
From: Geoff Gilbert
Sent: 21 January 2008 10:20
To: Fitchie, Andrew
Cc: Hecht, Philip; Jonathan More; Alastair Richards - TEL; Damian Sharp
Subject: RE: SDS

Andrew

My view on the last four points in the Email are set out below. Is this correct from a legal perspective? What other arguments from a legal perspective do you think PM may raise on the response? If you agree with my analysis then those are the arguments we should run but I think we should hold back on replying until we see BBS's plan later today. However, please prepare the draft novation agreement including provisions that reset the programme obligation.

Tom also suggested a) an incentivisation arrangement which on reflection I think we should encourage b) that BBS would take the design risk for money, which we will explore from a commercial perspective.

Regards

Geoff

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 16 January 2008 17:40
To: Geoff Gilbert
Cc: Hecht, Philip
Subject: FW: SDS

Geoff

This does not really progress matters further, other than to agree that Tom Murray's point about the unavailability of any contractual remedy being missing is wrong..

The new programme still appears imperative.

From: LAING Ian [mailto:Ian.Laing@pinsentmasons.com]
Sent: 16 January 2008 13:52
To: Geoff Gilbert; Fitchie, Andrew
Cc: MOIR Suzanne; Martin Gallaher; Hecht, Philip
Subject: FW: SDS

Geoff/Andrew

On the back of yesterday's discussions on the SDS Novation, I have reviewed the relevant provisions of the SDS Agreement in relation to remedies against Parsons Brinkerhoff for late provision of design information (particularly pursuant to Clause 7 and Schedule 4 of the SDS Agreement).

Clause 7 of the SDS Agreement provides:

7.1.1 The SDS Provider shall progress the Services with due expedition and in a timely and efficient manner without delay, to achieve timeous completion of the Services (or the part thereof) and its other obligations under this Agreement in accordance with the Master Project Programme and unless otherwise agreed with the Client, the SDS Provider shall adhere to the Master Project Programme with due diligence.

7.1.2 Within 30 days of the Effective Date, the SDS Provider shall update the Programme with the detailed programme information and shall thereafter maintain, update and amend the Programme in accordance with the requirements set out in Paragraph 4 of Schedule 1.....

7.2 The SDS Provider shall carry out the Services required in respect of.....the Detailed Design Phase in the order of "criticality" (with "A" being the most critical), sequence and dates shown in the Programme Phasing Structure.

The principal difficulty with all of this is that the SDS are very late in relation to the provision of this information. By way of example:

- The Programme in Schedule 4 indicates that SDS should have completed the Services (and all the design) by 25th October 2007; and
- The Programme Phasing Structure indicated that "detailed design approval" should have been obtained for the majority of the design in 2006 and the complete design February 2007.

A couple of things flow from this:

1 BBS should not be required to inherit a situation where SDS are already in culpable delay (if indeed this delay is as a consequence of the failings of the SDS); WE ARE ARE NOT EXPECTING BBS TO INHERIT A POSITION OF SDS IN CULPABLE DELAY. THE NOVATION AGREEMENT WILL CONTAIN THE PROGRAMME FOR DELIVERY OF THE REMAINING DESIGN THAT ALIGNS WITH THE INFRACO PROGRAMME. THIS WILL EFFECTIVELY RESET SDS's PROGRAMME OBLIGATIONS.

2 As BBS has no visibility of the reasons why the design is late, how could BBS reasonably make any claim against the SDS? Perhaps SDS will seek to pin the blame on a failure by tie to approve the design in accordance with the mechanism set out in the Agreement. If reasonable criticism could be made of tie, BBS will have no remedy against the SDS and no remedy against tie. THIS IS NOT AN ISSUE WHERE THE PROGRAMME IS RESET.

3 We will need an undertaking from both tie and the SDS that they have not entered into any documents or correspondence which would affect the enforcement of or interpretation of tie's rights under the SDS Agreement. AGREED

4 BBS will need express protection in relation to late delivery of design from the SDS. Perhaps a pricing assumption? WHERE THERE IS A CLEAR AND AGREED PROGRAMME OBLIGATION THEN THIS IS NOT NECESSARY. RELIEF WILL AS HAS BEEN PROPOSED BY tie BE GIVEN IN RESPECT OF DELAYS RESULTING FROM CONSENTS NOT BEING FORTHCOMING.

Hope this helps. Happy to chat.

Regards

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Partner

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