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**From:** Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]  
**Sent:** 02 September 2010 23:35  
**To:** Brandon Nolan  
**Cc:** rush\_aj@[REDACTED] Richard Jeffrey; Steven Bell  
**Subject:** FW: Clause 80.20

**Follow Up Flag:** Follow up  
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Brandon

As Tony has explained, CEC are anxious to have Richard Keen review 80.20.

Below is my analysis of where this would get us. Would you be very kind and put this to Richard to obtain his view.


The interest is in a possible interpretation that 80.20 creates - assuming it is triggered and I am not at all convinced it has ever been triggered by BSC - an obligation on BSC to execute **tie** instructions (which would include Notified Departures) which is different to the operation of Clause 80.13 in other words no Estimate is in place and BSC must get on. I struggle get beyond there may be grounds to say that the opening part of 80.20 obliges them to work at risk until they produce an Estimate in 20days but the cost is covered under 80.16 in any event.

Happy to discuss further but trust my analysis in the email below is clear.

kind regards

**Andrew S. Fitchie**  
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**From:** Fitchie, Andrew  
**Sent:** 02 September 2010 23:17  
**To:** Nick Smith  
**Cc:** Richard Jeffrey; Steven Bell; Glover, Joanne  
**Subject:** Clause 80.20

**Legally privileged and FIOSA Exempt**

Nick

Following our meeting yesterday with Carol, I set out our views on Clause 80.20 in the context of where the imperatives for administration of the Infracore Contract sit today, namely the maximising of commercial pressure on BSC to view a negotiated outcome on Carlisle as the most attractive option when compared with termination or the status quo. In that environment, fresh eyes as I stressed yesterday - can be useful. I also said that facts were king in how 80.20 might be deployed. I focus here directly on Clause 80.20 for the sake of brevity, but it should not be forgotten that it sits within the scheme of Clause 80 and Clause 34.

We did indeed provide advice to **tie** regarding the operation of this provision at intervals between August 2008 and Q1 2009, by which time matters had polarised between the parties. Revisiting all of that advice to **tie** here is not entirely on point - as we discussed when we met - since it was treating a particular resolution being pursued by **tie** at that time. I will summarise that advice under separate cover, with attachments so that you can review the circumstances. The immediacy you were interested in was the provision's potential application now. And so:

1. 80.20 is a reactive clause. It operates as an available means of response by BSC to a **tie** instruction which BSC consider is triggering a **tie** Change. It is not an instructing clause itself, and in the logic of the contract where the Client instructs, it would be odd if it were. Because it is a protection for BSC, likely to influence the speed with which the instructions are obeyed, there is a time limit (20 BD) within which BSC must alert **tie** to their view and provide a costing for their proposed compliance with the instructions. At the point the notification and Estimate itself are in hand, **tie** has choices:

- accept the notification and agree the Estimate within 10 days and issue a **tie** Change Order in which case BSC are required to proceed;
- reject the notification and Estimate and put both into DRP in which case, subject to **tie** issuing a tCO to that effect (on the basis of urgency or serious programme impact and subject to Clause 80.12), BSC are required to proceed pursuant to Clause 80.15 under payment through 80.16 until a DRP determination/settlement.
- reject the notification and the Estimate and do nothing further - in which case BSC are not obliged to proceed, (subject to the possible interpretation that during the 20 BD they have to notify a **tie** Change and produce an Estimate, they are to proceed with the **tie** instructions).

The clause has no application in the case of a Notified Departure.

2. Question: can we interpret the clause to mean that BSC is obliged to proceed during the 20 BD allowed for production of the Estimate? At first sight: it is correct that this is different situation to **tie** issuing a Notice of Change. This is the Infraco responding to **tie** instructions by requiring the potential operation of Clause 80 and there is no obvious contractual reason why they should remain inactive, until they produce an Estimate which ( if not agreed within 10 BD) results in either party's right to start DRP and **tie's** 80.15 right to instruct BSC to get on with the works, subject to the 80.16 protection for BSC on costs.

3. However, reading the 80.20 language : *If having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with these instructions would amount to a **tie** Change, then the Infraco shall comply with the instruction and shall with 20 Business Days of any instructions being received....* The drafting is making a distinction between the instructions received from **tie** which are the subject of the Infraco's notification and something else which Infraco must comply with: "*the instruction*". So that the 'instruction' can be read in fact as the substitute here for the precursor to **tie** Change - an 80.2 Notice of **tie** Change, which triggers the obligation on Infraco to provide an Estimate. The language is therefore reflecting Clause 80.2.2 and 80.4 and is obliging the Infraco, if it believes to be a **tie** Change, to act as if it has been instructed by **tie** there is one and provide an Estimate. The reason for the longer period (20 BD) is because there is no right to request an extension of time (as there is under 80.3) and the reason why there is a set time limit of 10 BD on seeking to agree the Estimate is because the Infraco has triggered the hiatus. The use of the word instruction appears again in the phrase applying Clause 80.15, again as provision under which **tie** issues an instruction - a **tie** Change Order under 80.15.

We arrive, in essence, at 80.15 and the important 'five words in 80.13 - with the difference that complete failure by BSC to produce an Estimate is fatal because of 80.21.

4. The commercial reason against the interpretation at 2 is that Infraco could incur a very large immediate cost in complying with the instructions and **tie** would have limited visibility of this outcome and a potential liability (for example the instructions unwittingly necessitated a complete cessation of work by specialist subcontractors whose work was time, availability and cost critical) before the delivery of the Infraco Estimate.

5. The crux remains the facts: are there in fact any instances where Infraco have challenged an instruction from **tie** using 80.20? How the clause works in terms of performance obligations of BSC will be academic unless there has been failure by BSC to implement works which were properly instructed, challenged abortively as a **tie** Change using 80.20 and we can track this failure as a continuing default which now satisfies the criteria of Infraco Default (a) or 56.7.1. What I have seen so far may well not, in our view, approach that category of Infraco breach - but I am entirely open on this until all the facts and potential cases become clear.


I am keen to get this short analysis with Brandon and Senior Counsel. I shall return to the actual correspondence which came about in August 2008 onwards to review how this affects the strategy being pursued alongside production of RTNs and UNW and generally **tie's** position were there to be a requirement to terminate the Infraco Contract.

Happy to discuss further early next week.

kind regards

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