1). However a basic exception was then provided (3.2). It narrated

"it is accepted by **tie** that certain Pricing assumptions have been necessary and these are listed and defined in section 3.4 below. The parties acknowledge that certain of these pricing assumptions may result in the notification of a Notified Departure immediately following execution of this Agreement. This arises as consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply".

The execution of the agreement was 14 May 2008.

Para 3.4.1

Central to the contentions of parties is how this paragraph is to be construed. It reads, so far as applicable, thus:

"(i) the Design (sic) prepared by the SDS provider will not (other than amendments arising from the normal development and completion of designs (sic)).

1.1 In terms of design principle, shape form and/or specification be amended from the drawings forming the Base Date Design Information..."

It is further provided that "for the avoidance of doubt normal development and completion of designs 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."

Base Date Design Information is defined as certain drawings issued to Infracore up to and including 25 November 2007.

It is to be observed that "Design" is a wider term than design drawings forming the Base Date Design Information. I consider that there are two strands of thought here and that design information is but an illustration of the "Design". "Design" is not given any restricted definition in this section. The word is defined in schedule part 1 which is called the design of the Edinburgh Tram Network. In part 4, in my view, it must encompass more than the BDDI drawings. How much more may depend on the circumstances and a view on "normal" development. This reference to Design, to have meaning must be related to the whole design of the Edinburgh Tram Network and is not restricted by BDDI drawings.

Notified Capital Departures 4 and 5

The parties were agreed that there had been notified departures. The question was, from what? The competing contentions were: a) that the design was one to be extracted from the DDI drawing DRG00103 by adapting the sections shown there to cover the whole chainage length and b) that the drainage plan DNE001 (REV.2), being the only plan dealing with the whole run of drainage, and further being of later date than DRG00103 was the appropriate one for the pricer to use.

No doubt, had there not been the artificial cut-off point of 25 November these BDDI Section and Plan drawings would have been reconciled into an inclusive DNE plan similar to those issued for construction. That did not happen. I think it could have been reconciled before the cut-off point but it was not. I note from the papers in front of me that DNE plans were prepared but not made available for the entire length of Section 7A. They were not issued to the contractor. There is, therefore, on the written material no clear indication of what had to be priced for except in DNE0001. One asks what is the contractor to do? As a matter of taking a decision about which version or which of the plans as between the competing plans 0001 and 000103 the pricer could not, in my view, be faulted for choosing the plan of latest date, which was agreed to be DAE0001. That view in my opinion, would have been fortified by the manifest incompleteness of detail in DRG00103 at that date. It is noted thereon that design detail remains to be resolved. The pricer cannot be expected to resolve such problems or guess how they might be resolved. The two plans being for different purposes, cannot be readily compared. The only safe assumption was to adopt the simple (and it would appear from the sums contended for) cheaper approach.

I therefore concluded that the contractor was entitled to rely upon and adopt as his measure the latest depiction and found that his description of the Notified Departures were accordingly appropriate. That conclusion meant that the dispute about the appropriate depth of excavation adopted in referring parties valuation is no longer relevant. When it was an issue I had not finally determined as above but would have found that the responding parties approach was better justified.

Since there was no dispute, in the event that I so found, about the valuation of the Departures 4 and 5 which valuation was fortified by the Assessors Report (which I called for to advise me in relation to the quantification of the disputed departures) I declared that the value of Departure 4 is €10,742.62 and Departure 5 is €72,820.06.

Alleged Notified Departure 7

This part of the dispute was concerned with a part of the length of track in Section 7. Parties agreed that Section 7 drainage was a reference to drainage from chainage 710000 to 712579. That is a length of 2579metres. Alleged Notified Departure 7 related to the drainage between chainage 710900 to 712579, a length of 1679metres, which can be contrasted with the 900metres agreed to be covered by BDDI drawings. This disputed length is thus 1.87 times larger than the undisputed length. That fact had to be one of the surrounding circumstances when considering problems in construing the contract in relation to this dispute; also whether the IFC drawings can give rise to a Notified Departure for this portion of the track drainage in the absence of a specific BDDI drawing. It is a substantial length to be encompassed in a natural extension of existing designs, but there may be no alternative between that and no design at all.

The Referring Parties' approach was in essence to pose the question, from what are the IFC drawings a Notified Departure? They founded upon the absence of any BDDI drawings actually depicting this part of the section. They contended that since there were no such drawings there was nothing to be departed from. The matters described in the Infraco notification of the change do not show in any BDDI drawing and accordingly there could be no Notified Departure.

They then posed the question whether the matter which was shown on the only available BDDI drawings had been amended. They asserted that if the work had not been specified in the BDDI drawings then possession of design information for other areas of Section 7 could not constitute or form the basis of an amendment of the design. A thing cannot be amended it was said, "if it is not firstly showing" and, further, that an amendment does not and cannot include additions to or additional detail within a drawing or any development of it.

They also contended that any such amendment would not be a change in design principle shape or form or outline specification. Finally it was argued that the amendment arose from the natural development and completion of designs (para 5.16 of the referral notice).

Since (referral notice 5.7) the IFC drainage was an addition to and so not an amendment from the BDDI drawings, pricing assumptions 3.4.1.1 had no application to that drainage. Those contentions were not materially departed from in the referring party's reply to the response.

The responding party argued in the first place and in general that a comparison can be made between the drawings at BDDI stage (taking account of normal design development and completion) and the IFC drawings in respect of the features of the whole of Section

7A. When that is done Notified Departures through the whole of Section 7A are identified, as asserted in the notification of **tie** change No.315.

The principle contention was that the exact wording of the Pricing Assumptions invite comparison between the Design, defined in the agreement as the design of the Edinburgh Tram Network in its totality and the **BDDI** drawings. Therefore it must be assumed that those BDDI drawings will also show the totality of the Design. For present purposes the comparison is made between the Design as shown in the IFC drawing, and the Design as shown in the BDDI drawings. Any pricing assumption must be concerned with the whole of the Design.

The Pricing Assumptions only invite comparison of individual design features to identify in what respects the Design has been amended - an exercise which has to take place for valuation purposes.

Normal development of the design in drawing 0001 which shows three lines of drainage running alongside the track (being one carrier drain and two V ditches) would extend to the full length of the section.

Further, but for the argument that a thing cannot be amended if it is not firstly showing the Referring Party would (and should) have accepted that Notified Departures extended the whole length of Section 7A.

A Due Diligence report was founded upon by the referring party as indicating that when pricing the responding party must have taken account of the gaps in the design drawings when dealing with the overall drainage. The Due Diligence report indicates, on the face of it, an understanding of what the drainage for the whole of Section 7 would be. Drainage was essential. That report also plainly shows the respondents concern about the facts viz "not a single design element has received formal **tie**/CEC approval" and noted that the design of (certain) sections were still at a preliminary/concept stage or even completely missing. That report post dated 25 November 2007. It points up the distinction between overall Design and detail as in BDDI drawings.

Having considered these arguments as set out in written form and amplified in oral submissions it appeared to me that a critical matter was how "amendment" had to be construed. While the context may be of some relevance, it is clear to me, that the word is apt as a matter of interpretation to include additions to a document or to an inferred design document. There is no reason to attempt to find a restricted meaning although that might appeal to a legalistic approach as opposed to a practical one. The dictionary definition of "amendment" (S.O.E.D.) gives the definition "a change or addition to a document" and the word "amend" is widely defined as "better" "improve" "surpass" "rectify" and does not exclude additions. A good example of the use of the word in common language may be found I consider in the Constitution of the United States. For example, it is difficult to argue that, say, the Fifth Amendment is not an addition providing something which was not previously showing.

Accordingly I reject the argument of the referring party so far as it is founded upon construing the word "amend" in Pricing Assumption 3.4.1.1.

That might be thought, because of the way that the argument for the referring party was presented, to conclude the matter in the respondents favour. But there still requires to be considered whether the respondent was justified and reasonable in making the assumption contended for. Was it appropriate, particularly in the light of the dimensions involved? It is of only minor assistance to consider what happened elsewhere in the disputes concerning this section.

In my view it makes no practical or commercial sense in this context to hold that because there was no specific, discrete drawing giving a plan for this part presently under consideration, the pricer had to devise a figure based on no more than the outline Employers Requirements that there had to be drainage. The pricer had a gap in the drawings he had to fill so he considered all the available materials. He knew and might reasonably assume that the drainage depicted in terms on the available drawings would continue. He knew that the drawings were fixed with the drainage consideration at 26 November and that those were assumed not to be altered. So when one moves from chainage 710899 to the next part, say 710901 it would be natural and reasonable to assume there would be no change in the general plan, rather than speculate on design solutions.

In all the circumstances it cannot be said that it was unreasonable for pricing purposes to regard the configuration continuing and not the possible alterations which would inevitably be made. It is unreasonable and inappropriate to expect that the pricer in the circumstances here had to conclude that what appeared in the end of the day in the IFC drawings was what should be priced at the stage of 25 November 2007.

In the papers presented to me there was a Due Diligence report. This was initially mentioned by the Referring Party to advance the argument that the contractor knew what he was doing and what was required to meet the Employers Requirements. However it is plain from that report that there was at the least some understanding about the drainage for the whole of Section 7A. At page 38 thereof it is noted, with reference to section 7A, "detailed drainage drawings available which show carrier drains running alongside the new tram line" and "the designer has qualified the surveyor information of the existing drainage system" and "drainage schedules for section 7A are missing. Further it was said that not a single design element has received formal tie / CEC approval.

It would appear that it was to cope with such problems that parties adopted the Notified Departure mechanism to which para 3.2.1 refers and which states that the commercial intention of the parties was that in the circumstances outlined in 3.2.2 the Notified Departure mechanism would apply.

Accordingly I agreed with and adopted the contention of the Responding Party, (summarised in their conclusions in Reply at 5.16.1) in my declaration above made, which is in line with the only question ultimately posed at this stage (per Trams letter to me of 23 April 2010)

Adjudicators Expenses

Success in this adjudication has been to some extent divided. Neither party got the declarations they sought in the notice of referral and response. The concessions and agreements were part of the normal dispute resolution process and would not normally attract an award of expenses. However major success overall here lies with the responding party. Accordingly I found the referring party liable for 80% of my fee and the responding party 20%. The assessor's fee I consider to be part of the process of ascertaining and providing the facts to me and I have already indicated that his fee should be met equally by the parties.



T Gordon Coutts QC FCI (Arb)
Adjudicator

