
From: Robert Burt [rburt@acutus.co.uk]
Sent: 14 September 2009 09:29
To: Dennis Murray; Fiona Dunn; Susan Clark; John Casserly; Steven Bell
Cc: Anne Connolly
Subject: J084: tie - MUDFA; Suggested way forward to defend against CUS disruption claim(s)

Dear all – as previously discussed, I have noted below outline details of the suggested way forward for dealing with the current CUS disruption claim(s).

CUS' current approach – establishing **tie**'s negative case

As previously discussed, the current approach taken by CUS is what might be termed a 'top-down' global (or 'cost less value') type analysis. That is, CUS has taken the total hours which it alleges has been worked on the diversions during the relevant period¹ and proceeded on the premise that **tie** is responsible for any increase in hours above its tendered productivity. Although some allowance has allegedly been made by CUS for matters for which it is responsible, the overarching philosophy adopted by CUS is that **tie** must have been responsible for this increase. We are still awaiting details of the hours which CUS has accepted as its responsibility (see my email to Philipp Kolon of 10 September 2009).

[¹ **Note:** it has become apparent during discussions, that although the narrative of the CUS claims refer to assessing the disruption 'value' over the period from 1 October 2008 to 31 May 2009, the quantum does not. The quantum relates only to the period up to 30 April 2009. This means that in essence the CUS claims up to 31 May 2009 will be likely to be higher than presently claimed. This however only serves to again demonstrate the global / superficial nature of the CUS claims – they are clearly not linking cause and effect to any degree at all).

In terms of **tie**'s position on this type of approach, we are well advanced in developing a view on the various errors, anomalies and inconsistencies created by this approach. We will therefore be able to provide an initial draft report on same for discussion by the beginning of week commencing 21 September 2009. In essence, as has been discussed, **tie** will be able to use our report on the above to develop its negative case on the current CUS disruption claims.

The negative case set out above however will not be sufficient for **tie** to rely on in any dispute resolution forum. Although the criticisms are entirely valid, absent any other evidence from **tie** as to the true measure of disruption incurred by CUS, an adjudicator will be left with some sort of evidence and analysis from CUS and only criticisms from **tie**. The risk to **tie** of relying solely on the negative case strategy is that the adjudicator could try to make due allowance for **tie**'s criticisms and be tempted (or be left with no other option but) to rely on CUS's evidence/analysis (albeit flawed).

As such it is essential that we develop a positive case for **tie**. We therefore need to get away from the CUS global approach and get back to an approach which seeks to analyse the disruption actually incurred as a result of only the matters for which **tie** is responsible (which is how the CUS claim should be framed in any event). This is discussed below.

tie position (i.e. developing **tie**'s positive case)

As discussed, clearly the extent of analysis which would be required to reply to all CUS claims in all sectors is prohibitive both from a time and cost perspective. As such, we propose that a specific window of time within one sector be analysed.

1. **Work Sector:** As we are likely to obtain more detailed information from CUS on, and therefore a better insight into, the 'York Place to South St. Andrew's Street' work sector, it seems sensible to look at this area.
2. **Period for analysis:** as discussed, we will have insufficient time to review the whole period covered by the CUS claims even in this sector. Therefore, we need to pinpoint a window of time to analyse. We suggest that we pick an appropriate window (a minimum of one month or 4 weeks, possibly up to two months) following discussion with your site supervision.

That window selected should be one which contains matters which are the culpability of both tie and CUS plus neutral events (such as adverse weather and the like).

3. **Process of analysis:** the analysis of that period will necessarily consider the following:-
- a. Look at activities planned to be undertaken during the relevant period. We should be able to use a combination of the Work Order Programme and / or any look ahead programmes issued by CUS as the works in that area progressed.
 - b. Look at the planned resources for those activities. In this regard, CUS has undertaken to provide a detailed rate breakdown for the original Work Order. This can also be cross-checked against the 'Carp' rate details previously submitted by CUS.
Consideration will also have to be given to whether the planned resources would have been adequate.
 - c. Look at activities actually undertaken and the period of time taken for same. We will be able to use the CUS as-built programme submitted as part of its recent claims (although the veracity of the dates / data will have to be checked);
 - d. Review the issues raised by CUS in its delay / disruption analysis for that period and see how and in what manner they would have affected (or did affect) the CUS activities;
 - e. Discuss and then consider issues raised by **tie** site supervision for which CUS are responsible but which may not be highlighted within the CUS claims.
 - f. Look at weather records and whether adverse weather affected activities / productivity.

A progressive analysis of the above should give a much better indication of the actual measure of disruption caused to CUS operations as a result of the matters for which **tie** is responsible.

Most importantly, it avoids starting on the basis that all the hours are to **tie**'s account unless something is specifically deducted.

4. **CUS hours claimed in period:** by way of a 'health-check' on the above, the alleged actual hours claimed by CUS during the relevant period should be reviewed. We should seek to understand any major discrepancies during particular relevant weeks. Whilst there will inevitably be an unallocated balance of hours – this would be for CUS to explain not for **tie**.
5. **Parallel exercise:** someone from **tie** should also review the whole CUS table of disruption issues for this section in order to arrive at a position on each issues. This would entail firstly, identifying whether it is accepted as a matter for **tie** culpability. The second step would be to arrive at an assessment of the disruption caused by any event which is accepted as being tie's responsibility. The focus for that element of the exercise should however be on the items which occurred during the window identified in item '2' above.

Note: It would probably be prudent for that exercise to be extended to all four work sectors which are the subject of the current CUS claims

In order to progress the first part of '2' and '3' above, we have arranged to meet with one of your assistant project managers for 'York Place to South St. Andrew's Street' (Kevin Gray) on Monday to discuss a suitable period which could be analysed. We have also arranged to meet with John and Thomas on Monday to discuss both this and the negative case on the current CUS' claims. The intention would then be to revert and agree how to tackle the remainder of the exercises listed above. It would be helpful if you could advise who from **tie** would be best placed to consider and advise on the **tie** position for each of the alleged delay / disruption issues claimed.

Perhaps you could consider the above and revert with any comments you may have.

Kind regards

Robert

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