
From: Iain McAlister [imcalister@acutus.co.uk]
Sent: 30 July 2009 15:00
To: Susan Clark
Cc: Tom Hickman; Dennis Murray; Frank McFadden; Robert Burt
Subject: J086 - [163] - Comments and thoughts from EoT 2 meeting with BSC 28July09

Susan,

Thank you for your email. I've spoken with Tom and arranged to meet up with him on Monday. In the meantime, I'm working on the Section 5 assessment baseline from my own office.

Re. the issues from Tuesday's discussions, here are the points I noted down yesterday morning, expanded with further comments and thoughts.

1. BSC clearly want to "cut a deal", both in terms of time and money. They don't want to get into a detailed assessment of entitlement to either. (You can probably read into this better than I can.) My gut feeling is that when we get into the Sectional Completion C assessment there will be fairly large MUDFA and design related delays that may entitle BSC to EoT. It's too early yet to say if 6 to 9 months is realistic, but I sense it may not be too far off the mark. However, I also believe there are many concurrent delays that are the responsibility of BSC. Exactly how these will play out in any delay analysis will depend on the details. That aside, such BSC delays may be of particular significance in terms of the delay costs that BSC may be entitled to recover. What I took from yesterday's meeting is that Martin and his team would like to strike a deal that grants BSC around 9 months EoT with full time related costs, plus acceleration costs to, hopefully, achieve an earlier completion date. While their attitude yesterday was not aggressive, I sensed they were still seeking to drive a very hard bargain. My biggest reservation about striking a deal is that BSC would not be prepared to compromise their entitlement to further EoT and costs from the numerous ongoing issues associated with matter such as;- late delivery of design by SDS, mis-alignment issues, re-designs arising from unforeseen ground conditions, further MUDFA matters, consents, and the likes. As we all agreed yesterday, the devil (of such a deal) would be in the detail.
2. In point 1. above I touched on the subject of concurrent delays. As I am sure you are aware, there is endless debate in the legal and construction expert professions as to how matters of concurrency, and indeed dominant cause, should be treated both in terms of extension of time and the associated time related costs. While the academically minded debate the wording of the contracts and the strict principles that should apply, the reality is that in whatever type of forum a delay dispute is resolved, the particular facts of the case have a large bearing on the outcome. Where it can be evidenced that a party has significantly contributed to, or been the principal cause of delay, it is unlikely to secure entitlement to all relief from its time related obligations and secure recovery of all its associated costs. I make that statement under the caveat that it does depend on the wording of the particular contract. Most construction contracts seeks to strike a balance as to what is fair and reasonable and I consider the Infraco contract to be no exception.
3. During Tuesday's discussions we touched on some of the delay analysis principles that are often subject to debate. I didn't see any benefit in kicking-off a theoretical discussion on methods of delay analysis as this would almost certainly have consumed a large amount of the available time and detracted from the discussions on the real facts and issues at hand. It seemed to me that BSC is aware of the principles that apply and, while putting down some markers, it wasn't pressing too hard on any specific example. I read this as its recognition that, in these particular circumstances, many of its arguments are not founded on particularly solid ground.
4. I expected a stronger reaction to my suggestion that the MUDFA works at the Depot were not the dominant cause of delay. BSC did mention the recently issued **tie** Changes but I felt they didn't wish to press that line of argument too hard, probably because it would have led to a discussion on their culpability in through late notification, late submission of estimates, etc.. Perhaps they had already discussed amongst themselves the

difficulty of winning the argument for the “Gross” delay rather than the “Nett” (“dotted-on”) one that has been established in case law.

5. As you noted, Steve Sharp touched on a number of points about delay analysis. Interestingly, he made reference to the Society of Construction Law Delay and Disruption Protocol in relation to the definition of mitigation. I’ve seen no reference to this document in the Contract so I’m not sure why he would refer to it, other than that his very selective quote from it supported his argument that mitigation does not include increasing resources. I think any adjudicator, arbitrator or judge would not have the problem that Steve claimed to have had in finding a definition of the regular meaning of the word that could be used in the interpretation of the Contract. The Infraco contract contains particular wording in relation to the Contractor’s obligations to mitigate delay. I would suggest that this is more onerous on the Contractor than that found in most standard forms of contract. The SCL Protocol recognises this, in relation to the JCT forms’ “best endeavours” wording, and notes that that may place a higher burden on the Contractor than that set out in the protocol’s description of mitigation.
6. If you are familiar with the SCL Protocol you will be aware that it does not support many of the fundamentals of BSC’s approach to this whole issue. In particular it stresses the importance of establishing causation in claims for EoT and restricts the recovery of prolongation costs where there are concurrent Employer and Contractor delays. Although the Protocol is supportive of **tie**’s position in many respects I would be guarded against trying to bring it into the discussions with BSC as it is not perfect and may detract from the proper debate around the actual wording and correct application of what is a bespoke contract.
7. On the matter of Steve Sharp’s comments regarding start-to-start links on the Depot Building activities I think he was “shooting from the hip”. I understood the point he was making but having now had the opportunity to examine again the detailed programme it does appear to show exactly what he claimed. Notwithstanding, I don’t think anything turns on this point. I remain of the opinion that there is scope to reduce the construction time for the building, as a whole, if the Contractor is so minded. I also believe this could be achieved with little or no additional cost. Probably the most important question is, from **tie**’s perspective, “is the Depot Building actually going to be critical?”
8. With regard to actual production rates, BSC were not challenging the use of the actual duration, as opposed to its projected duration, for the additional Depot earthworks. What it was questioning was the reduction in the duration for the original earthworks. As I understand it, a significant proportion of the original earthworks has actually been undertaken and therefore the duration is a known fact. The remaining volume is not, at this time, on the critical path. My view is that in such circumstances the assessment of EoT should be based on where the project actual is at the time the assessment is made. I don’t accept that **tie**’s assessment must be made based on the known facts at the date BSC decided to base its claim, i.e. 31 March 2009, particularly as its submission to **tie** was made two months later. Clearly, BSC wants to ignore the facts and issues that have become apparent since 31 March 2009 and particularly those that evidence BSC culpability for delay.
9. BSC made the general statement that float belongs to the Project. It then argued that it has exclusive ownership of any float it generates. I think this matter needs to be considered on an area-by-area basis. I understand BSC discontent with such float being consumed to accommodate **tie** delays, but I do not believe that the Contractor can deny its use for the benefit of the Project, particularly if it is not required by the Contractor. As I have stated above, I think the fair and correct application of the Contract will depend on the actual details of each particular situation.

In conclusion, I think there is an attraction in trying to draw a line under the position to date and agreeing some sort of reasonable compromise in terms of both time and money by way of a “global deal”. If that was to conclude matters on the large number of issues currently in dispute I can see the justification for it. It would also be particularly attractive if it allowed the parties to really get the Infraco Works progressing at the rate required to meet the aspirations of the Stakeholders. However, I do have reservations.

- a) At the root of the current disputes are several contractual interpretation issues, particularly in relation to liability for delay. Striking a “global deal” would not address or resolve these matters. They will remain

areas of disagreement between the parties. This will almost certainly give rise to further claims and disputes on the same or similar principles.

- b) If BSC is to progress the Infraco Works “with due expedition and in a timely and efficient manner without delay” I believe there needs to be a significant change from its current approach. Can this be achieved as part of a “global deal”? If, as I believe **tie** expects, there will continue to be significant challenges to the timeous delivery of fully integrated, detailed and consented designs, further delays and claims will be inevitable. BSC will continue to deny any responsibility and/or culpability and seek recovery of all additional cost incurred. This may be no worse than the current situation, but it will be no better.

As a more general observation, I get the impression that both parties believe the SDS Provider is the source of many of the underlying problems. Whether or not this is true I do not know. I understand that **tie** was dissatisfied with the SDS Provider’s performance when it was operating under its control. Since its novation to BSC there appears to have been consistent criticism from **tie** that the design process is not being effectively managed and that that is the root cause of a great number of the delays. I sense that the key to delivering the Project in reasonable time is resolution of the design. **tie** has transferred responsibility for its management to BSC. If BSC’s interpretation of the Contract(s) is correct, it has little, if indeed any, liability for the SDS Provider’s performance and the timeous delivery of a complete and fully integrated design. Whether or not BSC is correct, until the design is resolved any Infraco Works programme will carry significant risk of further delay. I would suggest this is an issue that requires careful consideration and, perhaps, some creative thinking. Many I suggest we all give this some thought and discuss it further when we next meet.

I hope and trust that you find the foregoing informative and helpful in your reflections on Tuesday’s meeting. Please feel free to give me a call if there is anything you’d like to discuss.

Kind regards

Iain

From: Susan Clark [mailto:Susan.Clark@tie.ltd.uk]
Sent: 29 July 2009 16:00
To: Iain McAlister
Cc: Tom Hickman; Dennis Murray; Frank McFadden
Subject: Trams EOT

Iain

Thank you again for your support yesterday. On reflection I do think we moved the BSc position, however, i don’t want to get too excited about it yet.

Having discussed this with tom this morning can I ask that you carry on with the following;

- 1) Complete the work on Sectional C completion – Tom is back now and can work with you on this.
- 2) Can you have a think about any of the points made by BSC yesterday and give us a list of their points and our counter argument, e.g. Steve Sharps issue with start to start in depot, use of actual production rates in depot excavation, float generated by contractor should be for the contractor to use, definition of “mitigation”.

I’m going to have a think about the strategy going forward and will share this with you along with any input we would like from Acutus. Meanwhile can you proceed with 1) 7 2) above please?

Regards

Susan

Susan Clark

Deputy Project Director - Tram

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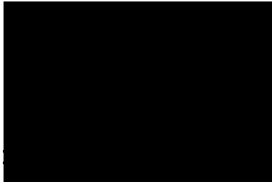
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