From: Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]
Sent: 02 December 2009 09:57
To: Stewart McGarrity
Subject: DRPs

Private

Stewart

I appreciated the steer very much yesterday. Sorry the call last longer than I had intended. My Tuesday trip to London developed into a bit of a nightmare when all East Coast trains north last night were cancelled due to a power failure at Grantham so on the early train back this morning instead.

I spoke to Stuart Jordan yesterday afternoon briefly after the conference with Richard Keen - which by all accounts delivered some robust and clear advice on merits and strengths of contractual arguments though I have yet to study details. I believe Steven attended too.

I do see and understand that there is frustration within tie management about why it is hard to articulate tie's best positions under the Contract and that the legal sessions have not removed the mist.

I have to say that I had doubts that Challenge would secure more clarity and I also consider that are elements of " with benefit of hindsight" present which ignore the environment in which the Contract was eventually closed. Nevertheless challenge was/is right and certainly introduced more discipline in examination of strands- but not necessarily an unravelling, more identification of differing arguments but not necessarily convincing statements to contradict what we have been saying. Clearly 5a and 5b vindicate BSC's extreme line.

In all this, it is very influential that Schedule Part 4 is based on the commercial arrangements that coalesced as the Wiesbaden Agreement (put together in order to construct a firm price at Preferred Bidder) and then emerged to be intentionally forced into the Contract and never really negotiated as an integrated part of it. This is what makes its fit with the normal contractual function of the ERs and Infraco Proposals very uncomfortable - the ERs which BSC were essentially refusing to recognise until SDS had stopped trying to disown them as having been developed by the Client in isolation from SDS design evolution. If it is not generally known in tie management that DLA was not involved in any Infraco Contract negotiations from May 07 to mid-September 07 and had no role in either preparing or reviewing the Wiesbaden agreement and the production of Schedule Part 4, then I should perhaps make this clear in the right way.

Having said this, I do not want there to be any sense that DLA is avoiding the reality that the scheme of the contract contains exploitable imperfections or we are somehow shrugging shoulders and not using our very best effort to defend tie's interests.

On the practical front: having talked to Stuart, I do not think that there is an actual advice paper due from us at present- we are focused on RRRW engagement and imminent delivery of pleadings today. The flow charts which Richard had wanted are in play (with Steven)- if there is further work need on these to make them fit for purpose, then this will be done.

Following Senior Counsel's advice (there will be an written opinion), it would be definitely right to take stock and once the immediate pressure of RRRW is off, that is what I will be doing with Stuart and Keith. From that, I will personally aim to distill what DLA say is tie's best position on all points and how/why we differ from McGrigors.

I very much hope this assurance hits target.

Kind regards

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