From:	Stewart McGarrity
Sent:	17 February 2009 13:28
To:	David Mackay; Steven Bell; Jim McEwan; Alastair Richards - TEL; Graeme Bissett (external contact); Andrew.Fitchie@dlapiper.com; Dennis Murray; Colin McLauchlan; Susan Clark; Frank McFadden
Subject:	Infraco engagement w/b 090209 - PRIVATE & CONFIDENTIAL

PRIVATE & CONFIDENTIAL

All,

My notes from the 2 meetings last week, for the most part with BB. Steven may wish to amplify some of the points.

Monday 9th Feb 09 : 14:30 – 16:30
tie: S Bell, S McGarrity
BB: M Heerdt, R Walker, R Sheehan
S: J Frentz, M Flynn (Siemens reps left at 3pm)

Unless stated otherwise the comment or assertion came from M Heerdt backed up by R Sheehan...(my post meeting comments in italics)

1. Their view of normal design development is very different to ours – they believe any change at all to the BDDI which has a cost consequence is a change which the client has to pay for.

2. They are unable to provide us with prices for changes because:
   - The multiple impacts of design changes, design delay, delayed completion of utility diversions, uncertain ground conditions are so pervasive as to render them unable plan the sequence of the works in an orderly manner.
   - Notwithstanding this difficulty, the volume of changes is far greater than they could have anticipated and they do not have the resources to progress them

   (The reasonable man is never going to accept that a Bilfinger and Siemens consortium found the project management of a linear rail project too difficult in the round. What have they been doing for 9 months given so little progress or a plan to progress? – what have their substantial team of QS's been doing? – why is their supply chain not wholly contracted and ready?)

3. They don't believe there is any contractual requirement for them to justify or explain why a Notified Departure is a tie Change

4. M Flynn – Questioned as he has before whether the budget/funding is actually in place to complete the project and notes that the client was in need of a project management service
   (These we MF's comments as he was pulling on his jacket to leave – I don't know whether the budget/funding concern was around the existing £545m or whether he was taking about additional headroom)

5. They believe that CEC may have been misled or have misunderstood the extent of risk transfer to the contractor
   (We strongly rebuffed this assertion and having read the Close Report gain I am doubly happy with how we reported it.)

6. Reiterated their previous assertion (Keysberg meeting in December) that the best outcome for CEC in cost and programme terms is to suspend construction for a period of time (except where we have agreed to progress on an actual costs basis) sufficient to complete design and utility diversions and re-price/re-programme

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(I think Andrew Fitchie would have issues with whether this stood the test of the procurement rules – its effectively a rebid they are talking about)

7. R Walker - Such progress as there is so far is as a result of a gentleman's agreement with WG is September 2008 to get on with it
   (Walker was dancing on the departed here – really bad behaviour)

8. R Walker – The £8m price increase in Weisbaden was nothing to do with normal design development – it was a "negotiated increase in the price"
   (I asked RW what therefore we got for the £8m and he replied that he couldn't recall – I find it inconceivable that he wouldn't remember what the £8m was for)

Tuesday 10th Feb : 17:00 – 22:00
tie: S Bell, S McGarrity
BB: M Heerdt, R Walker, R Sheehan, G Dalton
S: Nobody

1. This session involved them repeating the issues as above plus the additional stuff below. <u>They asked that the meeting be unminuted and open in spirit</u>. Again from M Heerdt unless stated otherwise....

2. They will only work on a cost+ basis for any work progressed prior to completion of design and utilities

3. R Sheehan – Disruption to programme is so great that it will not be possible to do a meaningful comparison between actual costs and the original tender allowances for an part of the work.
   (This is clearly bull shit)

4. R Sheehan – They reiterated their legal position on BDDI to IFC and suggest we take legal advice on our own position.
   (We explained that obviously we had)

5. They require our acceptance that a tie Change has occurred before they will start to estimate the costs relating to it.

6. They have examined their projected outturn costs on the project which will give them a loss of between £50m and £80m. The bottom end of this range comprises broadly £20m of direct costs due to Notified Departures/tie Changes, £20m extension of programme (the full 70 weeks delay <u>so far</u> @ circa £300k prelim rate per week) and £10m delay and disruption which was a broad estimate. R Sheehan said he had been through the calculation and was confident it was accurate. This is still a working estimate – it could go down or up a bit with good planning but for example if we/CEC should not think a compromise at £20m for instance is deliverable. This is for BB only and does not provide for Siemens.
   (Even if they do have a £50m projected loss - this anticipates that a contractual dispute would resolve with tie responsible for 100% BDDI to IFC evolution to our account and 100% of project delay (70 wks ie Oct 12 ops commencement) to our account. We have no visibility of how they get to the £20m direct costs of change figure at all – if they had shared the estimates with us it would have been helpful)

7. They will not be allowed by their German HC to proceed unless it's clear that they can recover this shortfall – therefore they require us help them cover projected costs otherwise it will revert to a contractual dispute and neither party will benefit.

8. R Walker – There was general acceptance by tie pre-contract that the project would cost £50m-£100m more than was in the contract at 15 May 08.

9. R Sheehan - They require a substantial interim extension of time now to alleviate their liquidated damages accounting – six months would be a good start.
   (Unabashed request if ever there was one. Steven noted that there are concurrent delay issues to resolve – eg their delayed mobilisation. Sheehan replied that they had saved us money by not mobilising)

10. If the foregoing makes the project unaffordable then they suggest we go back to the stakeholders and attempt to carve out an affordable scope of works.

....

The above was stated within a couple of hours. Steven then spent a significant amount of time trying to explain the need to take a more granular view of the project and the blockers in each section to find a way to mobilise and start work – indeed that is what Infraco should have been doing since day 1 notwithstanding delays that have occurred eg depot access and the difficulties and uncertainties of what's under the ground on areas like Leith Walk. For simplicity we divided the project into on-street and off-street and asserted there were no insurmountable barriers to progress on all the off street sections under the current contract and prices if there was a willingness to use the change mechanism and solve problems rather than create them. Some of the on-street sections may well require an adapted approach such as we have for Princes St. There was little in the way of positive response to what Steven was suggesting and M Heerdt in particular wanted to stick to the generalised view.

The action was for them to come back with a "route-map" being a plan as to how and when they would deliver the project under the contract from here and to make that a consortium view. They agreed but expressed concern about the time available to engage with Siemens before the meetings today (17th Feb)

Stewart

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tie Limited
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