
From: Anthony Rush [rush_aj@██████████]
Sent: 29 September 2010 06:28
To: Glover, Joanne; Fitchie, Andrew
Subject: RE: Instructions

Jo

Further to our chat last night.

We decided yesterday not to use suspension to bring more pressure to bear on Infraco to come to the party on Carlisle. My thinking on the alternative of getting counsel's opinion was obviously not to ask him to validate the idea of using suspension for that purpose – rather it was to get his opinion on if and how we can use suspension as part of the strategy. On that basis I think your note should therefore also draw reference to one of tie's essential requirements, that is to get SDS to complete the design they have been paid for. As we debated yesterday my thinking gave emphasis on the 45 business day rule recognising that if we passed that deadline without lifting the suspension we would hand Infraco the opportunity to claim that tie had breached the Contract and were in default. But as this would be contemporaneous with reaching the end of the line with the Conduct RTN did that matter? We would be in the position of counter suing in any case.

I look forward to seeing your instructions to Richard Keen.

Tony

From: Glover, Joanne [mailto:Joanne.Glover@dlapiper.com]
Sent: 28 September 2010 21:44
To: Fitchie, Andrew; rush_aj@██████████
Subject: Instructions

Below is the updated draft email (attachments still to go on) on the basis of both your comments.

I'm heading home shortly, but will log back on later and can send out then to **tie** or Keen, as you think best.

Jo

Strictly confidential, legally privileged and FOISA exempt

Dear Richard,

Further to our telephone call earlier this evening, noted below is a brief synopsis of the current position (relative to our instructions) and the questions which we would be grateful if you would consider and provide us with any comments. Thank you for agreeing to assist us with these queries at short notice and while you have many other commitments.

This email is being shared with our clients as we send to you (in the interests of time) and we will therefore advise as soon as possible tomorrow morning if there are any amendments to these instructions.

Attached to this email is a copy of the Performance Bond. Also attached is a copy of the Bilfinger Berger AG Parent Company Guarantee (the Siemens PCG is in substantially similar terms).

Synopsis

tie issued a Remediable Termination Notice ("**RTN**") in respect of the defective works on Princes Street on 9 August 2010. Further RTNs have also been issued, as per the list included in the course of conduct RTN subject of our earlier instructions.

The Infraco has disputed that the RTN is valid, but nonetheless submitted a rectification plan on 17 September 2010. **tie** has reviewed the rectification plan and considers it not to be acceptable for a number of reasons:

- The proposals are not approved by the relevant Approval Bodies (in particular the Roads Authority and Planning Authority).
- The proposals are based on advice from unnamed and therefore purported experts and not on adequate factual data obtained by recognised testing methods.
- The proposals do not address all of the defects present in materials and workmanship.
- The proposal to remove and replace a 300 mm strip of "wearing course" either side of the rail is unacceptable to us.
- The proposal to introduce another form of wearing course in random lengths and locations is not acceptable to us.
- The Infraco makes no proposal for the transition from the track's rigid construction to the adjacent flexible construction.

The intention is to communicate this rejection of the rectification plan to the Infraco on or before 1 October, in accordance with the contract timelines.

Our clients also issued contemporaneously with the Princes Street (defective works) RTN, an RTN which required the Infraco to rectify their lack of suitable supervision of the on-street works. The Infraco have failed to respond to this RTN.

On 8 September 2010, our clients issued an RTN requiring the Infraco to rectify their failure to develop an integrated assured design for the on-street trackway. The Infraco's rectification plan on Princes Street admitted that the Princes Street Works comprised, in part, works which were deficient in design.

In addition to the above, our clients have on six other occasions given the Infraco instructions to rectify defective work to Princes Street.

Our clients are considering the potential actions which may now be taken, against the backdrop of a number of considerations and pressures. Bringing about the ongoing negotiations in relation to a commercial arrangement is an essential consideration. Deciding on these options has to react to the current set of circumstances and our clients are continuously reviewing the best next steps.

The options can be summarised as the following (which are relevant for the questions below):

- do nothing;
- exercise the right to terminate (on 5 Business Days' notice);
- instruct a suspension of the on-street works pursuant to clause 87.1;
- instruct the removal of the work by a third party pursuant to clause 37.2 (the costs of which are recoverable against the Infraco) (other than the RTN, there has been correspondence between the Parties and instructions from **tie** in respect of the carrying out of the rectification works on Princes Street. The Infraco did not comply with these instructions, which led to the issue of the RTN);
- make a call on the Performance Guarantee (an on-demand bond in the sum of £23m);
- make a call on the Parent Company Guarantees (there are separate PCGs for Bilfinger Berger and Siemens, both in identical terms).

Our clients are concerned that taking no action at this stage could be perceived to be weak (the current thinking is not to terminate on the basis of the Princes Street RTN). Our clients are mindful that, to instigate clause 37.2 in the absence of an integrated assured design from the Infraco, it would be necessary to have another designer to produce a design (the timing of such action would likely exceed the timing to pursue termination by the route previously discussed with you).

Our clients are mindful of the potential for the Infraco deeming a **tie** Default if the suspension period exceeds 45 Business Days (where the Infraco alleges material breach), but note that the expiry of the suspension could be timed to coincide with the timing of the RTN on course of conduct (subject of our previous instructions) which our clients intend to serve within the next 48 hours.

Questions:

We would be obliged if you could give us your thoughts on the following questions:

1. What dangers to **tie** are there in suspending the on-street works?
2. Would not suspending the works give a send a stronger message to the Infraco, as it leaves the possibility of termination open and suspending the works could be seen to take the pressure off the Infraco for those works?
3. Do you have any further views on the use of suspension?
4. The question also arises as to whether **tie** should be permitting the Infraco to proceed against the current factual matrix (no on-street design, defective works, no adequate superintendence, no Programme), given that our clients owe duties to their shareholder which they cannot comply with (regarding the provision of collateral warranties from the Infraco's sub-contractors unavailable because of the Infraco's breach of contract) and CEC's duties (delegated to our clients) as Authorised Undertaker under the Tram Acts.
5. Do you think there is any gain in our clients making it clear that they are taking steps to procure a third party to carry out the rectification works? Would this also fall within the thinking that this could be seen to take the pressure off the Infraco?
6. Is there anything else of which you are aware which could provide a useful legal or tactical option?
7. Must our clients issue a clause 37.2 notice prior to making a call on the Performance Bond? (our view is that there are no 'conditions precedent' to our clients making a call on the Performance Bond other than the issue of a Default Notice to the Infraco at least 14 days prior to presenting the call on the Performance Bond to the Surety).
8. Neither the Performance Bond nor the PCGs contain a prioritisation provision. Is there anything at law, of which you are aware, which would impact upon the order on which either of these instruments should be called, or could these instruments be called simultaneously (for different elements/matters)?
9. Would it be a legally sound option (or would you have any particular concerns) to our clients making a call on the Performance Bond for the money already paid for the (defective) works carried out on Princes Street (approximately £9m), together with a call on the PCG (under clause 2.1) for the parent to perform the rectification works?

If you have any questions, or require any further information, please let me know.

Many thanks once again for your assistance.

Kind regards,
Joanne

Joanne Glover
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