
From: Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]
Sent: 18 December 2009 10:26
To: Anthony Rush
Cc: Steven Bell; Dennis Murray
Subject: RE: Changes - Fit for Purpose
Attachments: 27589270_1_UKMATTERS(Advice on key questions -Steven Bell).DOC

Legally privileged and FOISA Exempt

Tony


As asked

Please note that the section on Misalignment requires more work. This subject is complex and in essence involves argument over the contractual (ie entitlements) and practical effect over a post-contract signature exercise to deal with identified mismatches between SDS Provider Design (immediately prior to contract signature) and Infracore Proposals.

The draft Report is still raw and I am finishing this over the week end.

kind regards

Andrew Fitchie
Partner, Finance & Projects
DLA Piper Scotland LLP
T: [REDACTED]
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F: [REDACTED]

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From: Anthony Rush [mailto:rush_aj@[REDACTED]]
Sent: 18 December 2009 09:41
To: Fitchie, Andrew
Subject: RE: Changes - Fit for Purpose

No Rush

Telephone 01505 612093 Mobile 07831 442894

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From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 18 December 2009 09:39
To: rush_aj@[REDACTED]
Subject: Re: Changes - Fit for Purpose

Tony

Copy will follow when I reach desk this morning.

I will revert on your points.

Kind regards
Andrew Fitchie
Partner
DLA Piper Scotland LLP
T: [REDACTED]
M: [REDACTED]
F: [REDACTED]

From: Anthony Rush <rush_aj@[REDACTED]>
To: Fitchie, Andrew
Cc: 'Steven Bell' <Steven.Bell@tie.ltd.uk>; Dennis.Murray@tie.ltd.uk <Dennis.Murray@tie.ltd.uk>;
Richard.Jeffrey@tie.ltd.uk <Richard.Jeffrey@tie.ltd.uk>
Sent: Fri Dec 18 09:11:51 2009
Subject: Changes - Fit for Purpose

Andrew

I met up with Steven and Dennis yesterday and they gave me a copy of your latest "Report on Four Key Questions" – would you please be so kind as to let me have an ecopy?

When you and I met we discussed the natural meaning of "design principle, shape, form and/or specification". I am not fully aware of how the parties have acted yet, but I am minded that the natural meaning is very broad – *de facto* giving a meaning to "competency". I am working from the accepted principle that the "designer" is obliged to design a "fit for purpose" solution. Moreover, TIE can only "change" its "Requirements" - changes to drawings and the design being the responsibility of SDS (before novation) and Infraco (after novation).

The question I have in mind is whether the BDDI adequately defined a fit for purpose solution and if not were SDS obliged to in the knowledge that TIE was relying on it being the case. Moreover, to what extent should Infraco have "covered the deficiencies" in design in their price. In normal circumstances a D&B Contractor takes on the liability of deficiencies in the pre-tender design and is left to recover his losses (not the Employer's) from the novated designer. To what extent does 3.4.1.1 change that?

I am also hearing that Infraco have refused to carry out work until the revised price is agreed. It seems to me that pursuant to Clause 80.15 (subject to the limitations in 80.12) they can instruct Infraco to carry on. Admittedly, TIE would have to adopt a disputed change on a without prejudice basis, but I am not certain that this would have negative consequences for them.

I have other matters today, but intend to revert to this over the weekend. Your comments would be appreciated – if I am off course please excuse my lack of knowledge as yet.

Tony

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