
From: Torquil Murray [torquilmurray@██████████]
Sent: 07 June 2010 17:14
To: 'Anthony Rush'; 'Bentley, Bruce'; Dennis Murray
Cc: Steven Bell; Susan Clark; 'Brandon Nolan'; 'Fitchie, Andrew'
Subject: RE: tie Unilateral EOT Award
Attachments: 09-11-13 INF%20CORR%202785.pdf; 10-02-11 INF%20CORR%204069.pdf; 10-02-16 INF%20CORR%204112.PDF; 10-03-01 4834%20IN%20-%2025.1.201.KDR.4834.pdf; 10-03-01 4837%20IN%20-%2025.1.201.KDR.4837.pdf; 10-03-01 4843%20IN%20-%2025.1.201.KDR.4843.pdf; 10-04-01 INF%20CORR%204648.pdf; 10-05-21 25.1.201.KDR.5689.pdf

Tony

Further to your e-mail attached are letters dealing with the 9 month award:-

Tie Letter 13th November 2009 (INF CORR 2785) - The letter states that the award was an initial award of nine months. It is accepted that the wording identifies that it was in respect of delay to progress and is not specifically stated as being in respect of MUDFA. Noted that it appears, at some point, the Infraco has turned it into being an all inclusive wrap up deal.

In respect of the costs payment is based on the principles set out in the revised Estimate for INTC No.1. Noted that it is an offer of payment and not subject to the Infraco proving it incurred the cost.

Tie Letter 11th February 2010 (INF CORR 4069) – the letter from **tie** noted that the Infraco did not appear to have accepted the EOT award as it (Infraco) was proposing to refer the matter to mediation.

Tie Letter 16th February 2010 (INF CORR 4112) – letter noted that the Infraco has failed to provide adequate substantiation of the extension. The letter also noted that in order to assist the Infraco **tie** offered a 9 months extension.

Infraco Letter 1st March 2001 (25.1.201/KDR/4834) – Response to Tie Letter 11th February 2010 (INF CORR 4069). Letter stated that mediation is to allow both parties to articulate their respective positions.

Infraco Letter 1st March 2001 (25.1.201/KDR/4843) – Response to Tie Letter 19th February 2010 (INF CORR 4143). Acknowledges that a 9 month extension has been offered but states that it was only in respect of MUDFA.

Infraco Letter 1st March 2001 (25.1.201/KDR/4837) – Response to Tie Letter 16th February 2010 (INF CORR 4112). In respect of the EOT offer the Infraco notes:- ‘It is worthy of mention that the **tie** offer dated 13 November 2009 in which the extension of time of 9 months (6 months remunerated) was offered, whether intentionally or simply carelessly, was at best vague and did not clearly set out the cut-off date.’ Noted that the letter was in respect of the programme but does allude to the fact that the Infraco did not consider the offer was credible.

Tie Letter 1st April 2010 (INF CORR 4648):- Letter from **tie** notes that in respect of the 6 months costs it is up to the Infraco to prove that it falls short of any entitlement. **Tie** also restated that it had made an extra-contractual award and stated that it will pay the demonstrable costs before the compensation re the 6 month costs have been agreed. Letter notes that the Infraco has stated that it has only accepted that **tie** made an offer and not that it has accepted any award.

In respect of the award being vague and containing no express wording **tie** states that it was an initial extension of time. Also that it could not be deemed read that acceptance would deny the Infraco any further entitlement. However, **tie** does state that based on the information the Infraco has provided it considers the Planned Sectional Completion dates are achievable.

Item 17 states that the Infraco is to provide a programme which complies with the current Planned Completion Dates or one supported with a proper and detailed evaluation of entitlement to extension of time.

Item 20 notes that the Infraco has based entitlement in the premise that it is obvious that it has been delayed (by MUDFA) rather than providing an analysis of the dominant critical delays.

Infraco Letter 21st May 2010 (25.1.201/KDR/5689) – Response to **tie** Letter 1st April 2010 (INF CORR 4648). States that it is beyond doubt that the predominant delay on the project is the MUDFA works. Infraco also states that **tie** has failed to make a reasonable offer of an extension of time capable of being accepted.

Adjudication Referral: - understood that Infraco acknowledge a 9 month award made but it was not adequate.

The correspondence from **tie** does not specifically state that the award is in respect of MUDFA simply that it is an interim award. It is the Infraco that appear to have attached the award to MUDFA (assumed to be based on their position that the only delay is MUDFA). Having said that the Infraco also appears to consider that the award is a wrap up deal for all delays up to 13 November 2009.

As regards further extension **tie** has stated that further entitlement will have to be based on an Infraco submission. In respect of the information within its possession **tie** considers that the Planned Sectional Dates are achievable (understood to mean the original date + EOT award 1 [7.6 weeks] + 9 months). In other words there is no further entitlement.

Regards

Torquil

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From: Anthony Rush [mailto:rush_aj@[REDACTED]]
Sent: 04 June 2010 08:40
To: 'Torquil Murray'; Bentley, Bruce; Dennis Murray
Cc: Steven Bell; Susan Clark; Brandon Nolan; Fitchie, Andrew
Subject: RE: tie Unilateral EOT Award

Torquil has produced the note below for me. You may know that the Chairman has agreed with David Darcy that I will look at the question of extension of time.

Frankly I am minded that it would not be a sustainable argument for us to withdraw the 9 months "offered" in the letter dated 13 November 2009 and moreover it is in our favour not to do so. Can Torquil sweep the record for the various letters written since then which confirm that we have granted it and on the grounds of utility delays and that we have considered further entitlement and concluded that none justified please?

I am also of the mind that it would be seen as a gratuitous argument for Infracore that tie cannot decide to extend on an extra-contractual basis in the absence of submissions under Clauses 65 and 80. If Clause 6.1 has any meaning tie may be said to do so pursuant to the spirit of that Clause.

The date of the extra-contractual letter is post the date of the MUDFA 8 claim and I have relied upon this to support the approach that we granted without proper details.

I would like to hear at the Level 2 meeting on Monday from Dennis and Bruce what their strategy is for the next stage in the Howie adjudication. Please bear in mind that Infracore have to Programme to complete by the Planned Completion Dates.

Tony

From: Torquil Murray [mailto:torquilmurray@██████████]
Sent: 03 June 2010 15:48
To: 'Anthony Rush'
Subject: tie Unilateral EOT Award

Tony

tie (unilateral) EOT Award

In respect of the EOT provisions in the Contract they are mainly positive actions on the part of the Infraco.

Under Clause 65 COMPENSATION EVENTS it is stated that the Infraco has an entitlement **to apply** for an EOT and that tie is to review the submissions. The situation would be different if the words 'to apply' were not inserted in the clause in which case there would simply be an entitlement.

Under Clause 80 tie could issue a **tie** notice of an EOT entitlement. However, the clause puts the onus on the Infraco to provide the estimate and relevant information. It is noted that it is the Infraco's case that to be a valid EOT tie would have to issue a change order. It is also the Infraco case that that cannot happen until the estimate has been agreed, even, it is understood, if a Mandatory tie Change has occurred. The Infraco currently are stating that the nine months is an offer with conditions for consideration.

Clause 118 is a duty to act reasonably but it is to be applied where within the Agreement a Party is required to make any determination or to give any decisions, instructions, opinions or consents or to express satisfaction or approval or otherwise take any action, that Party shall act fairly and reasonably within the terms of this Agreement (save where this Agreement expressly states that **tie** is to have absolute discretion), and having regard to all the circumstances. The clause permits tie to make decisions but where the contract provides that a decision is required. In respect of the Contract the onus is on the Infraco to make the submission/application for an EOT.

There is a general obligation under Clause 6.5 that requires senior representatives to review any matters that may adversely affect the completion of the Infraco Works. However, the proposals are to be in accordance with each Party's existing rights, obligations and the existing contractual mechanisms under the Agreement. Accordingly, any right will, unless agreed otherwise, have to be in accordance with the Contract.

The only positive obligation on **tie**, other than reviewing submissions, as regards EOT is in respect of clause 62 LIQUIDATED AND ASCERTAINED DAMAGES.

Clause 62.1 states 'Liquidated and ascertained damages **shall** be recoverable by tie in respect of delay to Planned Sectional Completion Dates as follows:'

However Clause 62.4 states the following:-

62.4 tie **may**:

62.4.1 deduct and retain the amount of any liquidated and ascertained damages becoming due under the provisions of Clause 62.1 from any sums due or which become due and payable to the Infraco; or

Accordingly, while under 62.1 **tie** has an entitlement to deduct but clause 62.4.1 states that it **may** apply the damages due under 62.1. In calculating the amount it would be reasonable (clause 118) for tie to take account of the period that it considered the Infraco had an entitlement. It may indeed choose not to deduct any damages.

In summary it could be said that there is nothing that specifically prevents tie from issuing and EOT award. Common commercial practice would suggest that any offer, especially if an interim award, would be accepted. However, the Contract provisions generally provide that the Infraco to pursue the matter. As the Infraco has already stated that any award must be properly instructed and in accordance with the Contract they may dispute any unilateral award. As stated the only positive action tie could do under those circumstances is not deduct the full damages taking account of the nine months.

Regards

Torquil

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