From: Anthony Rush [rush_aj@cqm.co.uk]
Sent: 14 December 2009 21:16
To: Richard Jeffrey
Subject: RE: Private & Confidential

Thanks Richard – a lot to read.

Who are Robert Bell and Colin Brady? Maybe a list of actors would help.

I hope to have read my way through it all by tomorrow before I see Andrew at DLA.

In the meantime I would observe that the delays caused by late service diversions at the north end are a weakness. Moreover, I gathered that BSC are also majoring on the ground conditions and changes to drainage in off road areas. I am sure you will have thought of the risk of a substantial loss and expense claim from both topics.

Maybe instead of a "mature divorce" we may think of suggesting a mediation process towards a new deal which includes taking from Princes Street to Leith out of the current contract. It strikes me that in view of CEC limiting possession to short lengths of road it may be wise to compete the track etc under the one possession for each length. It would also permit spreading cost over a greater length of time whilst BSC could deliver the trams on time, Siemens may be employed to do their bit to the track/signals etc..

See you about 4pm tomorrow.

Tony

Telephone [redacted] Mobile [redacted]

Replies will also be received on my blackberry

From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 14 December 2009 11:09
To: rush_aj@cqm.co.uk
Subject: FW: Private & Confidential

Tony, their failure to manage the design and the design process is definitely one of their weaknesses.

R

From: Robert Bell
Sent: 14 December 2009 08:24
To: Steven Bell; Dennis Murray; Frank McFadden; Richard Jeffrey
Cc: Colin Neil
Subject: Private & Confidential

Gents,

I have a pretty good working relationship (relatively speaking) with Baltazar at BSC. He came to see me late last week as he wanted me to persuade Colin to delete an e-mail he sent to him in error (it was obviously intended for Colin Brady). So far as Baltazar is concerned, he then witnessed Colin delete the e-mail from his "Inbox" and "Deleted Items" box without opening it and he now believes we cannot access it. Fortunately in this instance, we

then managed to retrieve the e-mail from the server, so you can have an interesting read of the e-mail (below) and attached document. The e-mail is more interesting!!!

I would like to maintain my working relationship with Baltazar, so can I ask that this info and how we accessed it is kept confidential.

Regards,

Bob.

From: Baltazar.Ochoa@civil.bilfinger.co.uk [mailto:Baltazar.Ochoa@civil.bilfinger.co.uk]
Sent: 09 December 2009 17:19
To: Martin.Foerder@civil.bilfinger.co.uk; Kevin.Russell@civil.bilfinger.co.uk; Colin Neil
Subject: Fw: MoU

Gents,

Please see attached legal opinion regarding MoU, now agreement.
I would like to discuss this issue at your earliest convenience, since SDS is getting nervous.

Regards,

Baltazar Ochoa
Change Manager

Bilfinger Berger Civil UK Limited
9 Lochside Avenue
Edinburgh
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Tel: +44 (0)[redacted]
Fax: +44 (0)
Email: baltazar.ochoa@civil.bilfinger.co.uk
Web: www.civil.bilfinger.co.uk

----- Forwarded by Baltazar Ochoa/Commercial Management/Civil/Bberger on 09/12/2009 17:15 -----

From: "MOIR Suzanne" <Suzanne.Moir@pinsentmasons.com>
To: <Baltazar.Ochoa@civil.bilfinger.co.uk>
Cc: "MCMILLAN Fraser" <Fraser.McMillan@pinsentmasons.com>

Date: 09/12/2009 16:58
Subject: MoU

Balthazar,

I have managed to look at the SDS MoU this morning.

I understand the purpose of the MoU is to get SDS agreement to an acceleration of the design programme, which they will sign up to in exchange for the additional sums payable as set out in Appendix 3 - divided equally between each milestone and paid in accordance with Appendix 6. This is required because Infraco believe SDS may have a successful defence in relation to any claim under the SDS Agreement for late delivery of the design - as a result of BB/Siemens failure to provide design information, carry out the CIDR etc in time and in accordance with the current design programme. This could result in Infraco being exposed under the Infraco Contract if as a result of the OSSA or success in the Adjudications, tie instructs or Infraco become obliged to proceed with the works - for which there is no design at this time as a result of Infraco failures as set out above. However, Infraco also believes that SDS is culpable for some of the delay - but intend to deal with this issue "after the fact" given the potential exposure as a result of the design being incomplete and the need to have SDS "on side" to assist with future ND claims.

At the same time, you are also agreeing various "assumptions" which will inform the basis upon which SDS carry out the design activity - although the impact of any of these assumptions not being correct is not clear (see below).

Finally, there are a number of changes which have not yet been instructed but for which you are agreeing in advance the SDS design fee.

Given the above context, I have the following comments:

- **MoU - Memorandum of Understanding** suggests that this is not intended to be a contractually binding agreement. If it is intended to be binding on the parties (and I assume it is, I would suggest that it should be badged simply as an "agreement")
- **Siemens involvement** - I see from the comments Siemens do not want to be a party to the MoU. The SDS Agreement was novated to both BB and Siemens, jointly and severally as "Infraco". Accordingly, it may only be amended or varied by an agreement which is signed by SDS, BB and Siemens. However, see the next point…..
- **Clause 11.5 of the Infraco Contract**. This clause requires tie's written consent to any amendment of the SDS Agreement. However, a new agreement which does not seek to amend the original agreement does not require tie's consent. A new agreement will also have the benefit of:
    - not having to be signed by Siemens (although it seems strange that BB should bear all the risk of SDS design delays contributed to by Siemens!). If Siemens are not a party to the agreement BB will have to undertake to procure the delivery by Siemens of the information Siemens are responsible for in Appendix 1; and
    - Preserving your rights and remedies under the original contract - which I understand you want to do.

The attached mark up proceeds on this basis - and characterises the agreement as being an agreement for additional resource in order to allow BBUK to satisfy its obligation to mitigate under the main contract. It is a bit of a stretch - and we couldn't guarantee that an adjudicator would not take the view that it is is in reality an amendment to the SDS Agreement, but it would at least give you an argument on the issue.

- **"managing party"** I don't understand this reference - suggest it is not incorporated. PB is SDS!!
- **Relationship between Appendix 6 and the Design Completion Schedule -** we discussed this. Clause 12 beginning "The remuneration" is useful in this regard as it states that BB are only required to pay the amounts in Appendix 5 on achievement of the milestones!
- **Clause 2 -** I have amended this clause to make the obligation on SDS to complete the design packages clearer.
- **Clause 4 -** this is important, although it duplicates some of what is said in the final clause inserted by Siemens. The exception refers to waiver by SDS of any right to double recovery for the additional resource under the SDs Agreement.
- **Clause 6 -** the additional Siemens wording is not required - it merely paraphrases the law on causation and loss. As it cuts both ways I would suggest we would be better to leave this wording out.

- **Clause 7 -** as drafted this clause doesn't really get SDS anywhere or allow them to establish any entitlement to additional payment in addition to any entitlement they may already have under the SDS Agreement. Good for us. However, if SDS notice this we will need to carefully consider the risk you are taking back in relation to third party consents. Your route to recovery of additional design costs as a result of proceeding other than on the basis of the normal design development process without tie's buy-in to this amended process is not clear.
- **Clause 10/11** - wording is trying to makes sure that it is understood the Parties have not agreed whether or not these are actually changes. If possible we should keep "guaranteed" out. The reference to "entitled to recover" is the correct approach as the novation agreement contains provisions which try to ensure that Infraco will not be left out of pocket by virtue of the amounts they need to pay to SDS.

As discussed there is a significant risk that the 75% payments will not be recoverable from SDS in the event that we manage to establish they were not entitled to such payments under the Infraco Contract. In order to succeed on this point we would have to be able to argue that in accordance with Clause 12 and the cross reference to 5.2 those amounts are only payable once entitlement is established under the SDS Agreement - or alternatively through some right of set-off (which I need to think about further). The only way of putting this beyond doubt would be to incorporate a specific provision - but I understand the sensitivity.

Happy to discuss.

Suzanne Moir
Senior Associate
Pinsent Masons LLP

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