
From: VRE - MobileMe [vicemery@██████████]
Sent: 21 July 2011 17:52
To: Steven Bell
Cc: Walker Eleanor
Subject: DRAT EMAIL FOR COMMENT - Settlement Agreement

Steven

Reference our discussion today, I would be grateful if you could pass your eye over my proposed email to Alastair McLean below and make any comment/additions you see necessary.

thanks

Vic

To: Alastair McLean
Cc: Sue Bruce, Colin Smith, Dave Anderson, Alan Coyle

Just before I went on leave you kindly passed me a copy of a revised Settlement Agreement dated 21st June 2011 (see below),

It is possible that in the last month this Agreement has been revised further however, I thought I would offer you my observations and queries;

1. Who is the contracting parties?

It would appear that CAF are contracting directly with CEC.

BBS, however, are contracting with both tie and CEC, both of whom will sign the contract.

However, tie will be/is an 'empty' entity supplying services to CEC, who will control the project.

This approach may create new interface risks.

It also gives 'issues' to the revised Boards of tie/TEL who have no authority to discharge their corporate liabilities.

Not being party to the legal negotiations (thank heavens!), I am not sure why we still need to keep tie in the equation (unless the employment issues prevent it??)

2. Is it the Full settlement?

At Mar Hall we said we wanted price certainty and all known changes included. And given that it was claimed that the Design/Drawings were "almost complete", everyone was more than aware of the full scope of work.

Referencing Part 2, Clause 2.4 (page 3) of the Settlement Agreement, this suggests that the intent of the agreement is a 'sole settlement'.

However, Part 2, Clause 2.3 identifies unspecified amounts to BB and Siemens but I don't see an exclusion to them using Clause 90 from the original agreement to claim further payments for changes.

3. Payment.

Further to my item (1) above. Tie is required to make payment of claims and milestones , but the current organisational changes move Accounts Payable to CEC.

Also, tie has no mechanism of validating payment demands.

As you probably know, tie has a small commercial team who assess the value of each payment claim but in the event of a dispute, the claim is, in fact, validated by the Independent Certifier who is contracted directly by CEC.

4. Milestone Schedules/Final Settlement.

At Mar Hall we agreed that we would remove preliminary payments and shorten the list of milestones to fewer, more meaningful milestones which would be readily recognisable and easy to access plus an overriding clause that would also address overall progress against an agreed schedule. This was to avoid/block BBS and CAF chasing cash.

In the Settlement Agreement, there does not appear to be an operative mechanism to reflect this principle.

Without a full list of meaningful payment milestones against a detailed schedule of work, I cannot see how we would be able to plan cash flow (and therefore the funding profile) or to assess the completion of milestones or overall progress of the work to certify payment.

5. What is the relationship to the Interface Agreement?

As you know, I have been consistently concerned about the integration of the various parts to deliver an overall transport system. On the Mar Hall principle that "We (CEC, tie) need to be "held harmless" with respect to the Novation of the CAF contract back to CEC.

I am concerned that Part 4, Clause 4.2.1 exposes tie to BBS and given the current direction of things, tie cannot remedy or authorise.

6. On-Street Work.

It is important that detailed schedules are attached to the Settlement Agreement because it is against these schedules that progress would be measure, albeit a lump sum price, target cost or cost plus.

This would also include the payment of preliminaries which, as far as I can see, are to be paid 'on time' basis as long as progress is being delivered against the schedule.

I assume profit would also be paid as a percentage of the cost incurred by BBS. Profit could be paid against schedule performance!!

I notice that Schedule F is not yet agreed.

The Target cost is generally agreed to be £14 - £18 million too high and is driven primarily by Siemens who have admitted that they are trying to recover their pre-Mar Hall position for Airport to Haymarket and they see the only way to do this is to load the on-street price (see my separate email).

7. Confidentiality.

Does this cover any demands placed on CEC/tie with respect to FOI(S)A?

8. Client Requirements?

This is a worrying area for me and is a potential primary area for future dispute and cost exposure.

BBS will interpret this element (with some justification) against a set of drawings and everything that is not in accordance with the drawing data pack will be deemed as a "tie change". This may include any defective work or changes where, at the end of the day, the drawing data pack does not meet the client requirements. Put simply, you can reflect all of the requirements in a drawing pack.

There is no way that the client (tie/CEC) can be sure that the drawings will achieve client requirements until the requirements have been demonstrated "to the client's satisfaction".

Also the changes in definition and performance requirements, driven by the phasing of construction, need to be made in conjunction with the Settlement Agreement, not subsequently as a 'tie change'.

9. MoV4 carry over to MoV5.

A number of agreements were reached on MoV4 which, at various meetings with the CEC/tie team, were agreed not to be taken into MoV5 but, were 'stop gap' measures to get MoV4 "over the line",

I notice that these MoV4 precedents have now, in fact, materialised in MoV5.

As I said in the beginning, there may be revisions to this document which I have yet to see and therefore some of the foregoing may have been overtaken by events.

However, I trust that you will find it a useful input.

Thanks

Vic