
From: Anthony Rush [rush_aj@cqm.co.uk]
Sent: 05 December 2010 12:04
To: Brandon Nolan
Cc: Richard Jeffrey; Steven Bell; Nigel Robson; Jim Molyneux
Subject: Strategy Meeting - legally privileged

Brandon,

Thanks for sending me a hard copy of your draft report – I got it yesterday and it is my afternoon reading.

We spoke on Friday about the enormous task facing **tie** in responding properly to the various contractual matters now in front of them (DRP's, INTC 536, cessation, Clause 34.1/80 responses to INTC's; design etc) and how best we can articulate this to Richard on Tuesday. But in the meantime he is meeting Tom Aitchison on Monday to discuss the next steps following the meeting on Friday. I set out my thoughts:

When considering the next steps to take in the matter of mediation after the apparently somewhat fruitless meeting held in effect between just Bilfinger Berger and CEC last Friday there are a number of points to take account of:

- Are the consortium members as co-ordinated and strategically focused (as Alastair McLean for CEC appears to believe), or are they dysfunctional and pursuing their own agendas?
- Walker wrote to **tie** under the Contract on the 2 December (received on the 3rd) a letter making a proposal to mediate with **tie** which is in conflict with his proposal to CEC to “remove **tie** from the equation”.
- CAF in effect confirm that they have no influence on the other two partners to whom they “don't matter”.
- Siemens weren't represented at the meeting – does this confirm disunity and/or EK's comment to Jim of disappointment at only being offered a “low level” meeting.
- Performing the contract is not attractive to BSC – no surprise here as the volume of INTC's has consumed both parties to a point where unless the parties compromise there is uncertainty for all parties.
- Walker not knowing what Siemens “walk away” price can only show that they cannot agree and that this is why they have not come back after their last meeting with Richard on “mature divorce”.
- The issues between **tie** and BSC on Project Carlisle are:
 - I. Price – **tie** have always admitted that they will compromise on price and so have Bilfinger Berger and Siemens.
 - II. Programme – **tie** have suggested that they will move on completion dates.
 - III. Scope of work – despite agreement with EK, Siemens want to terminate at Haymarket if Bilfinger Berger are doing so.
 - IV. Scope of Work - despite agreement with EK, BSC are attempting to retain the principles of Schedule Part 4.
- Privately EK always attempted to have the works “shut down” for the winter to allow the design to be sorted out.
- The task facing both parties in working through the mass of INTC's and DRP's which will flow from them is simply enormous and whilst **tie** may not win the adjudications they are in fact only the “tip of the iceberg”. **tie** will have to engage in more DRP's to have the project completed.

- Design is and Achilles heel for BSC but the work in proving that will require **tie** to deploy substantial resources to untangle the web which surrounds it.

Conclusion

There are three options facing the parties:

1. Hold BSC to perform the Contract until it is in tie's interests to terminate for Infraco Default.
2. The "mature divorce".
3. Agree a truncated compromise.

All stakeholders in **tie** now see the difficulties in termination. The debate about how RTN's should or should not be issued in a moot point as it is always necessary for **tie** to prove that the Infraco are in material and adverse breach of contract. It is now realised by all that that process is time and resource consuming. At the same time the parties are engaged in settling differences which will also consume the same time and resource framework.

The "mature divorce" is an ill placed definition because "divorce" is predicated on their being two parties to the arrangement. In this case the BSC Members have to agree to their own divorce settlement before they can divorce from **tie**. Bilfinger Berger and Siemens have been at odds on their "rights" for nearly 12 months. Without having it made clear to them that they are not going to be given an easy exit, this option is unlikely to come about.

A truncated compromise should be deliverable. The problem is that as BSC have progressively destroyed trust the desire by **tie** stakeholders to have a "water-tight" agreement has become greater. However, it may have finally dawned on the BSC members that they have no palatable option, because failing compromise (whoever is managing the project on behalf of CEC) the future does not look any better to them than the present. However, it may well be that in pursuing a truncated compromise a mature divorce may emerge.

I suggest:

1. It would be unsafe to conclude anything other than the consortium members are dysfunctional with their own agendas. Maybe each company has the ability to strategise but they aren't able to combine their strategies.
2. Unless CEC are prepared to act on the basis that **tie** have been removed from the equation there is no alternative to **tie** responding to the letter from Walker – if for no other reason it is the only approach which can be clearly claimed to be a formal position of all BSC Consortium Members (neither Siemens or CAF having written to disown it).
3. There should be no delay in responding to that letter and I suggest:

Thank you for your letter dated 2 December 2010 (reference 25.1.201/RJW/7586).

We take it that you refer to Project Carlisle in your 3 paragraph. The terms contained in our letter dated 24 September 2010 are those which were agreed with Mr. Kitzman as being the framework on which a revised contract price could be agreed. We had also indicated that we would re-consider the proposed dates for completion as part of agreeing the revised price.

Mediation may well be a route to reach final agreement on the terms and we look forward to hearing from you that this is what you propose. In confirming this please also confirm you availability for a meeting to agree the mediation process.

We note that mediation on this matter would be out with the procedure under Schedule Part 9, but this may indeed allow the mediation to move quickly. There would, of course need to be a structured resolution involving a binding

legal agreement and if mediation is to succeed the parties representatives must have the authority to bind their companies/bodies.

One of the early steps will be to select and agree a mediator. We will write further on this before we meet to agree the "rules" for what has to be a confidential process.

4. Assuming that CEC agree with this approach, I suggest that Tom Aitchison writes in his words confirming CEC's agreement.

Tony

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