
From: Fitchie, Andrew
Sent: 10 September 2009 13:31
To: 'Stewart McGarrity'
Subject: RE: The Curious Case of the 3 Wheeled Car and other fables - Private & Confidential

Legally privileged and FOISA Exempt

Stewart

Thanks for this and that thought that went into it. A pleasure to be referred to as a Doberman , as opposed to a thief or w*****.

In very simple terms, what BSC squeezed on was:

- the introduction of Schedule Part 4 as, in their opinion, the master qualifier
- there would be relief for Infraco, with restrictions, through a Compensation Event where (i) SDS failed to produce IFC drawings on time or (ii) SDS was in breach of its obligations under the SDS Agreement as regards design quality.

Nowhere is there , in my opinion, is there wording or a combination of provisions in the Infraco Contract that Infraco is not responsible for the production of design or that it can escape the financial consequences of design inadequacies. This , however is the discussion with Bradon, -as I understand it based predominantly on what the Infraco Contract does not say explicitly as opposed to what it does say.

Very happy to discuss your analysis more. There are management documents which Infraco will possess that must shed light on their developing view of the adequacy of the Wiesbaden tender pricing and what it included. They're very likely to be careful not to share this information under contractual audit obligations. My discussions with Attilio three weeks ago confirmed this - these financial exercises are their Budget 0 (post award), Budget 1 etc.. I believe quite strongly that there is merit in considering what these are and what they must contain, where they would be and **tie** asking very specifically to see these now. They must the part of the BB corporate decision process (as opposed to just multiplying production cost by delay), logically , for assertions about £80 million overrun. Obviously, I do not know how the 104 Audit requests have been framed.

If parts of DRP go to litigation, these papers would need to be disclosed to **tie** by BSC and the fact that they have refused to disclose them in explanation of their claims about how much more money is required to complete their four wheeled car could prove prejudicial.

:Lastly, as mentioned in the past I am confident that Geoff Gilbert could make a useful contribution if asked.

kind regards

Andrew Fitchie
Partner, Finance & Projects
DLA Piper Scotland LLP

T: [REDACTED]
M: [REDACTED]
F: [REDACTED]

 Please consider the environment before printing my email

From: Stewart McGarrity [mailto:Stewart.McGarrity@tie.ltd.uk]
Sent: 10 September 2009 11:49

To: Richard Jeffrey; David Mackay; Steven Bell; Graeme Bissett (external contact); Susan Clark; Alastair Richards - TEL; Dennis Murray
Cc: Fitchie, Andrew
Subject: The Curious Case of the 3 Wheeled Car and other fables - Private & Confidential

Private & Confidential

Book 1 - Weaselling in Weisbaden

Stop me if you think I keep sending history which is of little relevance to who prevails going forward. The moral high ground is important in my personal value system as a starting point for anything. I forwarded the (unsigned) Preferred Bidder Infraco evaluation report and Board Presentation to most of you on 19th August. At preferred bidder (submission in August 07) approximately £50m of the BBS price was designated provisional on the basis of insufficient design information – including £30m on structures, £11m on roads and £3m on tram stops.

Off our intrepid heroes go to Weisbaden in mid December 07 and return with tails wagging having negotiated a deal which makes all these previously provisional items firm so long as design completion from 25th Nov 07 falls to be classified as within “normal development and completion”. In return BSC get an £8m increase in the price. Our VE register was also deducted from the price on the basis that conditions specific to each individual item was met. The deltas are summarised in the table below.

	Pref Bidder	Deltas	Weisbaden
Firm Prices	159,120,890	54,789,452 ^A	213,910,342
Provisional Prices	49,579,452	(49,579,452)	0
VE taken into price- with conditions		(13,818,006)	(13,818,006)
Premium for firm price		8,000,000	8,000,000
	208,700,342	(608,006)	208,092,336
Infraco Normalisation (Provisional Sums)	17,803,222	(7,633,132)	10,170,090
Negotiated BBS Price	226,503,564	(8,241,138)	218,262,426

A - In addition to making provisional prices fixed other items netting £5.2m (including NR Immunisation) were moved into core scope from the Infraco Normalisation line

The text of the Weisbaden Agreement is attached. Can anybody see anything which says “3 wheels only chaps!” - unless of course whole elements of the works were missing from the design information drawings issued to BBS up to 25th Nov 07? There are subtle changes from the design development qualification in that agreement (eg the term “design intent” got lost) and the words which ended up in Sch pt4 reproduced below – I can’t judge whether these changes make a difference or not.

Extract from Sch pt4 of the final contract:

3.4 Pricing Assumptions are:

1 The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):

1.1 in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information (except in respect of Value Engineering identified in Appendices C or D to this Schedule Part 4);

1.2 be amended from the scope shown on the Base Date Design Information and Infraco Proposals as a consequence of any Third Party Agreement (except in connection with changes in respect of Provisional Sums identified in Appendix B); and

1.3 be amended from the drawings forming the Base Date Design Information and Infraco Proposals as a consequence of the requirements of any Approval Body.

For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.

In the engagements with BB and S in the dark days before the Princes St supplemental agreement, Mr Walker (god bless him) would not be drawn on what we paid the £8m premium for. Maybe we should be asking for it back?

If we had time we might want to commission the following:

- (1) Go through the final BBS bid submission (7th August 2007) and give it a thorough review for qualification of quantities and scope from a QS perspective
- (2) Track back through the late changes to the contract in the lead up to Financial Close and satisfy ourselves that at no point did BBS's incredibly smart lawyers manage to sneak in amendments to the contract which effected a complete risk transfer on design back to us without the assembled might of tie's commercial nous and legal Dobermans noticing.

Stewart

Stewart McGarrity
Finance Director
tie Limited
Mobile: [REDACTED]

From: Richard Jeffrey
Sent: 04 September 2009 15:33
To: David Mackay; Steven Bell; Graeme Bissett (external contact); Stewart McGarrity; Susan Clark
Subject: Meeting with BSC, what really happened!

General

We agreed that we have a fundamental disagreement over the contract.

We used the 3 wheeled car analogy

We agree that we all understand that what TIE want is a 4 wheeled car

We agree that at the time of letting the contract, only 3 wheels were designed, and the fourth wheel was still to be designed.

BSC believe that they only priced for 3 wheels, and the fourth wheel was always going to be extra

TIE believe that the contract price is for 4 wheels, but that there is scope to vary the price if the fourth wheel is different. This is the fundamental nature of our dispute.

BSC believe that the contract is perverse and does not pass the common sense test, but it is what it is (this point is important later)

Hilton Car Park

It took almost no time to agree that we should go straight to adjudication, but that BSC would condition this by saying that it must go to the legal panel, not the financial panel, or else they would want to go to mediation.

I agreed to send this straight to the legal panel for adjudication

EOT1

Conversation as above. BSC very keen to go to the legal panel as they believe this whole issue turns on a strict legal interpretation. They do not want a QS deciding on these complex legal issues and were concerned that a QS might apply 'common sense'. BSC's point is that the contract is not necessarily sensible, but that is not the point, the point is what is the strict legal interpretation of the contract, and this is best decided by a legal led panel.

We took a break and I consulted with our team. They were strongly of the view that, for exactly the reasons made by BSC that we would want to go to the financial panel.

Given this we had no agreement so the issue goes to mediation.

Finally, at the end of the meeting BSC issued 2 DRP's on Russell Road retaining wall and MUDFA delays.

We can discuss Monday.

Richard

Richard Jeffrey
Chief Executive

tie Limited
Citypoint
65 Haymarket Terrace
Edinburgh EH12 5HD

Direct line: [REDACTED]
Fax: [REDACTED]
Email: Richard.Jeffrey@tie.ltd.uk

www.edinburghtrams.com
www.tie.ltd

The information transmitted is intended only for the person to whom it is addressed and may contain confidential and/or privileged material. If you are not the intended recipient of this e-mail please notify the sender immediately at the email address above, and then delete it.

E-mails sent to and by our staff are monitored for operational and lawful business purposes including assessing compliance with our company rules and system performance. TIE reserves the right to monitor emails sent to or from addresses under its control.

No liability is accepted for any harm that may be caused to your systems or data by this e-mail. It is the recipient's responsibility to scan this e-mail and any attachments for computer viruses.

Senders and recipients of e-mail should be aware that under Scottish Freedom of Information legislation and the Data Protection legislation these contents may have to be disclosed to third parties in response to a request.

tie Limited registered in Scotland No. SC230949. Registered office - City Chambers, High Street, Edinburgh, EH1 1YT.
