From: Nick Smith
Sent: 12 February 2010 16:53
To: Dave Anderson; Donald McGougan; Alan Coyle; Gill Lindsay; Marshall Poulton
Subject: Tram - D&W review

We have now received the first draft of the report from D&W. As predicted there are no major surprises, but there are a few interesting observations. I am not proposing to circulate the draft at present but please let me know if you would like a copy to review. A final version will be with us in 10 days but I am advised that there will be no substantive changes to the current draft.

In summary:

- The contract contains a clause which effectively means that common law rights cease to exist and the contract can only be terminated on the grounds set out in the contract.
- In the absence of grounds constituting Infraco Default, tie has no right to voluntarily terminate the contract at the present time.
- Whilst tie could seek to bring about a tie default, there is no obligation upon Infraco to exercise its rights to terminate.
- Negotiated termination would likely provide a better exit route than wrongful termination and liability for damages.
- On termination tie is essentially liable for the value of works and services performed and goods and materials delivered plus demobilisation costs and expenses arising from the termination of its subcontracts together with an element of loss of profit of such costs and expenses at the rate of 10% for civils and 17% for track and systems. This would clearly need to be evaluated financially and much depends on the results of the various DRPs and whether tie or Infraco's interpretation is correct.
- The right of tie to effect a significant scope reduction through the change mechanism in the contract is not clear cut. Infraco may have legitimate reasons for rejecting such a change. It is apparently at least arguable that a route reduction is not competent through the change mechanism.
- D&W have highlighted a potential lever which I have informed Richard about. In short tie is entitled to terminate if four or more Underperformance Warning Notices are served in 12 months. Assuming tie have grounds to serve the notices then this would mean that after four notices we would effectively be into Infraco Breach territory. Unfortunately there is a discrepancy between the drafting of an operative clause and a definition which means it is not the silver bullet we hoped for. However it is still an argument worth running and DLA and McGrigors are now looking into this further (it was not an avenue Richard was previously aware of). If nothing else it may scare Siemens enough. We will need to await a fuller analysis of this option by tie.

In the meantime if you have any queries, please let me know.

Kind regards

Nick

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Please note that I am not in the office on a Monday