
From: david_mackay@[REDACTED]
Sent: 24 November 2009 11:07
To: Graeme Bissett (external contact); Richard Jeffrey; Steven Bell; Stewart McGarrity; Dennis Murray; Susan Clark; Alastair Richards
Subject: Re: Output from today's DRP meeting

Graeme,

Thanks, We have a complex bespoke/hybrid contract which obviously makes definitive interpretation challenging to say the least-----no change you might be tempted to say!

Be that as it may there is a long way to travel and we must continue to make all reasonable efforts to try to establish "clarity"-----if that is indeed possible.

The DRP's were part of the journey, with more to come, and yesterday's long session was quite helpful, as was Richard's summary and of course your e-mail. Brandon's incisive and no frills approach was refreshing whereas the DLA response, (or lack of it), continues to really disturb me. However hopefully Stuart's forthcoming summary paper will hopefully help to allay my fears and demonstrate they are not locked in denial .

All of the foregoing will of course be vital for Richard's next exchanges with Darcy and perhaps a;so Siemens.

In a nutshell maybe all I am saying is I agree!!

David

-----Original Message-----

From: graeme.bissett@[REDACTED]
Date: 23/11/2009 17:57
To: "Richard Jeffrey"<Richard.Jeffrey@tie.ltd.uk>, "Steven Bell"<Steven.Bell@tie.ltd.uk>, "Stewart McGarrity"<Stewart.McGarrity@tie.ltd.uk>, "Dennis Murray"<Dennis.Murray@tie.ltd.uk>, "Susan Clark"<Susan.Clark@tie.ltd.uk>, "Alastair Richards"<Alastair.Richards@tie.ltd.uk>
Cc: <david_mackay@[REDACTED]>
Subj: Output from today's DRP meeting

Colleagues, reflecting on today's meeting I think we all agreed that tie should not be waving the white flag because of the Hunter judgement, but a full examination of the implications of that judgement is needed to condition further formal dispute activity alongside continued attempts to find a negotiated solution. The purpose of this note is to summarise what I understand to be the logic behind this approach and the areas which need to be focused on.

In the Gogarburn and Carricknowe submissions, tie contended in overall terms that the changes pursued by Infracore were in fact the product of normal design development and were therefore not Notified Departures. It is understood that the basis for pricing changes is by reference to BDDI drawings not the ERs, but only to the extent that changes are

outwith normal design development, as defined in Sch Part 4, 3.4.1.1. What was surprising in the Hunter judgement was not the analysis of the contract, but the narrowly based assumption that the baseline for changes was precisely what is on (or not on) the actual BDDI design drawings. Infraco / Hunter are implicitly arguing that almost any change to the BDDI designs is outwith normal design development regardless of whether the change is needed to deliver the finished article, in the form of the ERs. It is not clear (at least to me) whether this conclusion is based on robust contract terms or is an interpretation capable of rebuttal. For example, Hunter seems to be very persuaded that his conclusion is the only logical way to interpret the inclusion of Sch Part 4 by the Parties. This is interpretation, not obviously supported by contract terms.

Tie's view continues to be that the ERs represent the benchmark against which "normal development and completion of designs" is to be measured. In this approach, tie is seeing the finished article and interpreting the contract to mean that changes will only be outwith normal design development if they produce a finished article different from the ERs.

The core of the argument seems to me now to be focused on the benchmark against which normal design development is to be measured within the contract's change-pricing process. Tie's basis is the end-point (the ERs) while Hunter / Infraco assess the character of change against the BDDI drawings.

I am not close enough to the fine print of the contract to follow the trail properly, but it does seem clear that a paper and supporting flowchart is needed which addresses precisely this aspect of the change-pricing process. This should show conclusively the legal linkages which support the tie position which was the basis on which tie confidently launched the DRPs. It should also seek out any support in the contract for the Hunter position. This process will naturally pick up the bat-box issue, but I think it is wider than items which are unarguably excluded from the BDDI drawings. The paper needs to be clear about weaknesses in tie's argument, ie those aspects where there is evidence in the form of signals of the parties' intent, common commercial sense or other circumstantial support as opposed to unambiguous contract language.

It does seem that this matter, if I've understood it properly, will benefit from Counsel's opinion, which can be brought to bear on further DRPs.

Although there is another line of defence in the form of the "can't be paid twice" argument, there is merit in seeking to crystallise the legal argument about the change-pricing process in tie's favour, or at a minimum in achieving a further judgement that counter-balances the Hunter judgement, as a basis for a commercial negotiation.

For completeness, I would also suggest that the paper builds in a summary of how the change-pricing process is impacted by the misalignment items and the other 42 pricing assumptions (taken as a group).

Finally, we agreed today that a high-level financial interpretation of the Hunter judgement would be useful. This will need to take account of the impact on programme to be complete.

Sorry if this is self-evident to you all, but let me know if the logic above is broadly right. In addition to informing the decisions on further DRPS, the underlying intention is to help articulate why the Hunter judgement does not nullify the arguments tie believed it had on its side when the DRPs were launched, or in a worst case to identify why those arguments were not sound.

Regards

Graeme

Graeme Bissett

m : +44 [REDACTED]

</BLOCKQUOTE

Money advice when you need it [REDACTED]