
From: david_mackay@[REDACTED]
Sent: 09 February 2009 16:48
To: Andrew.Fitchie@dlapiper.com; Steven Bell; Stewart McGarrity; Dennis Murray
Cc: Joanne.Glover@dlapiper.com; Keith.Kilburn@dlapiper.com; Graeme Bissett (external contact)
Subject: Re: BSC behaviour

Andrew,

Given the events of today your email makes even more interesting and indeed stimulating reading.

The senior team here will debate the foregoing further at our session tomorrow and we'll report back.

Thanks!

David

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

From: Andrew.Fitchie@dlapiper.com

Date: 09/02/2009 16:14

To: "Steven Bell" <Steven.Bell@tie.ltd.uk>, "Stewart McGarrity" <Stewart.McGarrity@tie.ltd.uk>, "Dennis Murray" <Dennis.Murray@tie.ltd.uk>

Cc: "Glover, Joanne" <Joanne.Glover@dlapiper.com>, "Kilburn, Keith" <Keith.Kilburn@dlapiper.com>, "Graeme Bissett" <[graeme.bissett@\[REDACTED\]](mailto:graeme.bissett@[REDACTED])>, <[david_mackay@\[REDACTED\]](mailto:david_mackay@[REDACTED])>

Subj: BSC behaviour

Legally privileged and FOISA Exempt

Steven
Dennis

I have been giving more thought to how **tie** could increase pressure on Bilfinger Berger in a situation where Siemens (and CAF) may be indifferent at the moment.

There is one move which might used to unseat BB UK Limited - the issue of a formal default notice as an ostensible precursor to a call on the BB AG/Siemens AG parent company guarantees (as opposed to the performance bond where **tie** would, conventionally, need to claim either terminal breach or breach causing serious demonstrable financial loss) on the basis that there are repeated breaches of contract which BB UK does not appear to be capable of remedying. Were such a notice to be issued, it ought to trigger internal and potentially external reporting duties on BB UK. The default notice would also be seen by Siemens AG.

Obviously, such a step all the way to a call would require very careful analysis (and preparation in terms of notification), but:

- there is no immediate downside for issuing the default notice, nor is there any requirement to pursue it to the point of call on the PCG, if the threat of **tie** doing so resulted in a more reasonable approach.
- the form of notice would cite the breaches of contract and it would not be immediately apparent to BSC whether the performance bond or the PCGs were going to be called
- there are no restrictions on what type of breach needs to be at issue, how many calls can be made or any consequence of withdrawing a call on the PCGs

- if a call is made and the result was a denial by BB AG that there had been any breach of contract, a dispute is crystallised.
- does Dr Kaisberg want a contract - which he is charge of - to have a PCG call showing
- I am not certain that Bilfinger Berger will have taken advice on performance security calls at this point - in which case there should be an unsettling effect

Lastly, I am acutely conscious of how hard it is at the moment for **tie** management to preserve effective working relationships with BSC and, as I understand matters, I consider that **tie** probably has done more than clients often do on that front. I am focused again on our advice on the need for **tie** to preserve rights legitimately by having in place the right documented contemporary audit trail on **tie's** view on the consequences of BSC's behaviour. Particularly important when DRP may be in the offing.

kind regards

Andrew Fitchie
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