From: Richard Jeffrey [Richard.Jeffrey@tie.ltd.uk]
Sent: 18 December 2009 13:37
To: Anthony Rush; Fitchie, Andrew
Cc: Steven Bell; Dennis Murray
Subject: RE: Changes - Fit for Purpose

On the refusing to carry out work bit I did offer in the summer to Dr Keysberg that any areas of dispute are automatically carried out on a demonstrable costs basis, and we would pay on this basis, without prejudice and then we would settle the liability after the event, but in the meantime the work would not be delayed (effectively going straight to 80.15 without a dispute). He refused to do this saying this would expose them to the risk that they might do the work and then not get paid for it. I responded that either the work was in the contract price, in which case they would be obliged to do it anyway, or it was extra in which case they would get paid for it. He said that they might end up losing any dispute of what was or was not in the price, but by then they would have done the work may not be entitled to keep the money and that was not acceptable to him.

Speaks volumes I think

R

From: Anthony Rush [mailto:rush_aj@[redacted]
Sent: 18 December 2009 09:12
To: 'Fitchie, Andrew'
Cc: Steven Bell; Dennis Murray; Richard Jeffrey
Subject: Changes - Fit for Purpose

Andrew

I met up with Steven and Dennis yesterday and they gave me a copy of your latest "Report on Four Key Questions" – would you please be so kind as to let me have an ecopy?

When you and I met we discussed the natural meaning of "design principle, shape, form and/or specification". I am not fully aware of how the parties have acted yet, but I am minded that the natural meaning is very broad – de facto giving a meaning to "competency". I am working from the accepted principle that the "designer" is obliged to design a "fit for purpose" solution. Moreover, TIE can only "change" its "Requirements" - changes to drawings and the design being the responsibility of SDS (before novation) and Infraco (after novation).

The question I have in mind is whether the BDDI adequately defined a fit for purpose solution and if not were SDS obliged to in the knowledge that TIE was relying on it being the case. Moreover, to what extent should Infraco have "covered the deficiencies" in design in their price. In normal circumstances a D&B Contractor takes on the liability of deficiencies in the pre-tender design and is left to recover his losses (not the Employer's) from the novated designer. To what extent does 3.4.1.1 change that?

I am also hearing that Infraco have refused to carry out work until the revised price is agreed. It seems to me that pursuant to Clause 80.15 (subject to the limitations in 80.12) they can instruct Infraco to carry on. Admittedly, TIE would have to adopt a disputed change on a without prejudice basis, but I am not certain that this would have negative consequences for them.

I have other matters today, but intend to revert to this over the weekend. Your comments would be appreciated – if I am off course please excuse my lack of knowledge as yet.

Tony

Telephone 01[redacted] Mobile 0[redacted]

Replies will also be received on my blackberry

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