
From: Fitchie, Andrew
Sent: 17 August 2007 16:29
To: 'Graeme Bissett'
Subject: FW: SDS Claim

Graeme

FYI only.

From: Fitchie, Andrew
Sent: 17 August 2007 16:23
To: Geoff Gilbert
Cc: Matthew Crosse; Susan Clark; Steven Bell; Fitzgerald, Sharon
Subject: SDS Claim

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Geoff

Following on from my e-mail last night, I attach the SDS claim document itself which I have annotated with our comments. Because this was a PDF, we had to recreate the document for mark-up which appears in bold italics, so that the text may have some minor flaws particularly in the tables but I have not commented these at this point. There was also some bold text in the later pages of the SDS Claim paper, but this was not italicised so is distinguishable. With some exceptions, which I mention in the mark up and also below, our input here has to be limited to what is asserted on the face of the document and since we do not have the supporting files, I am aware that my comments cannot make account of the quality/relevance of the substantiation materials which PB have provided to **tie**. It is the case that any formal dispute resolution process is going to attribute evidential weight to contemporary documents which state factual situations and peoples' view at that time.

Our comments are not intended to be a formal rebuttal of SDS's claim but pointers on the weakness of their argument on the Contract.

My further comments are in three categories:

- The selective nature of PB's quotation of and reliance on applicable contract provisions: when the Contract is read in its entirety, many of the assertions about purported limits on PB's obligations would be much more difficult to sustain
- Allegations about causes of delay appear patchy: e.g. I do not see how PB could assert being delayed by utilities diversion agreements which **tie** concluded either around the time SDS were mobilising or even before their appointment.
- PB put an interpretation on their acceptance of Consent risk which is at odds not only with the wording of the Contract, but also with what occurred during clarification of bidder comments on the draft contract prior to signature. Under the Restricted Procurement process, each bidder was required by **tie** to demonstrate what it would include in its financial bid for certain key risk allocation positions. **Consents** was one of these and, in the case of PB, it was dealt with at a meeting on 26th May at Verity House. PB dropped its objections and included an allowance of £2.6 million for unqualified acceptance of the Consent provisions (Clause 5 as drafted). No further discussion with PB took place on the subject after that.

Knock Out

Clause 28.7 of the Contract was inserted (at the time of a complete review of **tie's** consultancy appointment contracts) to prevent providers storing up claims and launching these at their preferred tactical moment, even though the real alleged grounds for claim could have arisen in the past. For the purposes of the Contract, a Dispute is defined as "*any dispute, difference, or unresolved claim between the parties arising from or in connection with this Agreement*". At this point, my view is that there is a dispute. In summary, Clause 28.7 places an obligation on both parties to raise a

matter to formal Dispute resolution within 3 months of the date on which the circumstances giving rise to the Dispute first arose. This guillotine does not apply to any defence, retention, set off or other compensation raised in defence. Depending on how the Appendices to the Claim have been assembled and the logic used to underpin link from change, delay and EOT to resultant damages/costs, I would expect there are elements of SDS's factual assertions which may well be vulnerable to this time bar and ought to be attacked on that basis.

Equally, it would be advisable for **tie** to put forward its counterclaim in the form of a rebuttal of the claim, in order to maximise the argument that **tie's** defence and counterclaim in relation to SDS's failures is sheltered by the exclusion in Clause 28.7 referred to above.

Lastly, I notice that in the Section 3.10 entitled Quantum, SDS assert loss related to management time. This is not a contractual allowable head of claim (unless it arises as a result of a third party claim against the claiming party - not the case here). See Clause 27.4 which specifically excludes Indirect Loss; Indirect Loss definition expressly encompasses loss of management time.

You may feel a meeting would be useful early next week before your planned engagement with SDS. I am not certain of your timing so let me know if this is required.

Kind regards

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