

"MOBILISATION PAYMENT"

This note proceeds on the basis that, for the moment, we have not seen any contemporary documentation dealing specifically with the payment and its timing.

Background

1. The Contractor is obliged to mobilise generally in order to achieve diligent and timely performance of the Infraco Works. The Infraco Contract does not stipulate that any specific payment is necessary to secure discharge of that obligation.
2. The Mobilisation and Advanced Works Agreement ("MAWA") is dealt with at Infraco Contract Clause 7.2.1. Works performed under it are deemed to have been performed under the Infraco Contract. Claims under it are translated as claims under the Infraco Contract. The slate is wiped clean with regard to delay and costs claims which Infraco might have prior to 14th May 2008 under Comp. Events (a) to (s) and (w). Comp Events (t) and (u) and design related and Comp Event (x) and (v) are not relevant to the MAWA. It is useful and instructive that the MAWA makes no mention of a distinct "Mobilisation" Payment; by 14th May 2008 BB were mobilised.
3. The potentially relevant payment provisions in the Infraco Contract are Clauses 41, 66, 67 and 69.3/4. The scheme is conventional:

Clause 41 provides for notification by Infraco to **tie** of milestone achievement (against Schedule 5). Following testing (and **tie**'s satisfaction), the Infraco may be submit on Application for Milestone Payment. This can include Permitted Variation costs and SDS Provider payments. The application is to be supported by documentation. **tie** then assess "that part of the sum claimed which is approved by **tie**" and "give(s) reasons why any part of the sum claimed has not been certified" under a Construction Interim Certificate. Clause 69.3 entitles **tie** to operate set off "in respect of damages, loss or expense sustained by Infraco's breach of the Agreement". This right is expressly preserved at termination by Clause 94.

In the ordinary course, **tie** has express contractual entitlement to deduct **tie**'s claims for damages or loss and expense against any application for payment. Infraco has no such right (Clause 69.6 states this clearly).

These provisions would be available in the event **tie** wished to claw back part of the "Mobilisation" Payment, on the basis that works or services that were contemplated as being paid for through the £45.2 million had not been executed properly or at all in breach of the Infraco Contract.

The question asked by tie is: what happens to the "Mobilisation" Payment if the Infraco Contract were terminated prematurely for any reason?

We are instructed that **tie** made an advance payment to Infraco to secure a discount on the Construction Works Price¹ through immediate cash flow improvement, not to pay for named site establishment and normal subcontractors' mobilisation. Infraco's position in recent correspondence appears to be that the payment was made to defray non specific mobilisation

¹ If this is documented, that fact would be very important.

expenses of an undetermined amount. In this, we anticipate that they will seek to rely upon the fact that Schedule Part 5 in the Infraco Contract contains three Milestone Payments designated as "Mobilisation" in April 2008. We have not seen how Infraco applied for these payments but this ought to have happened pursuant to Clauses 41 and 67, unless under separate arrangement. [We understand that the advance payment is paid down pro rata to Milestone Payments (?).]

Termination for tie Default

On termination for **tie** Default, the provisions of clause 88 are in play (and are sole remedies for BSC); the relevant paragraph is:

88.8 *tie is required to pay the Infraco the "value of all work carried out prior to the date of termination (in so far as not already covered by payments on account made to the Infraco)"*

In our opinion, this language would permit **tie** to assert that the so called "Mobilisation Payment" (in fact an advance payment) is a payment on account against which Infraco needs to show actual value in services performed and works executed. Unless BSC can demonstrate that works and services have been delivered to the value of the entire "Mobilisation Payment", this amount would need taking into account when at termination assessing any final aggregated payment due to (or reimbursement by Infraco) under clause 88.8.

88.8.1 would permit recovery of prelims already paid to BSC where no related work or services have yet been provided by Infraco.

Termination for Infraco Default

Conventional Client entitlements are enshrined in Clause 90:

90.7 **tie** may complete or procure completion of the Works using Infraco's equipment and materials on site.

90.11 No compensation for termination is payable to Infraco.

90.12 The Parties are to agree:

- amounts reasonably earned but not yet paid to Infraco in respect of work actually done;
- value of materials in **tie**/CEC's possession not yet paid for;

Within 6 months of completion of the Works up to Service Commencement Date:

tie to certify the cost of completing Infraco Works (whether or not under a new contract) and all **tie**'s costs in doing so, less costs due to BSC had they completed.

amount for Maintenance Services **tie** will pay, less payment **tie** would have paid to BSC.

90.14 provides for the final account (no payment to be due to Infraco until after completion if **tie** enters works and expels BSC):

90.16 **tie** may issue an interim certificate if amount is a debt due to **tie** from Infraco.

- Language of 90.12 would allow **tie** to argue that any amounts paid as Advance Payment should only be retained by BSC to the extent justified by Works done but not yet paid for.

In the case of termination (irrespective of Infraco Default or **tie** Default), we would expect **tie** to assert Infraco breach and to be calling the BSC "on demand" performance securities.

Assignment of the Infraco Contract to Siemens

Under Options being considered for the exit of Bilfinger Berger, there would need to be a careful examination and full reconciliation, based on certified Infraco records of how the Infraco Members shared in and now account for the advance payment.

DLA Piper 18.02.10