From: Anthony Rush [rush_aj@[redacted]
Sent: 02 September 2010 17:39
To: Richard Jeffrey
Cc: Fitchie, Andrew; Joanne.glover@dlapiper.com; Torquil Murray; Steven Bell

Richard

I think that Nick Smiths opening paragraph in his email doesn't demonstrate an understanding of what are rather complicated terms which would have been drafted in an easier to read fashion in a standard form of contract – but this is why bespoke contracts agreed as the negotiations proceed (as this did) are so wrong.

I understand that Lord Dervaird's decision is thought to be "obvious" – that may be so but my view is that Lord Dervaird has given some clarity on the matters which divide us. In applying that clarity it will not make any difference to the ultimate gain by BSC from the project – it may take longer and have a delaying effect on completion – it doesn't help us from a price and time certainty basis. But it isn't helpful to BSC unless **tie** decide to give in and agree to inflated Estimates.

I am not certain why Smith should assert that it has been decided that Clause 80.20 is a no-go option – or even what is meant by that – maybe the intention is to be pejorative. Clause 80.20 has to be considered in the context of Clause 80 and the other terms, including those terms which we can rely on if BSC breach Clause 80.20 or any other sub-clause. When you asked me previously about Clause 80.20 I have replied that it takes you back into Clause 80. I will explain why from a commercial standpoint – there may be a different legal interpretation and I will try and identify where.

Firstly, a Notified Departure is deemed pursuant to Schedule Part 4 to be a Mandatory **tie** Change. The absurdity argument is, in simple terms: can it be right that BSC can influence a change from BDDI and expect it to be automatically deemed and paid for as a Mandatory **tie** Change? Moreover: can it be right that the project may be delayed whilst a Notified Departure is challenged through DRP?

Secondly, the straightforward premise of Clause 80.13 is that there is a TC and an Estimate agreed. We say that the subscript to this Clause is if there is a TC arising from a ND and/or Infraco don't issue or agree an Estimate **tie** can instruct them and they should get on with the work (the absurdity argument). Lord Dervaird isn't with us – but he doesn't put a meaning on the words *"unless otherwise directed by **tie**".*

Whereas under Clause 80.15 if the parties have got to the Estimate stage (having agreed there is a TC) and, after attempting to agree the Estimate under Clause 80.9, it goes to DRP **tie** have the alternative to see DRP through, or, if its urgent etc. to issue an instruction to BSC get on under the risk for tie under Clause 80.16.

Clause 80.20 envisages is a position where the circumstance doesn't arise from Schedule Part 4 ND or a TC but Infraco deem an instruction (empowered by Clause 34.1) to be a TC. Under time restraints (20 business days)they have to issue an Estimate which stands mutatis mutandis in place of a DRP in Clause 80.15. That is tie can require Infraco to get on as soon as the Estimate is issued without having to complete the Clause 80.9 procedure, subject to it being urgent etc.

It is also predicated on Infraco considering compliance amounting to a **tie** Change. If they don't it doesn't kick in.

This is where a legal interpretation may differ from my commercial interpretation. The Clause says:

*"If, having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with those instructions would amount to a **tie** Change, then the Infraco shall comply with the instruction ....."*

My view is that if Infraco decide that it is a tie Change, compliance can be satisfied by BSC giving us an Estimate within 20 business days. I think what Smith and others think is that it means that they should in all cases comply by getting on with the works. Maybe, but that takes away the right for tie to reconsider the instruction.

The Clause goes on:

*... and shall within 20 Business Days of any instructions being received, notify **tie** of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by **tie** of such an Estimate, Clause 80.15 and 80.16 shall be deemed to apply mutatis mutandis to the work carried out by Infraco in complying with such instruction.....*

At which point if tie consider the matter urgent etc. They can issue instructions *"to carry out the proposed **tie** Change prior to the determination or agreement of the Estimate by issuing a **tie** Change Order to that effect".* This would seem somewhat gratuitous, if BSC had already started to carry out the work.

The Clause goes on:

*....If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a **tie** Change (either Party being entitled to refer the matter to the Dispute Resolution Procedure if the matter has not been agreed within 10 Business Days of the Estimate being received by **tie**) then the provisions of this Clause 80 (**tie** Changes) shall apply to such instructions.*

What is interesting to note is that this limits the time for agreeing the Estimate (10 business days), whereas there is no prescribed time limit in Clause 80.9.

I also think we have to consider Clause 38 which gives tie powers to require BSC to carry out urgent or emergency work for Health & Safety Reasons. The question I ask myself is: what work involving BSC in additional cost, other than a TC, could **tie** instruct on the grounds of urgency?

Lord Dervaird referred to Clause 34.3 and Brandon has put some weight to this. The relevant part of the clause to this issue is:

*...If such instructions require any variation to any part of the Infraco Works, **tie** shall be deemed to have issued a **tie** Notice of Change requiring such variation, which **tie** Change shall be a Mandatory **tie** Change.*

Of note here is that means of resolving the instruction is drawn back into Clause 80. By Clause 80.14 **tie** has 28 Business days after the Estimate had been agreed to issue a change order otherwise the **tie** Change will be deemed to have been withdrawn, other than for Mandatory **tie** Changes. Pursuant to 80.13.2 it appears that **tie** cannot withdraw from a Mandatory **tie** Change.

Taking account of the above I cannot see from a commercial view point how Clause 80.20 would help us or would have helped us.

We have to recognise the reality of the situation: we can and maybe should have gone to DRP if we believed any ND wasn't a departure.

Tony

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