
From: Robert Burt
Sent: 29 August 2010 11:28
To: Dennis Murray; 'Fiona Dunn'
Cc: Iain McAlister; Anne Connolly
Subject: J086: tie - Infraco; DRAFT Infraco Prelims exercise - STRICTLY PRIVATE AND CONFIDENTIAL AND FOISA EXEMPT
Attachments: J086-901 Ver03 DRAFT Assessment of Infraco Preliminaries items.xlsx
Importance: High

Dennis / Fiona – further to our earlier meeting we have compiled (and attached) a draft spreadsheet for calculation of potential ranges of **tie** liability for Infraco prelim costs. Please note that the draft spreadsheet attached does not arrive at a position on overall totals as yet (the sums in the attached are simply inserted for discussion). As discussed, prior to arriving at ‘firmer’ figures there are a number of matters which need to be discussed with yourselves. I have listed these issues below together with an explanation of the spreadsheet itself. The text below can also form the ‘agenda’ for our meeting to discuss the attached.

Spreadsheet format

The following comments are relevant to the general format and setup of the spreadsheet:-

[Please note that the spreadsheet is quite wide and so is presently set to print on two A3 pages wide. This however can be adjusted as we discuss format and content]

1. The password to open the file is **J086tieInfraco** (please note that the “J” in “J086”, and the “I” in “Infraco” are both upper case) .
2. We have tried to follow the general layout of the Bilfinger Berger Preliminaries spreadsheet model. A number of columns have however been added to allow us to develop a position on each prelims item.
3. To avoid accidental deletion or changes to cell contents (i.e. formulae) we have also protected the sheet contents. The password to edit the protected file contents is also **J086tieInfraco** (although caution should be exercised if doing so).
4. Where data / date entries are required, the relevant cells are highlighted in yellow e.g. **01/09/08**. Those entries are generally required in columns 15, 16, 26 (optional) , 28, 32 (optional) & 34.
5. We have also added column ‘3’ (“Schedule 4 Description”) as in certain instances the Infraco description is not very helpful (in terms of the prelims item coverage).
6. **Columns 15, 16, 17 & 18** are cells where dates are required. Those dates are derived from our analysis of the relevant sections.
The intention behind these columns is that the dates inserted should reflect the actual (or anticipated) start dates where applicable; and finish dates which reflect the current opinion on the period that Infraco should be allowed for completion of the relevant intermediate sections. Those end dates are to be distinguished from forecast end dates of the works on site (because the latter include periods for which Infraco will be responsible and therefore should not be reimbursed).
7. **Columns 26 & 32** allow manual periods of prelims entitlement to be inserted (as opposed to the periods calculated by reference to columns **15, 16, 17 & 18**). Please note: these *manual periods* are prioritised over the periods calculated from the dates in columns 15 to 20. We have not inserted any periods in these columns at present.
8. **Columns 28 & 34** allow percentages to be applied to the original weekly prelims value/rate. They can also be used to effectively reduce the period of prolongation over which the prelims are assessed (although that is best done in the date or % adjustment columns). See further comments below re specific prelims items.
9. Provision has also been made to allow data entries at other yellow cells in the spreadsheet (these are explained further below).
10. As discussed we have set up the spreadsheet to recognise and reconcile the various periods against which the original prelim items were priced. This is particularly relevant to Consortium (Edin. Park) prelim items, which were originally priced at 169 weeks (line items 35 to 42 and 49 to 57).

11. Situations where 'actual periods are less than periods previously reimbursed': Can we discuss how you wish to approach situations where the actual periods for certain intermediate sections may be less than previously reimbursed to Infraco? At present, where this situation arises the current assessment is set to 'zero' (i.e. no reduction is made; see formulae in columns 25 & 31). This could however be reset to address any reductions in periods. While care would need to be taken with such an approach, it is worth discussing and closing out.

General Comments

1. Infraco entitlement to / value of certain prelims items: As discussed at our last meeting, there are a number of prelim items which we believe will require Infraco to demonstrate whether (despite a section being prolonged) it is appropriate for it to receive any payment for same. Even if some form of payment may be due to Infraco there is also a question as to whether it should be at the full value of the original prelims allowance. As discussed, items such as 'bonds' and 'insurance' allowances are prime examples. These questions however will also apply to other elements.

We have made specific comments against the relevant items below.

Another question we should discuss is to what extent the 'value' of the prelims 'weekly rates' can / should be opened up. The more the values/weekly rates are opened up, the more they become akin to loss and expense type claims and assessments. I'm conscious however that you emphasised this isn't a loss and expense analysis. Inevitably however it would appear that some degree of opening up and/or proof will be required.

2. Schedule Part 43 Appendix G clause 1.3 "If appropriate": No doubt there will be debate about what the term "If appropriate" means and how any definition should be applied. For example, can the prelims rates be reduced from (or increased above) those detailed in Appendix F (see similar comments above). An item for discussion.
3. MUDFA Rev.8 decision (Infraco obligations to mitigate): the Acutus 25 June 2010 report was based on Iain McAlister's separate mitigation exercise. One of the difficulties that arises following the MUDFA Rev.8 decision is that as we understand the decision, the Adjudicator held that Infraco has no obligation to consider acceleration measures. I understand Mr Howie also decided that such measures have to be instructed by **tie** prior to Infraco considering same. As such the conclusions in our earlier report (which rely on Iain's mitigation exercise) may be held to be going too far with the mitigation measures applied.

For simplicity however we have generally relied on those conclusions in our assessment of lower limit dates / periods. We should however discuss and consider applying a factor to the lower limit in particular, to reflect the implications of that adjudication decision.

The difficulties that may be faced with the operation of Clause 61 (acceleration) also need to be considered. That is, the possibility that **tie** is unable to dispute Infraco's estimates for acceleration.

4. On-street works: The attached presumes that Infraco will carry out the on-street works. If however, the 'mature divorce' happens certain costs might not ultimately apply. Once the current exercise is complete we could (if required) identify those costs which in those circumstances may not ultimately apply.
5. Data / documents required (Acutus email of 17/08/10): In order to complete the exercise we will need sight of the data / documents listed in our email of 17 August 2010.
6. tie Changes: Can you confirm whether any **tie** Changes agreed include any Sub-Contractor prelims elements (which might also be included in some of the prelims items)?
7. Periods of delay: The periods of delay upon which the attached is based, are presently assessed in relation to the Acutus report dated 25 June 2010 (report ref. J086-812). That report included an assessment of estimated culpability for matters known about up to end of April 2010 (see Exec. Summary item 10). Those periods can however be adjusted following further discussion about any further delays arising.

Section A (Depot) [Prelims Spreadsheet Column 1 line items 5 to 10]

Specific comments in relation to cost categories are as follows (all for discussion):-

- **[Col.1 Line item 5] Supervision:**

Lower limit dates: We have inserted an actual start date of 01/09/08. We understand that this is around the date when the Depot Sub-contractor (Barr) commenced. This will be verified with Andy Scott. The end date has been inserted as the date to which Mr Howie has awarded an EoT (2/11/10). Although the EoT granted by Mr Howie was 22 weeks, the 'appropriate' prelims period is not necessarily the same as Barr did not mobilise in accordance with the original programme date (hence prelims were not incurred over the longer period).

Upper limit dates: again we have used the actual start date of 01/09/08. The end date however has been extended to take account of a possible further 8 week EoT which may be due to Infraco for **tie** Changes / issues at the depot (bulk earthworks increased qts, foundation and steelwork changes).

% adjustment to weekly rate [Lower Limit; col.28]: we have applied a suggested reduction to 30% of the original rate on the basis that it is likely that only a minimal site presence will have been made by Barr during the early delays. To discuss (see also General comment 1 above).

% adjustment to weekly rate [Upper Limit; col.34]: we have applied a possible reduction to 50% of the original rate for the first 12.8 weeks; and added 100% for the add'l 8 weeks applied to the upper limit period. See formula in cell AU14.

- **[Col.1 Line item 7] Scaffolding and Misc Plant:** the start date of 7 April 2009 has been inserted (end date 2/11/10 as above). The reason for not using the 01/09/08 start date referred to above is that although Barr were on site from around September 2008, they almost certainly didn't have scaffolding and misc plant on site until they actually started carrying out the Works. One question which also affects this start date is "Did Barr actually carry out the bulk earthworks or did BSC engage another sub-contractor to do so?" We can put this to Andy Scott. If the latter is true then the 7 April 2009 date should, perhaps, be even later. This means that the duration of this prelim item is less than previously reimbursed (and hence presently 'zeroed' out).
- **[Col.1 Line item 8] Insurance and Bond:** Please see 'General Comment 1' above; periods are as Depot Supervision above. We have however rated the lower limit as 0% (column 28) as it is possible that no costs were incurred (therefore it is not appropriate to increase sums payable). Infraco should be put to proof on this item i.e. to demonstrate it is appropriate to be reimbursed for this and what the appropriate reimbursement should be. Upper limit set at 100% for the time being (but at £53,511 it is clearly worth querying).
- **[Col.1 Line item 9] Establish & Maintain compound:** dates as Supervision above. Lower limit & Upper Limit values set at 100% (col. 28 & col. 34) to reflect site compound being in place;
- **[Col.1 Line item 10] Non-productive labour:** dates as Supervision above. Lower limit set at 50% of original value for initial delay; Upper Limit value maintains that 50% for first delay period plus 100% for 8 week period. See formula in cell AU19.

We have also added a row for 'extraordinary' (area/structure specific) prelim items / claims which may arise (see for example spreadsheet row 23). This has been done for each of the four major prelims divisions shown in Infraco's spreadsheet model. The intention is that this is developed during our subsequent meeting to discuss the attached.

Section C (Airport to Haymarket) - [Prelims Spreadsheet line items 11 to 21]

- **[Col.1 Line item 12] BB High Level – Section A Supervision [Off street]:** We understand that the original intention was that this BB High Level prelims item was to relate to satellite office supervision for off-street works. In the event this function appears to have been served by the Edinburgh Park office. That said, we discussed that the principle of reimbursement for such staff should still apply. We have proceeded with the attached on that basis.
Lower Limit dates: we have inserted the contract start date of **14/05/08** as the start date for this prelim item. The lower limit end date has been inserted as the maximum of the other intermediate section end dates in items 14 to 20. We should discuss whether the commencement date is indeed correct (and whether any reduction in the percentage applied is appropriate).
Note: the original date for V31 prelims was set at 2 weeks after the latest end dates for this element of the works. The source of that date is not readily apparent. We should therefore discuss whether the end date inserted should be increased by this 2 weeks.
Upper Limit dates: start date of **14/05/08** as explained above. The upper limit end date has been inserted as the maximum of the other intermediate section end dates in items 14 to 20. To discuss whether the start date is indeed correct (and whether any reduction in the percentage applied is appropriate).
Please also see note above re the original date for V31 prelims (set at 2 weeks after the latest end dates for this element of the works).
- **[Col.1 Line item 13] BB High Level – Section A Maintain Section Offices [Off street]:** please see comments at Line item 12 above.
- **[Col.1 Line item 14] BB – Section A (5C (depot to 5B), 5B) [BB 'self-delivery']:**
For present purposes this has been taken to mean 5B plus that portion of 5C which includes both the A8 Underpass and the Depot Access Bridge [this however should be clarified].
Note: the Rev.1 (V31) end date in the Infraco spreadsheet does not appear to be correct. Infraco lists this as 09/12/2010, but that date appears to relate to '5A' not 5B or 5C. We think the correct 5B & 5C Rev.1 (BB scope) end dates are 31/08/10 or 26/07/10 respectively. This could clearly affect (reduce) the period over which the original prelims are 'spread'; and hence increase the weekly rate. We accept you may not want to change this but thought it prudent to raise for discussion.

Allocation of responsibility for prelim costs across the combined 5B/5C intermediate sections is very complicated. We have however gone through the various elements in this area and with the information available it appears that the A8 Underpass and the affected 5C Road & Track are the dominant factors affecting ultimate completion of the 5B/5C element.

Lower Limit dates: we have inserted a start date of **25/08/08**. We understand that to be the earliest commencement date (for the Edinburgh Park Station Bridge 'access roads/site clearance/offices & compound'). The latest projected end date in Iain's mitigated review for 5B & 5C was **4/11/11**. That however includes Infraco culpability. Our analysis of the lower limit of liability is that **tie** are responsible for some early delays to the A8 Underpass; but that BB is likely to be responsible for the latter delays. The approximate (lower limit) split is thought to be about 25% **tie**; 75% BB. We can explain how the current lower limit date is assessed in the attached when we meet.

Note: there is an argument that the early **tie** delays will not have used up the early 'float' available on the A8 underpass activity, such that they may not be held to be one of the operative causes of the additional prelims incurred. That said, we would not recommend relying on this argument for the purpose of setting a lower limit of liability (albeit that it may be something **tie** could run in negotiations with Infraco). Again, we can discuss this further when we meet.

Upper Limit dates: we have maintained the actual start date of **25/08/08**. In terms of the potential upper limit of liability, the latest projected end date in Infraco's Issue 3 Rev.3 programme for 5B & 5C was **02/03/12**. At present, we have inserted that date as the upper limit of liability. We think this is probably too high in terms of **tie**'s upper limit of culpability – but due to the complexities attaching to this analysis, we believe there is a risk that a third party decision-maker may 'allow' Infraco this period of costs. Much will depend on that person's ability to understand the complexities. We have therefore left this at the full period pending our discussion with you.

- **[Col.1 Line item 15] Section A (2A, 5A) Supervision [Sub-Contractor]:**

This element is driven by 5A. Intermediate section 2A durations are all subsumed within 5A.

Lower limit dates: a start date of **15/10/09** has been inserted (start date of Russell Road RW4). A lower limit finish date of **25/01/12** has been inserted (from Iain's mitigation exercise – see also General Comment 3 above). That results in a shorter than previously reimbursed period.

Note: something may have to be added for the 13 week early start at Haymarket viaduct. This may well depend on who made this start i.e. was it BB or Graham? Another item to discuss.

Upper limit dates: start date remains at **15/10/09**. An upper limit finish date of **19/09/12** has been inserted (to reflect Infraco's Rev.3 Issue 3 programme date). We have left this as the upper limit date as we understand that this 5A duration is driven by resource constraints within Infraco's Rev.3 programme. In light of Mr Howie's decision in the MUDFA Rev.8 adjudication, we understand that there is a risk that Infraco may be permitted to retain those constraints. As such we have left the upper limit at the period from actual start to projected (Rev.3) finish.

Note: again something may have to be added for short 13 week false start at Haymarket viaduct. See above - to discuss.

- **[Col.1 Line item 17] Section A (2A, 5A) Preliminaries (Time Related)[Sub-Contractor]:** please see 'Line item 15' above.

- **[Col.1 Line item 18] Section A (2A, 5A) Insurance and bond [Sub-Contractor]:** please see 'Line item 15' above. Please also see comments at General Comment 1 above.

- **[Col.1 Line item 20] Section A 5C (Depot to Sec.7), 7 Preliminaries (Time Related)[Sub-Contractor]:** the dominant issue in this intermediate section appears to be the Gogar landfill delays. It appears to be that issue which is forecast to prolong Farran's overall site presence. There is the possibility of a large swing in any decision on liability here. Although the scope of the landfill works has increased significantly (Infraco claims up to +36 weeks increase in duration) there is the question of why it took Infraco so long (up to 14 months) to react to the December 2008 Geotechnical IFC. If **tie** is successful in running the argument that 'but-for' Infraco's lack of diligence in actioning the Geotechnical IFC, the landfill works could have been completed much earlier. The consequence would then have been that no additional time would have been incurred to this overall section (and hence no additional prelims costs). If however, Infraco is successful in arguing that it is not responsible for that early delay, then time (and costs) will likely attach.

Lower Limit dates: actual start has been taken as **13/10/08** (which we understand was the start of Gogarburn Underbridge). End date inserted as allowing Infraco no more than the original planned period for this element. This will be reviewed further prior to final issue of spreadsheet.

Upper Limit dates: start date as above; end date could be held to be **7/7/11** (Infraco projection of completion of civils works following landfill).

Note: the original V31 end date should also be discussed as we think it may not reflect the full period of BB works in Section 7.

Section C (Haymarket to Newhaven) - [Prelims Spreadsheet line items 23 to 30]

- **[Col.1 Line item 23] BB High Level – Section B Packages Supervision [On street]:**
Lower Limit dates: we have inserted a start date of **17/03/10** (re Int. section 1A) and an end date (of **11/05/12**) to reflect Iain's mitigation exercise. On the basis of those dates, the period of prelims previously reimbursed exceeds the projected (mitigated) completion date for this area. That said, see General Comment 3 above (re MUDFA Rev.8 decision).
We will also need to recognise the 'false start' at Int. Section 1B (for about 1 month).
Upper Limit dates: we have kept the start date of **17/03/10** and inserted an end date (of **08/02/13**) to reflect the scenario that *if* Infraco is not obliged to consider acceleration measures until instructed (as appears to have been decided by Mr Howie) then that leaves the door open to it to make much larger claims in respect of delays and the like. This results in *some* additional prelims – but because of a much later start than planned, the period of additional prelims should be reduced.
That said we will need to discuss the period to be allowed for Supervision in the on-street section. This is because it is possible that some supervision was taken on for the on-street sections prior to the 17/03/10 start date we have inserted. This does seem likely and should be discussed.
Also need to discuss percentages to be applied to same (cols. 28 & 34).
- **[Col.1 Line item 24] BB High Level – Section B Maintain Section Offices:** we have inserted the same dates as above.
Neither the Lower or Upper limits generate additional prelims – mainly due to the fact that the period previously reimbursed (176 weeks) exceeds the current actual estimated periods.
- **[Col.1 Line item 26] BB Section B (1B) [BB 'self-delivery']:** we have inserted the approximate start dates taken from our June 2010 report i.e. a start date of 05/07/10.
Lower limit end date of 11/05/12; Upper Limit end date of 08/02/13 (both corresponding to the overall On-street dates above).
Again, neither the Lower or Upper limits generate additional prelims – mainly due to the fact that the period previously reimbursed (176 weeks) exceeds the current actual estimated periods.
- **[Col.1 Line item 27] [Sub-Contractor] Section B (1C, 1D):** we have marked this in yellow pending clarification on proportion of prelims covered by the Princes St. Supplemental Agreement (see Acutus email of 17/08/2010 at item 7).
- **[Col.1 Line item 29] Section B (1A) [Sub-Contractor] Prelims (Time related) :** we have inserted the same actual start and projected end dates as above (i.e. from Iain's mitigation exercise).
We have presently inserted 100% on both lower and upper limits (in cols. 28 & 34).
- **[Col.1 Line item 30] Section B (1A) [Sub-Contractor] Supervision:** dates and percentages as prelims item 29 above.

We should also consider making some sort of provision where structure specific preliminaries can be considered and added where necessary. This is more difficult to estimate at this stage (pending receipt of BB's sub-contractor's claims but it is probably prudent to make provision for same). Please see spreadsheet row 51. **[We will add this into the subsequent draft following our discussions re the attached.]**

Consortium Prelim Costs Contractual Requirements Sections A & B [Prelims Spreadsheet line items 31 to 59]

As discussed we have proceeded on the basis that these prelim items relate to Edinburgh Park (this is despite the prelims items being split into Section A & Section B).

We have also made provision in the spreadsheet for reconciliation of the 7.4% paid via **tie** Changes for certain Consortium Prelims. Cells **AO86 & AV86** make provision for this. This figure will have to be provided by **tie**.

Specific comments in relation to prelim categories are as follows:-

- **Lower Limit dates:** we have maintained the Contract start date of 14/5/08 and inserted the end date as **11/05/12**. That date comes from Iain's mitigation exercises – but please see 'General Comment 3' above. The overall lower limit of delay is set at circa **61 weeks**. That said, not all prelim items should necessarily be 'valued' at 61 weeks – see comment at 'Spreadsheet format item 10' above.
- **Upper Limit dates:** *if* Infraco is not obliged to consider acceleration measures until instructed (as appears to have been decided by Mr Howie) then that leaves the door open to it to make much larger claims in respect of

delays and the like. We have therefore inserted an estimated upper limit of **100 weeks** for discussion. That said not all prelim items are 'valued' at 100 weeks – see comment at 'Spreadsheet format item 10' above.

- **[Col.1 Line items 31 & 46] Contractor's bonds:** Please see 'General Comment 1' above. To discuss whether to 'allow' this item. In our opinion Infracore should be put to proof such that it produces evidence that (i) it is appropriate to apply this item; and (ii) what rate should be applied. The sums involved are huge. For the lower limit of this item we have inserted **10%** (Col. 28) because we suspect the full value should not be applied. We have left the upper limit at **100%** just in case but we can discuss this as it seems highly unlikely that this will be correct.

Note: the bond end date is taken as 6 months beyond Section C date as the original pricing. This appears to extend the pricing period to the Section D date (i.e. 6 months after Section C. As Infracore are involved during this period it may be correct that the end date goes to the Section D date. For completeness however this should also be confirmed.

- **[Col.1 Line items 32 & 47] All other insurances required by the Contract:** as comments immediately above. For the lower limit of this item we have inserted **10%** (Col. 28) because we suspect the full value should not be applied. We have left the upper limit at **100%** just in case but we can discuss this as it seems highly unlikely that this will be correct.

Note: the insurance end date is taken as 6 months beyond Section C date as original pricing – this however also needs to be confirmed.

- **[Col.1 Line items 34 & 49] Maintain and operate offices (for Client):** included at full periods and 100% of value for both lower and upper limits.
- **[Col.1 Line items 35 & 50] Maintain and operate transport vehicles (for Client):** included at full periods and 100% of value for both lower and upper limits. To discuss.
- **[Col.1 Line items 36 & 51] Photographic equipment (for Client):** *currently* included at full periods and 100% of value for both lower and upper limits. This however should be discussed as it may not be 'appropriate' to simply apply the original weekly rate. To discuss precisely what this covers and if all the costs are truly time related.
- **[Col.1 Line items 37 & 52] Consortium Supervision:** included at full periods and 100% of value for both lower and upper limits.
- **[Col.1 Line items 38 & 53] Consortium Office Hire:** *currently* included at full periods and 100% of value for both lower and upper limits. This however should be discussed as it may not be 'appropriate' to simply apply the original weekly rate. To discuss precisely what this covers and if all the costs are truly time related.
- **[Col.1 Line items 39 & 54] Consortium Office Maintenance:** *currently* included at full periods and 100% of value for both lower and upper limits. This however should be discussed as it may not be 'appropriate' to simply apply the original weekly rate. To discuss precisely what this covers.
- **[Col.1 Line items 40 & 55] Consortium Surveying Instruments Maintenance:** included at full periods and 100% of value for both lower and upper limits. This however should be discussed as it may not be 'appropriate' to simply apply the original weekly rate. To discuss precisely what this covers.
- **[Col.1 Line items 41 & 56] Consortium IT equipment:** *currently* included at full periods and 100% of value for both lower and upper limits. This however should be discussed as it may not be 'appropriate' to simply apply the original weekly rate. To discuss precisely what this covers and if all the costs are truly time related.
- **[Col.1 Line items 42 & 57] Consortium Testing:** *currently* included at full periods and 100% of value for both lower and upper limits. This however should be discussed as it may not be 'appropriate' to simply apply the original weekly rate. To discuss precisely what this covers and how testing is carried out (e.g. in-house testing lab or outsourced testing).

As noted above, sheet row 86 makes provision for the reconciliation of the 7.4% added to tie changes for Consortium Prelims.

Siemens Costs

We are mindful that the above only relates to BB costs (although it includes some Siemens supervision).

We are also conscious that a recent claim has been submitted by Siemens in respect of delays and costs associated with the MUDFA Rev.8 decision. As such it would be preferable to see the detail of that claim prior to developing an estimate of those costs (see Acutus email of 17/08/2010). That detail should provide guidance of the claim heads and approx. value of the sums being claimed (even where thought to be invalid).

There is a worksheet summarising Siemens EoT1 costs in the attached but this has not been developed pending receipt of the above.

I do apologise for the length of the email, but it is important to record (i) our explanation of the spreadsheet generally (for future reference); and (ii) the issues arising from its preparation. It can also form an agenda for our subsequent discussions.

Perhaps you can let me know when you have some availability to go through the above and the attached (which will allow us to 'finalise' same).

Regards

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