

Colin Smith

From: Anthony Rush [rush_aj@██████████]
Sent: 05 March 2011 11:07
To: Nigel Robson; Colin Smith
Subject: Preliminaries
Attachments: Preliminariesopinion.docx

Attached the "independent opinion" I gave on the Preliminaries Issue in July to David Mackay and David Darcy (which is repeated by Dervaird)

It shows that the Infraco are open to being accused of acting in a manner not in accordance with what one would expect of an experienced contractor.

Sadly I gave the same advice to tie some months earlier and they chose to partially ignore although they did come up with their own version which Dervaird rejected. My intention when I first raised it was to claw back overpaid preliminaries from future payments – but this was thought to be too provocative.

Tony

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OPINION

I have been asked to consider the Payment of Preliminaries. These are my own views – not attributable to tie Limited or its management. I base my views on my understanding of the Infraco Contract and my experience in the Construction Industry.

The Arguments

My understanding of tie's position is that Preliminaries are Construction Milestones and therefore that Infraco should comply with Clause 41.3 and notify tie that a Construction Milestone has been achieved. They argue that the Infraco Contract does not provide "separate rules for Preliminaries". They rely on the fact that Preliminaries are included in Schedule Part 5 to support this argument.

Despite being asked to, Infraco have not explained why they do not accept this argument. They act as though they believe that Preliminaries should be paid simply on a monthly basis as scheduled in Schedule Part 5. This argument is offered by Mr. Darcy in his email dated 5 July to tie's Chairman. I understand that the email was subsequently withdrawn, but nevertheless it does explain Infraco's method of application.

Definitions

The normal meaning in the industry attributed to "Preliminaries" is those activities/items which are common across all other items. It is derivation being applied to bills of quantities which are either trade or activity based (for example groundwork or earthworks). Some items which will be included in Preliminaries are time related, as an example staff and others specific, for example erecting site accommodation.

Milestones normally mean contractually imposed dates by which certain parts of the work have to be completed, or when payment for certain completed parts of the work will be certified.

Schedule Part 1 defines:

"Construction Milestone" means any milestone (other than any Critical Milestone) which has been identified and defined as a construction milestone in of Schedule Part 5 (Milestone Payments);

"Milestone" means a Construction Milestone, a Critical Milestone, a Mobilisation Milestone, a Tram Milestone and/or a Tram Maintenance Mobilisation Milestone;

Schedule Part 5 is broken down into various headings one of which is:

00 Mobilisation and Preliminaries

Consequently there is no justification for considering Preliminaries to be Construction Milestones and there is justification for questioning whether they are in fact Milestones.

Contractual Considerations

- Infraco has a contractual obligation to provide tie with an updated Milestone Schedule pursuant to Clause 80.17.2.
- tie has an overriding obligation to administer the Contract so as to achieve best value for the public purse and is entitled to value payment applications (Clause 67.5).
- Schedule Part 1 paragraph 2.14 provides that "headings" in the Agreement shall not be deemed part of the Agreement. Clause 67.5 permits tie (acting properly and reasonably) to certify a part of a sum claimed by Infraco, and for the parts rejected giving reasons.
- Under Clause 80.17.2 Infraco should update the Schedule 5 (*Milestone Payments*)
- Clause 118.1 permits tie powers of absolute discretion in certain circumstances.

Questions to be addressed

1. Are Preliminaries Milestones and if so are they Construction Milestones?
2. Is Infraco entitled to be paid for Preliminaries in the tranches given in Schedule Part 5 - which does not reflect the actual construction period required (which has now been reported by Infraco as 66 months)?
3. Is tie is entitled to propose a readjustment away from the inclusion of the set Preliminaries payment based upon a 38 month construction programme?
4. From a practical standpoint, can tie effect the readjustment by disallowing Preliminaries (over a notified period of time) whenever included by the Infraco in the Reporting Period end in its Payment Application under Clause 67.4.
5. Have tie acted "unfairly or unreasonably"?

Opinion

I give the following opinion on the understanding that it cannot be binding on either party:

- Preliminaries are not Milestones and if they were they would not be Construction Milestones.
- Infraco are not (having regard to actual progress) entitled to be paid Preliminaries in the tranches given in Schedule Part 5. Such tranches are expressed on a monthly basis and reflect the rate of recovery of the Construction Milestones.

- Infraco should adjust the Preliminaries payment schedule to take account of delay and payment of loss and expense type reimbursement.
- **tie** is entitled to exercise the provisions of Clause 67.5 and readjust the payment of Preliminaries included In Schedule 5 (*Milestone Payments*) milestones on a fair and reasonable basis.
- **tie** has not been unfair or unreasonable. There is a whole range of ways **tie** could have adjusted the Preliminaries payment and still be fair and reasonable. The way they have done causes minimum immediate financial impact to Infraco.
- **tie** are entitled to withhold further payments for Preliminaries until the amount paid reflects the value of Construction Milestones achieved.

Anthony Rush
26 July 2010.