From: Jim McEwan
Sent: 04 March 2008 07:59
To: Fitchie, Andrew; Steven Bell; Geoff Gilbert
Subject: FW: SDS Novation Agreement - Revised Draft

Andrew

Re Ian's point number 3, I believe we agreed that the contract would be signed prior to conclusion of this exercise and that any changes to programme/deliverables/cost would be dealt with, implicitly, by variation through the formal change process.

j

From: LAING Ian [mailto:Ian.Laing@pinsentmasons.com]
Sent: 03 March 2008 14:52
To: Fitchie, Andrew; Richard Walker; flynn.michael@siemens.com; MOIR Suzanne; Martin Gallaher
Cc: Geoff Gilbert; Jim McEwan; Steven Bell; Horsley, Chris; Hecht, Philip
Subject: RE: SDS Novation Agreement - Revised Draft

Andrew

Many thanks for this.

I have seen Steve Reynolds' response to this and Jim's comments on that. Matters seem to have rested with Jim's e-mail to Steve on 29th February at 13.12. Has there been any further progress?

I have a number of comments on the draft which I have set out below and are subject to client comment. Before turning to those, it would help me (and I suspect others, including the SDS) to understand the process in terms of the instructions that are to be issued by tie to the SDS. The two critical instructions are to align the SDS design undertaken to date with (i) the Employer's Requirements and (ii) the Contractor's Proposals. The purpose of that is to understand the extent of any misalignment and how this will be resolved in terms of amended Deliverables. As I envisage the process after that it is as follows:

1. tie review the misalignment issues and determine whether a change is required to the ERs or the CPs.
2. tie issue appropriate instructions after consultation with BBS and SDS.
3. the Deliverables, Contract Price and Programme are updated to address the "new" Deliverables coming out of the alignment process (with BBS being held harmless from the consequences of that exercise)
4. when all the above has been resolved, this is the earliest point at which novation of the SDS Agreement can occur.

I suspect that the real "issue" (if there is one) is 4 above but I cannot see how we can complete the novation until 1-3 have been completed. Can you let me have your thoughts. Did tie envisage the process differently?

In relation to the detail of the amended draft, I have the following comments:

Clause 1

- How is it intended that the term "Issued for Construction Drawings" will be used? Whilst the term has been defined, it is not used anywhere in the document.
- In relation to the detail of the definition of "Issued for Construction Drawings", the question, I think, is what amounts to the "**complete package** necessary for Infraco to commence construction". This links to the question I raised previously about "Design Stage Consents" (what amounts to "any further **design related** Consents").
- Please can you clarify what the respective functions of the "Disclosure Statement" and the "Disclosure Letter" are.

Clause 4

- In relation to Clause 4.2.2(c)(A)(vi), I note that there is a reference to the draft agreements with the SRU and EAL. When is it envisaged that these will be concluded? We will need to be satisfied that the drafts align with the Infraco Contract.
- In relation to Clause 4.2.2(c)(B), the issue for BBS (as we have discussed) is that the Edinburgh Tram Network must be capable of being constructed, tested, commissioned and thereafter operated and maintained within the land which tie is making available to BBS. The drafting should therefore link to the land tie is making available in accordance with Clause 18 of the Infraco Contract. The relationship between this and the limits of deviation in the Tram Legislation is not clear to me due to the absence of plans. Perhaps you could clarify.
- the amendment at the end of Clause 4.2.2 should read ".....are consistent with **and adequate to ensure compliance with** the Employer's Requirements".
- Is Clause 4.6 required? This links to the question of the process raised at the outset of this note. It is perhaps worth repeating that I cannot see how the novation can take place without this exercise having been completed in which case I would have thought this clause is not necessary. Subject to clarification on that issue, is it not the case that any confirmation should be given to BBS. Why would tie be interested in such confirmation - it is difficult to see how any inaccuracy in the statement to tie would be actionable.

Clause 5

- My understanding is that there should be not outstanding disputes. That being the case the statement by tie should not be qualified. We have agreed that the SDS shall be novated "clean". BBS cannot be liable for any pre-novation liabilities or disputes. If tie cannot give a clear unqualified statement to this effect then tie ought properly to indemnify BBS from any pre-novation liabilities.

Clause 8

- The agreement as I understand it is that the novation is to be clean. Clause 8.1 ought therefore to end at the words "paid by tie".
- In relation to the work that will be undertaken by SDS as a consequence of the soon to be issued instructions, I envisage that this will have been completed and paid prior to novation.
- Delete Clause 8.5. The amendments are set out in Appendix Part 1 which is correct.

Clause 12

Please revert to our original drafting.

Appendix 1

Clause 1.1

- Please see earlier comments in relation to "Design Stage Consents". As noted, we are not satisfied that the description of "any further design-related consents" is adequately clear. Please can you let me have your thoughts on this and/or proposals for amendment.
- In relation to Table A, we will need definitions for many of the descriptions and in particular "Design Consultation", "Undertakings", "Agreements" "Letter of Comfort" and "Letter of Closure".I am not satisfied that there are terms of art sufficiently understood in the industry to avoid uncertainty.

Clauses 5.7 to 5.10

I appreciate that these clauses link directly to the drafting currently under consideration in the Infraco Contract and that has been in circulation for some time. However it has been necessary to consider the drafting in the context of the discussions last week with the SDS. The impact on the drafting of the comments set out below (if any) should also be reflected in the Infraco Contract.

- Clause 5.7. Delete. The SDS and BBS will need to get comfortable with the definition of Compensation Event in the Infraco Contract. Thereafter the existing definition is adequate to deal with this.
- Clause 5.8.1(ii). Delete. The concern here is one of timing. As the process is now understood, there is no "fat" in the timing of the various periods to get to IFC. That being the case, the impact of Clause 5.8.1(ii) would be to introduce a period of delay (the timing of the various steps in the process currently makes no allowance for any such meeting with the effect that introducing this step must result in a delay as the right to a Compensation Event only occurs after the opportunity meet and any resultant meeting has occurred) which would be at the risk of BBS. That is not the agreed risk allocation.

- Clause 5.8.1(iii). Delete as irrelevant. Obligation to mitigate addressed elsewhere and introduction of a "future" pre-condition to the Compensation Event is not appropriate.
- Clause 5.8.2. Reference to "agreed requirements of an Approval Body" not understood. We will need to consider the link to the Design Management Plan. To be discussed further with tie and SDS and amended in light of the actual process that will take place.
- Clause 5.8.3. To be reviewed when Infraco Contract is more stable. Notified Departures, for example, may need to be addressed.
- Clause 5.8.4. This needs to be amended to fit with the agreed timings set out in the Programme. After "caused" add "solely". It is clear from discussions with the SDS that a very significant number of factors will come into play in the timing of the Approval Body consent. Frankly, discussions from last week create even greater concern that this hurdle will simply be used to strip BBS and the SDS of any protection. tie should properly bear the burden of proof that the sole reason for the delay is the log-jam caused by other Consents.
- Clause 5.9. Not understood. What is the intention of this drafting? What is the link to Clause 5.8?

Clause 27. To be discussed separately when SDS have responded to commercial proposal. Please note, however, that the issue over whether or not the LDs are a penalty is one which tie should bear the risk on. If the LDs are unenforceable for any reason, the LDs should not be deducted from sums due to BBS under the Infraco Compensation Event mechanism. tie have set the level of the LDs and tie should accordingly bear the risk that these are challenged as not being a reasonable pre-estimate of loss.

I shall respond separately in the Disclosure Statement.

Regards

Ian Laing
Partner
Pinsent Masons LLP

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From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 27 February 2008 18:13
To: Richard Walker; Reynolds, Steve; Atkins, Chris; flynn.michael@siemens.com; roddy.gordon@watsonburton.com
Cc: LAING Ian; Geoff Gilbert; Jim McEwan; Steven Bell; Horsley, Chris; Hecht, Philip
Subject: SDS Novation Agreement - Revised Draft

Gentlemen

Please find attached the revised draft SDS Novation Agreement. The document is blacklined against the DLAP draft which we were suing yesterday and which , I think , Roddy had marked up.

The amendments follow yesterday's discussions and also develop beyond drafting notes in order to move to a complete document as quickly as possible.

There will be some work required to align definitions properly but in the interests of moving swiftly I consider that this is the best platform in the time available. It remains subject to **tie's** final review as well as some comments from BBS (which are marked in the text (where potential input is outstanding). Ian has already provided me with observations on Design Stage Consents and Issued for Construction which I am considering.

Kind regards

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