FOR DELIVERY

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Our Ref: KSB\\TIE0003 3\JIM
Your Ref:
Date: 14 January 2011

Dear Richard

Infraco Contract Investigation – tie

What follows is my draft report for tie Limited into the matter you have asked us to investigate up to and including the date of this letter.

Investigation and Instructions

[redacted]

[redacted]

Adjudications
I was provided with copies of a number of Adjudication Decisions which have been issued by various adjudicators Each such adjudication concerned separate issues in dispute summarised as follows:-

Depot Access Bridge
Murrayfield
Tower Bridge
Section 7A
Landfill Tax
MUDFA Revision 8
Russell Road Retaining Wall
Carrick Knowe Bridge
Gogarburn Bridge
Hilton Car Park.

Whilst each Decision turns on its own facts I have considered each one to identify what contractual provisions had been considered by the adjudicators. In general the Decisions centred around *changes* to the scope of the works or situations whereby it was argued by BB that some element fell to be considered a change to the works for which tie is responsible. A consideration of Schedule Part 4 by the adjudicators as part of their Decisions is commonplace and the apparent ability of BB to secure additional time or money under the terms of this Schedule appears to be at the heart of the disputes.

Infraco Contract
I considered the terms of the Infraco contract with specific reference to those terms and conditions which have been the subject of scrutiny in the adjudications.

[redacted]

[redacted]

Clauses 65 and 80

Clause 65 deals with "Compensation Events". In essence it provides that Infraco may apply for more time and/or money should their works be delayed, adversely affected or become more expensive in consequence of defined "Compensation Events". It is concerned with "relief events" to ensure the Infraco contract is not terminated in consequence of such events arising. The clause provides a carefully drafted procedure to deal with such eventualities "Compensation Events" are defined in Schedule Part 1 to the Infraco contract. These are effectively "risks" that tie have assumed in terms of the Infraco contract. These appear to me to have been reported by tie to CEC

Clause 80 deals with "tie Changes". In other words it caters for the situation whereby tie alter the works to be carried out by BB from those identified in terms of the Infraco contract. Again the Infraco contract contains a detailed mechanism for instructing, pricing and programming such changes. This Clause determines that where tie is "deemed" to have issued a Change Notice as a result of the occurrence of a "Notified Departure" (which is defined in Schedule Part 4) then the provisions of clause 80 apply. A "Notified Departure" is defined as "where now or at any time the facts or circumstances differ in any way from the Base Case Assumptions " except where that is caused by Infraco. The Base Case Assumptions are also defined in Schedule Part 4 and basically mean design as at 25 November 2007. These risks appear to me to have been reported by tie to CEC.

Schedule Part 4 and Clause 4.3

[redacted] in my view that the interplay between Schedule Part 4 and the conditions of the Infraco contract presented a clear risk to tie of the price or cost of the works rising should events which the Schedule contemplates occur

It is important to consider key elements of Schedule Part 4. Before doing so the terms of clause 4.3 must be considered. This clause provides as follows:-

"Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing)".

Views may differ between Infraco (BB) and tie on the interpretation of the Infraco contract as a whole but this clause allows BB to drive any claim for relief or payment directly through the terms of Schedule Part 4. Whether or not any Adjudication Decisions are ultimately upheld in

any subsequent process it is my opinion that this clause allied to Schedule Part 4 represented a clear risk to tie that the cost of the works could increase. [redacted] that the terms of the Infraco contract were drafted in a manner that exposed tie to significant risk of cost overrun [redacted]

[redacted]

DLA Piper were fully aware of the potential implications of Schedule Part 4 and, whether or not they were the authors of it, they were intricately involved in its inclusion in the overall structure of the Infraco contract. It is clear they understood its significance. If the intention of their revisal to clause 4.3 was to address the risk of claims through Schedule Part 4 then my view is their drafting does not redress the balance created by the original wording of 15 February. I do not know to what extent DLA Piper discussed this drafting with tie or if the drafting reflected tie's instructions.

There is evidence that DLA Piper did advise tie on the issue of risk prior to the execution of the Infraco contract. In particular there are letters of advice from DLA Piper dated 12 and 18 March and 12 May 2008 on the terms of the Infraco contract and they provided a risk matrix in advance of execution of the Infraco contract which specifically identifies for tie risk allocation as between tie, Infraco or as shared. This matrix and the written advice does not provide any comment on clause 4.3 or the terms of Schedule Part 4. The report prepared by tie at Financial Close does not in my view and on the basis of what I have seen, evidence any misrepresentation by tie of the advice they appear to have been given or of the facts as they believed them to be at that time.

I requested all written communication between tie and DLA Piper in this period. This was supplied. I have not located any advice at all from DLA Piper on the risks associated with clause 4.3 and Schedule Part 4. I have seen no evidence in these communications that tie misrepresented to CEC information or advice received, or not received as the case may be.

[redacted]

Yours sincerely,

Keith S. Bishop
Partner, Construction & Engineering
Accredited Specialist in Construction Law
for and on behalf of Anderson Strathern LLP

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