
From: Dave Anderson [Dave.Anderson@edinburgh.gov.uk]
Sent: 13 April 2011 07:24
To: Steven Bell
Subject: RE: Comments on MOV1 Draft

Thanks Steven. I'll catch up with you at TPB today. Events seem to be moving fast and I'm keen to ensure that the communications links don't suffer. Dave

Sent from my HTC Touch Pro 2 on Vodafone

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

From: Steven Bell <Steven.Bell@tie.ltd.uk>
Sent: 12 April 2011 14:05
To: alastair.maclean@edinburgh.gov.uk <alastair.maclean@edinburgh.gov.uk>
Cc: Graham, Drysdale <Drysdale.Graham@mcgrigors.com>; Macphail, Iain <Iain.Macphail@mcgrigors.com>; vicemery@ [REDACTED] Richard Jeffrey <Richard.Jeffrey@tie.ltd.uk>; Dave Anderson <Dave.Anderson@edinburgh.gov.uk>; Donald.McGougan@edinburgh.gov.uk <Donald.McGougan@edinburgh.gov.uk>; csmith@hg-group.co.uk <csmith@hg-group.co.uk>; Sue Bruce <sue.bruce@edinburgh.gov.uk>
Subject: FW: Comments on MOV1 Draft

Legally Privileged and FOI(S)A Exempt

Alastair,

Richard had asked me to review the MOV and supply you with any comments on behalf of tie.

I have reviewed this with Vic today and summarise below the issues which stand out.

The purpose is to assist CEC in arriving at a fully informed view. I have highlighted some of these issues because of more detailed knowledge of Infraco's historical positions and approach. I appreciate that such comments may be considered backward looking and that we hope for different behaviours in the future, but we have not seen those evidenced yet.

Summary Points

Hg Report: the copy of the report I have seen does not include all appendices yet so these have not been fully scrutinised.

Application of the Infraco Contract to the Prioritised Works: The issue of self certification and assurance is complex. tie (or any duty holder under ROGS) need sufficient transparency and ability to verify the design, construction and test & commissioning self assurance to satisfy themselves, the ICP and withstand any legal challenge. This MOV is drafted to cut out the existing review and approval rights of tie and it will be more difficult to demonstrate the other matters if there is any lack of transparency from Infraco. In addition, the MOV removes deliverables obligations on Infraco and requirements to maintain particular records of variations etc. The MOV must not make it more difficult to discharge the Safety Verification and Safety Assurance responsibilities that tie currently hold.

Programme: This is deliverable by 15 October 2011 and Infraco are protecting their float here. I perceive this is to allow Infraco options to change subcontractors and to complete remedial works before they get rid of the incumbents and to limit their exposure until they know if the deal is going to be signed.

Payment & Certificates 1,2 & 3: Putting aside the total values being proposed by Infraco for each of these stages (which cannot be objectively supported by me or my team for the detailed reasons outlined to Colin Smith on 31 March 2011), the role, accountabilities and

responsibilities of the Certifier in not compatible with the mechanics suggested by the MOV. They also cut across the Infraco Contract and mean that the client's Representative will be unable to affect payment and certification matters.

There appears to be no linkage of Certificate 1,2 or 3 payment to completion of an assured integrated design as was previously discussed as a potential intangible asset.

There is no mention of Warranty arrangements for Materials and Equipment.

This MOV requires the Certifier to certify Prelim type cost solely as a function of time passed and also to certify Milestones completed. You are aware of our views on that and that we thought CEC understood the need to link Prelims with work value earned in construction activity. That was the line previously pursued by Colin with Infraco.

There is also no requirement for Infraco to apply for milestones in the current draft.

Importantly, these are stated to be final and binding amounts (not the more traditional interim payments) and therefore there is no obligation to substantiate or opportunity to amend the value once certified. If Hg are to be the Certifier, then they will need to employ the resources to undertake the work to confirm milestones as this should not be disconnected from the accountability and responsibility .

Infraco have also accelerated the payment timetable to become due 2 weeks after VAT Invoice rather than the current 3 weeks.

I do not consider the above to be equitable, however it is a CEC call and if they want to instruct this they need to be informed of the size of the potential concessions they are signing up to.

Price and Change: the drafting and definitions add complexity and do not permit tie or CEC to require a change be implemented.

Sub Contractors: Whilst I believe I understand the intent from the HoT, The draft appears to remove tie's ability to address Health and Safety issues (Clauses 28.6 & 38). This needs to be amended.

Moratorium / Preservation of Rights: Draft appears somewhat one sided and significant concession to include "same grounds" even if future UWN / RTN. Given the wide ranging nature of RTN9 (Conduct) it is unlikely any category could be said to avoid the same grounds argument. Strongly recommend resist this part. Revised Programme incorporating all E.o.T. pre-12 March 2011 needs to explicitly include all Changes as well as referencing Notified Departures and Compensation Events.

Disputes: Ok with proposed Joint Project Forum taking place of CEO's meeting under DRP but tie/CEC need to decide who from the client side has mandate to move to next stage of no agreement is reached? tie Rep Or CEC?

Governance Structure: Key issues are Certifier Role and Joint Project Forum DRP mechanics listed above.

Risk: MOV is silent on risk register and (joint?) approach. Do we rely on agreement to agree?

Legal Advice on MOV: McGrigors should consider writing an advice note to CEC highlighting the significant amendments to the Infraco Contract and to the tie (client) rights and remedies if the MOV is signed to ensure this is clearly recorded in writing. We would not want to repeat the type of issues raised / concerns expressed which have been raised with DLA and visibility of the original advice over the Infraco Contract.

My (non legal) view is that the MOV proposes notable concessions from an already variable position.

Clause by Clause specifics

Clause 1

IDC check procedure needs to include for necessary assurance and integration with infrastructure and Trams explicitly.

Schedule Part 3 Materials and Equipment not yet available Chainages being checked.
Prioritised Works definition messy. Understand Carol Campbell of CEC is reviewing to improve.
Programme comments as per Susan's note of 4 April to Colin Smith.
Vesting Certificate to be agreed (not yet seen) and Bond to be agreed (not yet seen) and should be "on demand".

Clause 2

I note this means Schedule Part 4 and Clause 80 remain unamended.

Clause 3

3.1 do we need "the application of"?

3.3 /3.4 They were obliged to do that as part of their Assurance requirements anyway. The difference is they remove the approval step that tie has from Schedule part 14. The IDC element is unlikely to be complete enough to satisfy our legal requirements. Need to toughen up for Safety Validation and Assurance transparency and necessary reasonable information.

3.5 Summary point made above. Significantly removes rights tie has.

3.6 Requirements for licences / third party agreements etc need to be covered.

Clause 4

Talks about mobilisation but this is an advance payment. Funders need to be happy with that.

Clause 5

Programme comments as per Susan's note. Little reciprocity. Requires lifting of embargo but does not require >5 day working from Infraco.

Clause 6, 7 & 8

Already noted tie cannot support the values proposed in this section. Would be considered as significant advance payments. No visibility if Design delivery is a milestone for same. Bond needs to be on demand and Siemens to Warrant that Materials and Equipment meet ERs. Storage costs for materials and warranty arrangements for them to be resolved.

Clause 9

See payment comments above. Clause 9 omits any obligation on Infraco to apply for payment and places obligation on Certifier. No mechanism stated to address Change if it arose. Payments proposed as final and binding. Resist this approach. Payments timetable accelerated by 1 week from existing contract.

Clause 10

Needs tidy drafting and links back to payment point. 10.3 doesn't align responsibilities and accountabilities re Certifier / tie points noted above..

Clause 11

Excess Trams. OK

Clause 12

OK

Clause 13

OK

Clause 14

14.1.1 Draft appears one sided and significant concession to include "same grounds" even if future UWN / RTN. Given the wide ranging nature of RTN9 (Conduct) it is unlikely any category could be said to avoid the same grounds argument. Strongly recommend resist this part.

14.1.2 Stays claims only, no waiver.

14.1.3 This appears to be sin die? Reject.

14.2 OK subject to re read after rest of 14 is sorted.

Clause 15

15.2 Removes H&S rights for tie particularly under 28.6 etc. and possibly under 38. Reconsider.

Clause 16

16.2 needs to include for tie changes as well as NDs and CEs.

Clause 17

Ok with proposed Joint Project Forum taking place of CEO's meeting under DRP but tie/CEC need to decide who from the client side has mandate to move to next stage of no agreement is reached? tie Rep Or CEC?

Clause 18

OK

Regards

Steven

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