

**Adam McKinlay (Brodies Solicitors)**

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**From:** Fitzgerald, Sharon  
**Sent:** 10 April 2008 13:25  
**To:** John.Casserly@tie.ltd.uk  
**Subject:** Incentivisation Mechanism



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John

Rough first draft. I think this is more complex than you were after. Will call to discuss - drafting is based on dpofa.

Think you may just be after 50:50 saving based on issue for construction/approval drawings.

Regards  
Sharon



48. Value Engineering Incentive [Revised 10 April 2008]

- 48.1 [The Parties have agreed to work together [The MUDFA Contractor shall work with [the SDS Provider, the Utilities and] tie ]to, where possible, reduce the costs associated with the MUDFA Works by:
- 48.1.1 proposing and agreeing design solutions, innovations and "smart" applications involving value engineering;
  - 48.1.2 proposing and agreeing methods for maximising construction productivity;
  - 48.1.3 proposing and agreeing the manner in which any disruption caused during the MUDFA Works to the City of Edinburgh is minimised;
  - 48.1.4 achieving savings in the General and Work Sector Preliminaries and General costs through mitigation of delay prevailing at September 2007 and proactive management of emerging delays at source, i.e. the root cause of the event;
  - 48.1.5 [refinement of the sequence of work shown in the Construction Programme];
  - 48.1.6 proposing alternative materials and components which meet the requirements of the Agreement [(subject to the approval of tie)];
  - 48.1.7 achieving savings in respect of the required Temporary Works;
  - 48.1.8 achieving savings associated with risk mitigation;
  - 48.1.9 ensuring decisions are made promptly, by the joint project team, to ensure opportunities to achieve these objectives are not lost or impaired; and
  - 48.1.10 preparing and presenting business case justification for all incentivisation proposals which identify the potential benefits and any associated detrimental impacts involved. The net benefits being formally agreed by the nominated representatives of both parties (i.e. tie Construction Director and AMIS Project Director) prior to instigation of proposal.
- 48.2 The Parties have agreed to apply a mechanism to share proportionately in any savings generated in respect of Target Preliminaries Costs and Target Work Sector Costs on the following basis:
- 48.2.1 the mechanism shall be applied by tie to the aggregate Actual Preliminaries Costs and the aggregate Actual Work Sector Costs at the end of each Pain/Gain Share Period;
  - 48.2.2 the calculation shall be carried out by tie using the applications for payment and data submitted by the MUDFA Contractor on an Open Book Basis with regard to Actual Preliminaries Costs and Actual Work Sector Costs over the immediately preceding Pain/Gain Share Period and verified by tie audit on the basis of Clause 68 (*Audit*);
  - 48.2.3 the calculation exercise shall be completed by tie no later than 60 days following the end of the each Pain/Gain Share Period; and

48.2.4 the calculation shall compare the aggregate Actual Preliminaries Costs over the relevant Pain/Gain Share Period to the Target Preliminaries Costs and the aggregate Actual Work Sector Costs over the relevant Pain/Gain Share Period to the Target Work Sector Costs.

48.3 In the event that **tie** determines, acting reasonably, through calculation that the aggregate Actual Preliminaries Costs over the relevant period:

48.3.1 [have exceeded Target Preliminaries Costs, the Parties shall contribute to the deficit as follows:

48.3.1.1 **tie** contribution: nil

48.3.1.2 MUDFA Contractor contribution: one hundred per cent (100%)[JC - are you holding AMIS to the target ?]

48.3.2 have achieved savings against Target Preliminaries Costs, the Parties shall be entitled to a share in the savings as follows:

48.3.2.1 **tie** share: fifty per cent (50%)

48.3.2.2 MUDFA Contractor share: fifty per cent (50%)

provided always that unless expressly waived by **tie** in writing, the MUDFA Contractor shall not be entitled to apply for a share in the savings if the MUDFA Contractor has breached a material term of this Agreement and/or breached any health and safety legislation and such breach has resulted in a successful prosecution of the MUDFA Contractor and/or any MUDFA Contractor Party.

48.4 In the event that **tie** determines, acting reasonably, through calculation that the aggregate Actual Work Sector Costs over the relevant period:

48.4.1 [have exceeded Target Work Sector Costs, the Parties shall contribute to the deficit as follows:

48.4.1.1 **tie** contribution: nil

48.4.1.2 MUDFA Contractor contribution: one hundred per cent (100%)[JC - are you holding AMIS to the target ?]

48.4.2 have achieved savings against Target Work Sector Costs, the Parties shall be entitled to a share in the savings as follows:

48.4.2.1 **tie** share: fifty per cent (50%)

48.4.2.2 MUDFA Contractor share: fifty per cent (50%)

48.5 The calculations set out in Clauses 48.3 and 48.4 shall be reconciled by **tie** to produce an aggregate net result. In the event that the result is [positive number][saving] in the MUDFA Contractor's favour, **tie** shall notify the MUDFA Contractor, give details of the relevant calculations and reconciliation and state the net pain/gain share balance. [The MUDFA Contractor shall then submit an invoice to **tie** and **tie** shall make

payment within 30 days of receipt of the invoice. ] [Any payment which is due to the MUDFA Contractor shall be included with the Final Account Certificate and paid in accordance with Clauses 49.7 and 49.8.]<sup>1</sup> [If the result is a negative number representing an amount owed to **tie**, **tie** shall submit an invoice to the MUDFA Contractor and be entitled to receive reimbursement from the MUDFA Contractor within 30 days of the MUDFA Contractor's receipt of the invoice or by operation of set off from the MUDFA Contractor's monthly invoices until such time such amount is extinguished. Any amount outstanding to the credit of **tie** shall be treated as debt due and payable to **tie** by the MUDFA Contractor.]

48.6 In the event of expiry of the Term or an early termination, **tie** shall carry out the calculation under Clauses 48.3, 48.4 and 48.5 on a pro rated basis and the provisions of Clauses 48.3, 48.4 and 48.5 shall continue to apply, [save that any amount due and payable to **tie** shall be paid by the MUDFA Contractor to **tie** within 30 days of written demand by **tie**.]

48.7 The MUDFA Contractor may refer any Dispute concerning any determination, calculation or reconciliation by **tie** in accordance with Clauses 48.3, 48.4, 48.5 and 48.6, to the Dispute Resolution Procedure. If it is determined pursuant to the Dispute Resolution Procedure that the whole or any part of any disputed amount should be paid to the MUDFA Contractor [or to **tie** (as appropriate)], then payment shall be made by the appropriate party to the other within 30 days of the receipt of an invoice in respect of the determined amount. Any costs incurred by the MUDFA Contractor in auditing any determination, calculation or reconciliation which is the subject of a Dispute under this Clause 48.7 shall be at the MUDFA Contractor's own cost unless the **tie** calculation or reconciliation is wrong in which case it shall be paid by **tie** to the MUDFA Contractor.

48.8

"Actual Work Sector Costs" means [];

"Actual Preliminaries Costs" means []

"Pain-Gain Share Period" means, as appropriate:

(a) in respect of Target Work Sector Costs, the period from the commencement of MUDFA Works in the Work Sector to the completion of MUDFA Works in accordance with the Agreement in that Work Sector; or

(b) in respect of Target Preliminaries Costs, quarterly ?]

"Target Work Sector Costs" means [];

"Target Preliminaries Costs" means []

"Saving" means [any saving identified in the "issue for construction drawings" compared to the "issue for approval" drawings]

<sup>1</sup> To be adjusted.

<sup>2</sup> To be adjusted.

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