

Ysella Jago

From: Gill Lindsay
Sent: 09 May 2008 11:52
To: Donald McGougan; Dave Anderson
Subject: RE: Final terms and event history

Donald, Dave,

I have considered Graeme's paper and would advise as follow:-

Essentially the matter is largely financial and relates to securing value. I have concentrated on the particular legal issue of considering the robustness we would have to a procurement challenge and some view in general of legal tests of value.

My advice in general is that we require to be confident and agree in financial terms that there is appropriate value from the concessions/adjustments to be made and we secure an updated DLA letter which contains similar or suitable comfort on successfully defending a procurement challenge which it did at the £508 figure. In the difficult circumstances, it would give CEC and Tie an external advisor view that they agree with Tie's assessment. I would also advise that this supports from a legal perspective no further debrief and cooling off period ie that this is not only commercially recommended by Tie but can be justified legally.

From my perspective the document is realistic and quite thorough though I believe it lacks some robustness in identifying the price impact and increases re Infracore from bidder selection and some robustness in valuing the adjustments to be made. I have no awareness of the figure of £8m at page 9 of Graeme's note and had been working from the percentage figure in the tramlines letter of 4/5 % (which is on this contract value not the overall cost figure). It may be that the original 8m difference is the sum of that and the price differential of 16% re maintenance. The reason I had focussed on price differential was because I believe that some of the other differentiating factors are becoming tenuous due to the extent of negotiation and difference in the contract terms and the original shift in price to date. The factor of trackform was not expressed in the letter but was a clear part of the evaluation, though it would present some issues in relying on this now as Tie would require to justify why it was omitted.

In terms of securing and evidencing value in relation to defending a procurement challenge, for me, this is clear where there is a consequent reduction in the QRA value. It is less clear to me where we will not be receiving any real benefit or additional service. For example with the incentivisation payments, these seem only to be paid in exchange for progress of contract works where there is already payment and there will be penalty or default clauses ie they do not yet secure a "gain" over and above what would have been achieved at £508m other than an argument that there is an additional likelihood of contract requirements being secured.

With regard to elimination of claims from works underway, this is arguably tenuous unless we can state that this risk was in the QRA expressly (or as part of wider risk which we may be able to identify).

Re entry of CAF, it is the consortium who changed their position by requiring CAF to be part of this now before further diligence can be undertaken.

My advice re procurement challenge is that we finally consider when the full details are known ie where in the £3-6 m the additional sum will be, in addition to the deferred penalty re Phase 1 b and when DLA provide their advice. I am liaising with Andrew on this now.

Gill

From: Graeme Bissett [mailto:graeme.bissett@...]
Sent: 08 May 2008 15:57
To: Donald McGougan; Rebecca Andrew; Dave Anderson; Duncan Fraser; Gill Lindsay; 'Willie Gallagher'; 'Steven Bell'; 'Dennis Murray'; 'Fitchie, Andrew'
Subject: Final terms and event history

Colleagues, here is a short novel on the evolution of the Infracore suite. It addresses the negotiation process, the detail behind the final changes since notification letters were issued, an assessment of

value for money on the final deal, an examination of the alternative procurement options and an evaluation of the risk of procurement challenge.

The areas which remain under negotiation are highlighted in yellow. The conclusions are obviously dependent upon the final outcome achieved. This draft is released to enable recipients to become familiar with the background and judgements in advance of a final version. At this stage, we cannot guarantee that material new points will not be introduced given recent events.

Once finalised, I would expect this document to be incorporated into the Close Report and that DLA would have the opportunity to comment formally on the legal aspects.

The executive summary is drafted to facilitate inclusion in the Council's planned report to its Policy & Strategy Committee on 13th May. It is also subject to the terms finally negotiated.

Comments and questions welcome.

Regards
Graeme

Graeme Bissett

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