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**From:** Steven Bell  
**Sent:** 11 April 2011 16:21  
**To:** vicemery [REDACTED]  
**Cc:** Richard Jeffrey; Susan Clark  
**Subject:** Comments on MOV1 Draft

**Tracking:**

Recipient	Read
vicemery [REDACTED]	
Richard Jeffrey	
Susan Clark	Read: 11/04/2011 16:30

**Strictly Private and Confidential: FOI(S)A Exempt**

Vic,

In advance of our discussion tomorrow, I summarise below some of the issues I want to discuss with you.

I suggest we concentrate on the summary points but have included more detail as well if that will assist CEC and McGrigors in arriving at a fully informed view. I have highlighted some of these issues because of detailed knowledge of Infraco's historical position or behaviours. I appreciate that is backward looking and their approach may be different in the future but I have not seen any such behaviour evidenced.

Summary Points

**Hg Report:** the copy of the report I have seen does not include all appendices 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 put 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..

**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 practical mechanics suggested. There appears to be no linkage of Certificate 1,2 or 3 payment to completion of an assured integrated design. 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.

There is also no requirement for Infraco to apply for milestones. 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.

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 but if CEC want to instruct this they need to be informed of the size of the 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)

**Moratorium / Preservation of Rights:** 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. Recommend resist this part. Revised Programme incorporating all E.o.T. pre-12 March 2011 needs to explicitly include all Changes as well as 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:** I will reflect on tonight again and identify any further gaps / issues for discussion tomorrow.

**Risk:** MOV is silent on risk register and (joint?) approach

**Legal Advice on MOV:** McGrigors should consider writing an advice note to CEC warning of the significant amendments to the Infraco Contract and to the **tie** (client) rights and remedies if the MOV is signed to ensure this is on the record. 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**

Definition required for Fixed Sum Prioritised Work – Target

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

Schedule Part 3 Materials and Equipment not available

Chainages being checked.

Prioritised Works definition messy. Understand Carol Campbell of CEC is reviewing to improve.

Auxiliary Works definition may be required.

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 "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"?

3.2 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.

3.3 Summary point made above. Significantly removes rights **tie** has.

3.4 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 significant advance payments. 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 accelerated by 1 week from existing contract.

#### **Clause 10**

Needs tidy drafting and links back to payment point.

#### **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. Recommend resist this part.

14.1.2 Stays claims only no waiver.

14.1.3 This appears to be sin die? Reject.

14.2 Reciprocity?

14.3 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

I will review the Schedules in more detail tomorrow morning.

Regards

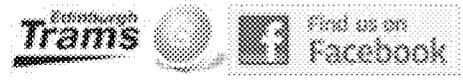
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