
From: Graeme Bissett [graeme.bissett@██████████]
Sent: 14 July 2009 12:50
To: 'Stewart McGarrity'
Cc: Fitchie, Andrew; 'Steven Bell'; Jordan, Stuart; Kilburn, Keith
Subject: RE: Notes & thoughts from Friday 10th July meeting w/DLA - Private & Confidential - FOISA Exempt

Follow Up Flag: Follow up
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I agree with your point earlier today about the value of a common body of knowledge which the numerous parties to this resolution process have access so that conclusions are consistently based. It might be useful to capture all of this in an over-arching document which includes :

- Background (see below) including objectives
- Summary of legal / contractual mechanisms available
- Analysis of the individual issues - to include underlying design process (see below)
- Analysis of BSC strategy
- Selection of method and timing of approach to each issue
- Programme to execute
- Project programme and financials - how the outcome range links to project programme and cost (this range will be wide but will help focus on what is important)
- Residual risk analysis (see below)
- Governance of process (see below)

As we discussed this am, there is value in the background section of the Resolution Strategy document as a paper which explains the course of events since contract signature, but particularly in recent months around Princes Street, PMP, informal mediation and outcome. This will provide a trail for any future review, which demonstrates why the next steps now proposed are right and necessary. It will also demonstrate that all reasonable steps have been taken, or identify where alternatives may sit.

On design process and status, I can only reiterate the view that a rigorous document which sets out all that tie knows is an essential part of the platform. The scope of the information request and audit of BSC / SDS would naturally flow from this. There needs to be formal evaluation of the possible lines of attack against PB which might also inform how the information-gathering on design is tackled.

It is important to highlight what residual risks will exist and how they are being mitigated, presuming that the current range of issues can be resolved satisfactorily. Apart from ensuring that all parties are clear that residual risk still exists, this might also identify issues which could be rolled into the resolution process to mitigate future risks.

Unless BSC take precipitate action, the resolution process is likely to extend for many months and the governance model needs to be flexible enough to work well throughout this period. The FCL sub-committee of the TPB is the logical vehicle and I will draft a revised remit and operational process which can be blessed at the TPB on 29/7. A weekly meeting of the right people would obviate the need for parallel tie / CEC meetings.

An important additional feature is the development of a comms plan to run alongside the resolution process, which Mandy will lead – once the resolution programme is clearer this can be brought to life.

It might be worth gathering later today to corral this lot ?

Regards
Graeme

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From: Stewart McGarrity [mailto:Stewart.McGarrity@tie.ltd.uk]
Sent: 14 July 2009 08:57
To: Steven Bell; Stuart Jordan (stuart.jordan@dlapiper.com); Keith Kilburn (keith.kilburn@dlapiper.com)
Cc: Graeme Bissett (external contact); Fitchie, Andrew
Subject: Notes & thoughts from Friday 10th July meeting w/DLA - Private & Confidential - FOISA Exempt

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All - My notes and other post meeting ramblings following our Contract Strategy session on Friday. All needs further discussion.

Present: S McGarrity, S Bell, N Smith(CEC), S Jordan, K Kilburn

General administration of the process

1. As well as providing the legal input to matters we want DLA to take control of the collation of all documentation and evidence on any given subject. In this role DLA will be proactive in chasing down the delivery of the technical and other evidence to support our case on each item / topic with very regular progress reporting back to me and Steven on what they think is missing. DLA to have a think about what this means for presence in tie offices. SMcG/SB to talk to DLA about keeping track of fees as we go.
2. There is already an exercise in progress to collate all DLA advice, analysis and position papers to date. When this is complete it should be married up to the technical and other evidence DLA do already have and the gaps (of which may be many) highlighted.
3. As a straw-man - the complete "file" on each dispute for referral might look like:
 - a) Executive Summary for dummies (like me)
 - b) Legal Analysis/Position Paper
 - c) tie technical analysis/evidence assembled
 - d) External technical/legal analysis (eg John Nicholson/Accutus/Donaldsons)
 - e) Reinforcing legal analysis/opinion (QC)
 - f) Range of impact outcomes would have on programme and costs
 - g) Cross reference to parallel contractual actions measures (notices of breach, notices to comply, invoke rights of Audit)
 - h) Brainstormed BSC response (essentially what do we know about the BSC position and their likely response)

Not all of the sections would be applicable to every item in dispute. Ideally this file would be one from which the submissions to an adjudicator would be pulled.

4. Parallel contractual actions – we didn't get to this item on the agenda on Friday but these are broadly (with apologies if i have missed anything):

- a) *Issuing notices of breach or to comply with obligations* – we have a large number of breaches identified which we need to filter
 - b) *Requests for information* – maybe needs to be a raft of these issued in fairly short order to provide the evidence that a dispute has crystallised in all the circumstances where we are failing to move forward due to lack of information eg estimates.
 - c) *Invoking the Audit and Best Value clauses* – the former feels like it would be a very powerful tool especially if we got amongst things like the BSC management of the design process post contract and the assembly of their supply chain. We need help in framing competent Audit notices, aligning them to the disputes we are pursuing at 3. above and
 - d) *Calling bonds / PCGs* – discounted at this stage as it's a pretty nuclear option. Need to keep in mind though
 - e) *Remediable Termination Notice* – this also seems to me to be very provocative being a notice that we will terminate the contract if they don't sort things out. Maybe would need specific stakeholder consideration? – I don't know. My reading of the contractual clause is that we must have already issues Underperformance Warning Notices for this to competent
5. Comprehensive Programme for DRP/contractual engagement – we need a full Gantt chart running over the coming months to show how all this fits together as a complete campaign and then to manage the delivery of that programme ruthlessly. Resource should come from Susan's team – with Susan herself as chief whip? – but again DLA to be 100% proactive in telling us what they think is missing at any point in time . **Current aspiration is to have a strategy paper, an overall programme and the first few DRPs and/or parallel contractual issues ready to go by the Board meeting on 29th July. Governance of DRP process might also be addressed at that time ie having approved strategy - don't need to wait for 4wkly Board meetings to launch. We talked previously about a sub-committee to oversee (FCL?)**
 6. Kicking the tyres and governance – meaning sign off internally plus Board and CEC as necessary. We must have a robust QC stop point in the process when we think we're ready to submit or take an action. This has got to include one or more fresh pair of eyes. As requested by CEC we also need a weekly meeting conference call to monitor status and progress and to make very sure that we have progress against the plan each week. CEC have separately asked for weekly briefings from DLA – need to figure out if we can get these joined up.
 7. Parallel communication with Consortium at all levels – need keep in touch with actual delivery and where olive branches are being offered. We don't want to miss a tipping point in our direction from any or all of the consortium members because were buried in the war room.

tie and other resources to deploy

8. These are:
 - DLA – Fitchie/Jordan/Kilburn/Horsley
 - tie – Principal team who will mobilise other people as required – S McGarrity/S Bell/S Clark/D Murray/F McFadden
 - tie – Strategy/ brainstorming BSC response and staying close to the Consortium (good cops) – R Jeffrey/J McEwan/A Richards
 - External resources – Accutus/John Nicolson/Donaldsons/others as identified
 - Kicking the tyres (6 above) – G Bissett/D Mackay/R Jeffrey / battle scarred externals such as members of Peer Review Group and Anthony Morgan of PwC /CEC and Board reps
9. A separate tie team dealing with pursuit of DRP and other contractual matters (ie separate from the project delivery team) is not a good idea – needs the knowledge and expertise of all those who have been involved over the past 6 months (indeed 18 months).
10. Holidays – a significant obstacle to making a fast start over the next 3 weeks at least as we have widespread leave commitments. Need to sit down and rationalise this and how it impacts our ability to deliver the first salvo competently by the end of July. Same goes with BSC.

Selection of items and measures to pursue and prioritisation

11. We reviewed the existing list of possible DRP referrals. We should be filtering on the basis of the following broad criteria (adapted from previous ideas from colleagues):
 - In the absence of the dispute BSC have no other impediment (we know of) to progressing the related work
 - Matter is material in terms of time or money impact
 - We are ready for referral technically and legally
 - We have a strong case – important to have wins under our belt
 - Either on its own or linked with other referrals and parallel contractual actions puts the greatest amount of heat on the whole BSC consortium
12. The other criteria to worry about is whether a dispute actually exists - DLA to assess where this is not the case and what we best do to crystallize a dispute where necessary.
13. The big impact issues are delay attribution and valuation, design change (incl BDDI to IFC) and getting a service out of BSC going forward under the existing contract which will include providing us with a programme. Initial hit list:
 - **EOT 1** – Valuation issue only but significant implications for future prolongation claims
 - **Hilton Car Park** – Easy win?
 - **BDDI to IFC** – selection of 3 or 4 specific instances (for individual DRPs) on the basis of the above criteria. Select items where we have an estimate in dispute (RRRW nearly agreed, others nowhere near agreed), where we have a problem with the IFC design in principle ie don't know how it got there of why it's the best (cost effective) engineering. Need to clarify how we get a specific BDDI / IFC into dispute if we don't have an estimate. Intended to drive out information or expose lack of information on design development and change. Possibly combine with **audit** of design status and design management by BSC since contract award?
 - **EOT2** – Huge implications. Cornerstone is the forensic analysis by Accutus (yet to be topped and tailed) and our internal workings of how delay would be fairly attributed to the two parties. Contractual obligation to mitigate (or at least give the client another option other than doing nothing) and strength of their “exclusive access” argument very relevant. Also need to bottom out impact of failure to mobilise. Possibly combine with **audit** of mobilisation and subcontractor arrangements?
14. There are also contractual mechanisms or interpretations which may form a dispute in their own right:
 - Effectiveness of Cl. 80:15 – instructing them to work in the event of a matter being referred to DRP – Peer Review team were worried about whether this was competent
 - Their obligation to provide an timely estimate for a change in the first place – ie we can't either agree or dispute something we have no or inadequate information to assess – vicious circle
 - Their obligation to progress the works in the absence of a dispute - Cl. 60
 - Operation of Cl. 80 change mechanism generally
15. We didn't get round to talking about design management responsibility (both pre contract and post contract) or possible liabilities for SDS. All very important.

Further session with Stuart Jordon today (Tuesday 14th) to progress further.

Regards,
Stewart

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