
From: Geoff Gilbert
Sent: 11 December 2006 12:14
To: Andie Harper
Subject: FW: SDS Novation

Importance: High

Andie

One part of DLA advice re SDS novations.

Regards

Geoff Gilbert - Project Commercial Director
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From: Fitzgerald, Sharon [mailto:Sharon.Fitzgerald@dlapiper.com]
Sent: 22 November 2006 17:37
To: Geoff Gilbert
Cc: Fitchie, Andrew; Ailsa McGregor; Bob Dawson
Subject: RE: SDS Novation
Importance: High

Geoff

Post novation the current contractual linkage is the collateral warranty between SDS and tie. The intention when this was conceived was that all utilities design would be complete but that if there were any problems with that design, then tie would be able to sue SDS under the terms of the collateral warranty. You will note that in the Infraco Contract, the definition of SDS Services does not include the utilities design - therefore, risk for that design was not anticipated to be transferred to the Infraco.

In considering your scenarios set out below, the concept of a partial novation is one which would not represent a true novation and what is/is not transferred to the Infraco would become potentially complex. Most of the obligations in the SDS Agreement would be needed in the contractual relationship with tie and with Infraco so there is not a clear split other than in terms of scope. A novation is different to an assignation/assignment in that a new contract is created on the same terms albeit with a switch of one contracting party for another - the benefit of novation being the risk transfer in work carried out prior to the novation taking place.

Scenario 2 is feasible provided that the required scope is within that which SDS is already doing and is carried out on the same terms and conditions - we would not want to inadvertently trigger a new procurement under the Procurement Regulations. Another solution would be to amend up the collateral warranty to incorporate the provision of the required scope on the same terms as were originally entered into by tie and SDS Provider. This would, in effect, create a combined warranty for the novated services and a contractual arrangement to continue to provide the required scope on the same commercial terms. Amendments would also be required to the scope in the SDS Agreement and possibly the novation

agreement prior to novation. This solution is a half way position between the current scenario and your proposed scenario 2, and has the advantage of all contractual provisions being in the one contract with a contractual obligation on the SDS Provider to execute a collateral warranty in favour of tie. In any event, what is proposed will require to be agreed with the SDS Provider.

Please give me a call if you would like to discuss this further.

Regards
Sharon

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From: Geoff Gilbert [mailto:Geoff.Gilbert@tie.ltd.uk]
Sent: 22 November 2006 12:56
To: Fitchie, Andrew
Cc: Bob Dawson; Ailsa McGregor
Subject: SDS Novation

Andrew

We are now considering the extent of work that we require SDS to undertake post novation to Infraco. The issues for us is principally access to PB post novation to complete the Utility Diversions designs and possible to support the TRO process.

Before we develop our thoughts further could you advise:-

1. Whether the contract can be split by a partial novation of certain scope to Infraco and the retention of the remainder by the Tram Project.
2. The implications of creating a separate contract with PB for the retained scope.

If feasible 1 would be preferable as it seems simpler. I am aware that we could have access to PB via the novated total contract. However, this a) gives Infraco too much scope to potentially disrupt progress of our design works b) creates a longer communication chain and c) adds Infraco margin to our SDS cost for no appreciable value added.

Regards

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