

INFRACO CONTRACT - CHANGE MECHANISM/CLAUSE 80

LETTER FROM BSC TO TIE DATED 4 NOVEMBER 2008 - DLAP COMMENTS 10.11.08
(for tie internal use)

- BSC's letter focuses on Clause 80.13 and the meaning of "unless otherwise directed by tie". The letter does not take a positive approach to reviewing tie's proposed Protocol (e.g. commenting on what is acceptable and which adjustments BSC require), which we understand both parties agreed was required to clarify a mechanism to deal with urgent instructed tie Changes.
- BSC say that the solution proposed by tie is not consistent with discussions between tie and BSC (point 2). BSC note two examples - the cap and timeframe for tie to respond to the Infraco Estimate. If these are BSC's only issues with the Protocol, BSC would have been/are free to simply make comments/request adjustments to deal with these two issues or any other specific issues which they have with regard to the Protocol.
 - **Cap** - we note from Dennis that tie agreed to consider this issue (although it is difficult to ascertain an appropriate level for a cap). There is no real risk to BSC anyway, as tie pays demonstrable costs until Estimate agreed, irrespective of the value of the change.
 - **tie timeframe** - the intention was that an appropriate timeframe for tie to respond to the Infraco Estimate would be set out in the programme to be agreed following the tie Priority Works Instruction, such timeframe to be commensurate with the complexity of the instruction. However, if this is very important to BSC, inclusion of a timeframe at the outset does not seem unreasonable in principle. Any timeframe should reflect the equivalent timeframe for BSC and the opportunity should be taken to reinforce that BSC must comply with their timescales in producing valid Estimates.
- **Interpretation of 80.13** (BSC 1st bullet point) - the words at the end of clause 80.13 clearly mean something i.e. are there for a purpose. For background, this is not new drafting - it was first introduced by tie in January 2007 and was accepted by BSC shortly afterwards. It accommodates potential instructions in relation to Notified Departures and any other circumstances in which tie requires to make a direction to request the Infraco to commence works, howsoever this need arises. Given the complexity of the contract this was an important "saver" for both parties in order to protect the workability and flexibility of the contract. This was discussed at length between the parties.
- **Clause 80.15 is not redundant.** Clause 80.15 deals with the different situation where the Infraco has already provided an Estimate, which cannot be agreed between the parties. The Protocol, clause 80.13 and clause 80.20 deal with the situation where the Infraco has not yet provided an Estimate. Clearly, clause 80.15 also has an express role with regard to clause 80.20 (it is incorporated mutatis mutandis into 80.20).
- **Payment provisions** (BSC 2nd bullet point) - this is not a sensible argument for BSC to make. Clause 80.15, 80.20 and the proposed Protocol all expressly set out that the Infraco will be paid its demonstrable costs to implement the change works until the Estimate is agreed. Clause 67.4.3 does permit the Infraco to include any such sums in an Application for Milestone Payment. Again, this was negotiated with BB at length.

- **Housing Grants etc Act** - this Act does not apply to the Infraco Contract. The Tram Acts expressly exclude it.
- **Interpretation of "unless otherwise directed by tie"** - It is not clear what BSC mean by their comments on the interpretation of this phrase (paragraphs commencing "in the circumstances" and "our view"). The construction of clause 80.13 does mean that in certain circumstances i.e. where otherwise directed by tie, the Infraco is not entitled to rely on its right/obligation not to commence works. By its nature, this may create a positive obligation on the Infraco to commence works (if tie so directs).

"Subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order unless otherwise directed by tie."

The opening phrase "Subject to Clause 80.15" deals with the distinct set of circumstances in clause 80.15. The sentence can be read without this phrase. The "saver" at the end of the sentence operates separately to this and provides for the potential for another set of circumstances which may arise.

- Penultimate paragraph - we understand that BSC's comments misrepresent the "assurances given" at the Gallagher/Walker/Flynn meeting. The Protocol reflected the parties' agreement as to the content of a mechanism to deal with urgent required changes (as per Dennis's note following the tie/BB meeting - "*Process to deal with work immediate instructions prior to tie Change process*"). BSC amendment agreement did not. BSC should therefore be notified that any delay in agreeing such a mechanism is not to tie's account (this also links to the general issue with regard to the provision of valid Estimates by BSC).
- In our opinion, attacking tie for the "numerous instructions" issued since contract commencement and threatening demobilisation is not a reasonable approach by BSC. As tie has already notified BSC, both parties were aware at contract close that there would require to be changes in the early stages of the contract and this was reflected in the pricing mechanism. Contractually, BSC are obliged to carry out the Infraco Works in accordance with the Infraco Contract, and also have a number of obligations in relation to project partnering, progressing the works, acting in good faith, general duties of care. tie is BSC's client in the project. It is not unreasonable to expect that tie may wish to give BSC instructions.
- The essence of any contract change mechanism is to ensure a sensible approach to changes which arise during the course of the contract (which is not uncommon or unreasonable, particularly in a large infrastructure contract) and in fact to protect the contractor, as well as the client. Change mechanisms rely on the good faith of all parties involved. Suggest that this BSC letter, which places emphasis on the interpretation of 5 words in the change mechanism, is not in the spirit of a good faith approach to changes, particularly since the bulk of the major variations was known to BSC (BB) at contract signature (schedule part 4).