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Sent: 07 August 2008 17:30
To: Dennis Murray
Cc: Fitchie, Andrew
Subject: tie/Infraco/Key Sub-Contractors

Importance: High

Dennis

I have reviewed and discussed with Andrew the draft form of sub-contract which Tom Murray has provided to you. As you will be aware, there are conventional provisions in the Infraco Contract allowing **tie** to exercise a right of approval of the form of sub-contract for each Key Sub-Contractor: the ability of **tie** to influence the detailed terms of each sub-contract is relatively limited. Bearing that start point in mind, we would make the following comments:

- In general terms, the document very much appears to be an initial draft and is intended to be developed further, presumably after discussion between Bilfinger Berger and the sub-contractor.
- The form of contract being proposed is the "Blue Form" sub-contract, which as are you no doubt aware is a contract intended for use in connection with civil engineering works. Though this might be acceptable for packages such as the major civils and piling it is, in our opinion, not suitable for others such as the system integrators and testing and commissioning specialists. Have Bilfinger Berger put forward the proposed forms of sub-contract for these other packages?
- The document also makes reference to an "Interface Protocol". **tie** will want to know what this is and, if available, receive a copy. It should deal with how the contractors interact with one another, which is important for programme and for third party interests.
- The draft envisages the sub-contractor being engaged by Bilfinger Berger alone rather than by the Infraco. We recommend that the Infraco rather than any one single Infraco Member engages the Key Sub-Contractors.
- There are a number of instances in the draft where there is an attempt to pass risk down to the sub-contractor in a less than sophisticated manner. That is an inevitable consequence of using a short standard form as the basis for the sub-contract where we have a detailed bespoke main contract and it does give rise to the potential for dispute. The general approach which has been adopted is workable; however we suggest that **tie** ask that more time is spent making sure that the sub-contract is back-to-back with the Infraco Contract so as to cut down on negotiation time and minimise the potential for post-contract differences in interpretation between Infraco and its sub-contractors.

- Some of the provisions listed in Part II of Schedule Part 38 of the Infraco Contract have not been incorporated into the draft adequately or at all. This needs to be addressed.
- We suggest that the variation provisions in the sub-contract require the sub-contractor to advise the Infraco of the need or desirability for a variation in the sub-contract works, thus facilitating compliance by the Infraco with clause 81 of the Infraco Contract ("Infraco Changes").
- In relation to the insurance provisions, it is important that the insurances required to be maintained by each sub-contractor are the same as that required of the Infraco under the Infraco Contract. You will want to check with **tie's** insurance team as to what their expectations are in this respect before reverting to Bilfinger Berger.
- **tie** may wish to enquire as to the bonding arrangements between Infraco and its supply chain, given **tie's** step-in rights.
- The draft acknowledges that the sub-contract payment provisions need to be discussed; we cannot comment further except to say we are puzzled why this fundamental aspect remains open at this stage. Some thought also needs to be given to the "maintenance" provisions in the proposed sub-contract, which are essentially the same as the standard "defects liability" type provisions in the Blue Form. Depending upon the nature of the package, these will need to be brought into line with those in the Infraco Contract i.e. who is it that will be the *de facto* Infrastructure Maintainer and are they contracted on a basis which safeguards performance of Infraco's post-service commencement and post-sectional completion maintenance obligations?
- Regarding your concern (in relation to clause 7 of the sub-contract) regarding the sub-contractor receiving instructions direct from **tie's** Representative, the proposed contractual position is that the Infraco will simply interpret and pass on relevant instructions from **tie's** Representative to its supply chain. It is not intended that **tie's** Representative will issue instructions to, or manage, any sub-contractor unless it steps into the relevant sub-contract. This seems acceptable.
- Lastly, clause 2(6) requires a collateral warranty to be given by the sub-contractor in favour of BAA. This should more properly be EAL.

I do hope that the above is helpful to you. Please do not hesitate to give Andrew or myself a call to discuss before you go back to Bilfinger Berger.

Kind regards

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