
From: Alastair Maclean [Alastair.Maclean@edinburgh.gov.uk]
Sent: 12 April 2011 23:06
To: Steven Bell
Cc: Sue Bruce (Chief Executive); Donald McGougan; Dave Anderson; csmith@hg-group.co.uk; [REDACTED] Richard Jeffrey; iain.macphail@mcgrigors.com
Subject: RE: Comments on MOV1 Draft
Attachments: image001.jpg; image002.png; image003.jpg

Steven

Many thanks for your email which is extremely helpful.

I have noted my comments below in block capitals (forgive the use of capitals but I cannot access colouring remotely!)

Can I suggest once the next draft has been produced by Pinsents that Colin, McGrigors you and me sit down and go through that draft to cover off all points (if any) which are still outstanding.

A

From: Steven Bell [mailto:Steven.Bell@tie.ltd.uk]
Sent: 12 April 2011 14:05
To: Alastair Maclean
Cc: Graham, Drysdale; Macphail, Iain; [REDACTED] Richard Jeffrey; Dave Anderson; Donald McGougan; csmith@hg-group.co.uk; Sue Bruce (Chief Executive)
Subject: FW: Comments on MOV1 Draft

Legally Privileged and FOI(S)A Exempt

Alastair,

Richard had asked me to review the MOV and supply you with any comments on behalf of tie.

I have reviewed this with Vic today and summarise below the issues which stand out.

The purpose is to assist CEC in arriving at a fully informed view. I have highlighted some of these issues because of more detailed knowledge of Infraco's historical positions and approach. I appreciate that such comments may be considered backward looking and that we hope for different behaviours in the future, but we have not seen those evidenced yet.

Summary Points

Hg Report: the copy of the report I have seen does not include all appendices yet so these have not been fully scrutinised.

I THINK COLIN PROVIDED A COPY OF THE APPENDICES TO RICHARD BUT COLIN SHOULD BE ABLE TO

RESEND THEM TO YOU IF NEEDS BE.

Application of the Infraco Contract to the Prioritised Works: The issue of self certification and assurance is complex. tie (or any duty holder under ROGS) need sufficient transparency and ability to verify the design, construction and test & commissioning self assurance to satisfy themselves, the ICP and withstand any legal challenge. This MOV is drafted to cut out the existing review and approval rights of tie and it will be more difficult to demonstrate the other matters if there is any lack of transparency from Infraco. In addition, the MOV removes deliverables obligations on Infraco and requirements to maintain particular records of variations etc. The MOV must not make it more difficult to discharge the Safety Verification and Safety Assurance responsibilities that tie currently hold.

THE ISSUE OF SELF CERTIFICATION WAS AGREED BY THE PRINCIPALS AT MAR HALL BUT I AGREE THAT WE NEED TO MAKE SURE THAT THE ROGS ISSUE NEEDS TO BE COVERED OFF THROUGH COLIN'S INTERDISCIPLINARY DESIGN CHECK PROCEDURE.

IAIN - COULD YOU HAVE A THINK ABOUT THIS POINT WHEN YOU REVIEW CLAUSE 10 AND PART 14 OF THE INFRACO CONTRACT?

Programme: This is deliverable by 15 October 2011 and Infraco are protecting their float here. I perceive this is to allow Infraco options to change subcontractors and to complete remedial works before they get rid of the incumbents and to limit their exposure until they know if the deal is going to be signed.

I CANNOT COMMENT ON THIS.

COLIN - CAN YOU RESPOND?

Payment & Certificates 1,2 & 3: Putting aside the total values being proposed by Infraco for each of these stages (which cannot be objectively supported by me or my team for the detailed reasons outlined to Colin Smith on 31 March 2011), the role, accountabilities and responsibilities of the Certifier in not compatible with the mechanics suggested by the MOV. They also cut across the Infraco Contract and mean that the client's Representative will be unable to affect payment and certification matters.

THE MECHANICS SET OUT ARE DUE TO CHANGE FOLLOWING TODAY'S LEGAL MEETING AS SET OUT IN IAIN'S NOTE EARLIER THIS EVENING.

ON THE ISSUE OF VALUES I CANNOT COMMENT BUT COLIN IS I UNDERSTAND HAPPY THAT THE MATERIALS AND EQUIPMENT WILL SUPPORT THE VALUES AND WILL BE BACKING THAT UP WITH A CERTIFICATE TO THAT EFFECT.

There appears to be no linkage of Certificate 1,2 or 3 payment to completion of an assured integrated design as was previously discussed as a potential intangible asset.

NOTED BUT THAT WAS NOT THE COMMERCIAL DEAL.

There is no mention of Warranty arrangements for Materials and Equipment.

IN CLAUSE 6.3 SIEMENS ARE CONFIRMING THAT THE MATERIALS AND EQUIPMENT MEET THE EMPLOYER'S REQUIREMENTS. THAT IS TO BE CHANGED TO A WARRANTY.

IAIN - CAN YOU MAKE SURE THE DRAFTING CATCHES UP ON THIS?

This MOV requires the Certifier to certify Prelim type cost solely as a function of time passed and also to certify Milestones completed. You are aware of our views on that and that we thought CEC understood the need to link Prelims with work value earned in construction activity. That was the line previously pursued by Colin with Infraco.

I AM AFRAID THAT I AM NOT AWARE OF YOUR VIEWS ON THIS - COULD YOU EXPAND?

IN ANY EVENT THE ISSUE OF PRELIMINARIES IS OUTSTANDING FROM TODAY'S MEETING. MY UNDERSTANDING IS THAT ALL OTHER PAYMENTS WILL BE AGAINST CERTIFIED MILESTONES.

There is also no requirement for Infraco to apply for milestones in the current draft. Importantly, these are stated to be final and binding amounts (not the more traditional interim payments) and therefore there is no obligation to substantiate or opportunity to amend the value once certified. If Hg are to be the Certifier, then they will need to employ the resources to undertake the work to confirm milestones as this should not be disconnected from the accountability ad responsibility .

THE MECHANIC HERE IS TO CHANGE AS PER IAIN'S EARLIER NOTE BUT YOU ARE CORRECT IN SAYING THAT

INFRACO WILL NOT APPLY FOR PAYMENT. PAYMENT WILL BE TRIGGERED BY THE ISSUE OF A CERTIFICATE BUT INFRACO WILL NEED TO PROVIDE A VAT INVOICE PRIOR TO ACTUAL PAYMENT.

Infraco have also accelerated the payment timetable to become due 2 weeks after VAT Invoice rather than the current 3 weeks.

NOTED.

I do not consider the above to be equitable, however it is a CEC call and if they want to instruct this they need to be informed of the size of the potential concessions they are signing up to.

I CANNOT COMMENT I AM AFRAID ON WHAT IS EQUITABLE BUT THIS APPEARS TO BE THE COMMERCIALY NEGOTIATED POSITION AND WILL BACKED UP BY QS CERTIFICATES.

Price and Change: the drafting and definitions add complexity and do not permit tie or CEC to require a change be implemented.

I AGREE THAT THE DEFINITIONS ARE COMPLEX. WHILST WORKABLE I HAVE ASKED FOR THE DRAFTING TO BE TIDIED UP.

IN RELATION TO CHANGE THE IDEA WAS TO SIMPLIFY THIS MOV WHICH IS ONLY TO APPLY TO THE PRIORITISED WORKS. IF A VOLUNTARY CHANGE IS NEEDED THE PARTIES SHOULD JUST SIT DOWN AND SEEK TO AGREE IT. IF THERE IS AN UNFORESEEN EVENT THEN SOME SORT OF CHANGE PROCESS IS NEEDED BUT NOT THE ONE IN THE INFRACO CONTRACT! IAIN IS DRAFTING A NEW CLAUSE 10.3.

Sub Contractors: Whilst I believe I understand the intent from the HoT, The draft appears to remove tie's ability to address Health and Safety issues (Clauses 28.6 & 38). This needs to be amended.

THE POSITION IN RELATION TO SUBCONTRACTORS WAS AGREED COMMERCIALY AT MAR HALL BY THE PRINCIPALS.

IN RELATION TO H&S ISSUES POSSIBLY IAIN COULD HAVE A LOOK AT THAT AND IF NEEDS BE BUILD SOMETHING IN.

Moratorium / Preservation of Rights: Draft appears somewhat one sided and significant concession to include "same grounds" even if future UWN / RTN. Given the wide ranging nature of RTN9 (Conduct) it is unlikely any category could be said to avoid the same grounds argument. Strongly recommend resist this part. Revised Programme incorporating all E.o.T. pre-12 March 2011 needs to explicitly include all Changes as well as referencing Notified Departures and Compensation Events.

I AM NOT CLEAR WHY YOU THINK THEY ARE ONE SIDED - COULD YOU EXPAND?

14.2 IS DESIGNED TO CEASE HOSTILITIES.

14.1 IS DESIGNED TO WIPE AWAY HOSTILITIES IF THE WIDER DEAL IS AGREED AND MOV 2 IS ENTERED INTO.

THE PRINCIPAL OF THIS WAS I THINK AGREED AT MAR HALL.

Disputes: Ok with proposed Joint Project Forum taking place of CEO's meeting under DRP but tie/CEC need to decide who from the client side has mandate to move to next stage of no agreement is reached? tie Rep Or CEC?

THIS IS A GOVERNANCE MATTER ON WHICH I NEED TO DEFER TO COLIN.

Governance Structure: Key issues are Certifier Role and Joint Project Forum DRP mechanics listed above.

AS ABOVE.

Risk: MOV is silent on risk register and (joint?) approach. Do we rely on agreement to agree?

I THINK COLIN WAS LOOKING AT THIS.

Legal Advice on MOV: McGrigors should consider writing an advice note to CEC highlighting the significant amendments to the

Infraco Contract and to the tie (client) rights and remedies if the MOV is signed to ensure this is clearly recorded in writing. We would not want to repeat the type of issues raised / concerns expressed which have been raised with DLA and visibility of the original advice over the Infraco Contract.

HAPPY WITH THAT. STRICTLY MCGRIGORS ARE TIE'S SOLICITORS WITH A DUTY OF CARE BEING OWED TO CEC SO ANY ADVICE SHOULD BE ADDRESSED TO BOTH TIE AND CEC.

IAIN CAN YOU HELP OUT ON THIS?

My (non legal) view is that the MOV proposes notable concessions from an already variable position.

THE INTENTION I UNDERSTAND IS PURELY TO HAVE A SIMPLIFIED DOCUMENT FOR THE PRIORITY WORKS. THE POSITION FOR MOV2 WILL CLEARLY NEED TO BE DIFFERENT.

Clause by Clause specifics

Clause 1

IDC check procedure needs to include for necessary assurance and integration with infrastructure and Trams explicitly.

NOTED - COLIN CAN YOU BUILD THAT IN?

Schedule Part 3 Materials and Equipment not yet available

COMMENTED ON ABOVE.

Chainages being checked.

MANY THANKS.

Prioritised Works definition messy. Understand Carol Campbell of CEC is reviewing to improve.

DRYSDALE WAS LOOKING AT THIS AND THIS IS BEING TIDIED UP.

Programme comments as per Susan's note of 4 April to Colin Smith.

ONE FOR COLIN.

Vesting Certificate to be agreed (not yet seen) and Bond to be agreed (not yet seen) and should be "on demand".

THE VESTING CERTIFICATE IS I THINK AN APPENDIX TO COLIN'S REPORT.

AS FOR THE BOND IAIN IS CHECKING TO SEE IF THE EXISTING BOND UNDER THE INFRACO CONTRACT COVERS THIS.

Clause 2

I note this means Schedule Part 4 and Clause 80 remain unamended.

NO. SEE CLAUSE 10.3. THAT NEED TO BE OUT ON HOLD AND REPLACED UNTIL MOV2.

Clause 3

3.1 do we need "the application of"?

DRAFTING POINT THAT I THINK WE CAN LIVE WITH.

3.3 /3.4 They were obliged to do that as part of their Assurance requirements anyway. The difference is they remove the approval step that tie has from Schedule part 14. The IDC element is unlikely to be complete enough to satisfy our legal requirements. Need to toughen up for Safety Validation and Assurance transparency and necessary reasonable information.

THE COMMERCIAL DEAL I UNDERSTAND IS THAT TIE'S APPROVAL REQUIREMENTS ARE TO FALL AWAY AND BE REPLACED WITH A RIGHT OF INSPECTION/SUPERVISION AS SET OUT IN THE IDC.

IAIN IS LOOKING AT ANY ROGS ISSUES IN HIS REVIEW OF CLAUSE 10 AND PART 14.

3.5 Summary point made above. Significantly removes rights tie has.

AS ABOVE.

3.6 Requirements for licences / third party agreements etc need to be covered.

IAIN/COLIN WE SHOULD DISCUSS FURTHER.

Clause 4

Talks about mobilisation but this is an advance payment. Funders need to be happy with that.

I THINK THE HEADING IS UNHELPFUL. MU UNDERSTANDING IS THAT PAYMENTS ARE TO BE MADE FOR MATERIALS AND EQUIPMENT AND ONLY ON A FOR VALUE CERTIFIED BASIS.

Clause 5

Programme comments as per Susan's note. Little reciprocity. Requires lifting of embargo but does not require >5 day working from Infraco.

I HAVE NOT SEEN THAT NOTE BUT I AM ASSUMING THAT THIS IS ONE FOR COLIN. PLEASE LET ME KNOW IF I AM WRONG IN THAT!

Clause 6, 7 & 8

Already noted tie cannot support the values proposed in this section. Would be considered as significant advance payments. No visibility if Design delivery is a milestone for same. Bond needs to be on demand and Siemens to Warrant that Materials and Equipment meet ERs. Storage costs for materials and warranty arrangements for them to be resolved.

ALREADY COMMENTED ON ABOVE.

Clause 9

See payment comments above. Clause 9 omits any obligation on Infraco to apply for payment and places obligation on Certifier. No mechanism stated to address Change if it arose. Payments proposed as final and binding. Resist this approach. Payments timetable accelerated by 1 week from existing contract.

ALREADY COMMENTED ON ABOVE.

Clause 10

Needs tidy drafting and links back to payment point. 10.3 doesn't align responsibilities and accountabilities re Certifier / tie points noted above..

ALREADY COMMENTED ON ABOVE.

Clause 11

Excess Trams. OK

NOTED. THANKS

Clause 12

OK

NOTED

Clause 13

OK

NOTED

Clause 14

14.1.1 Draft appears one sided and significant concession to include "same grounds" even if future UWN / RTN. Given the wide ranging nature of RTN9 (Conduct) it is unlikely any category could be said to avoid the same grounds argument. Strongly recommend resist this part.

ALREADY COMMENTED ON ABOVE.

14.1.2 Stays claims only, no waiver.

AS ABOVE.

14.1.3 This appears to be sin die? Reject.

AS ABOVE.

14.2 OK subject to re read after rest of 14 is sorted.

NOTED.

Clause 15

15.2 Removes H&S rights for tie particularly under 28.6 etc. and possibly under 38. Reconsider.

ALREADY COMMENTED ON ABOVE.

Clause 16

16.2 needs to include for tie changes as well as NDs and CEs.

THIS WORDING IS TO BE HEAVILY REVISED. LETS RECONSIDER WHEN THE NEW WORDING COMES OUT.
Clause 17

Ok with proposed Joint Project Forum taking place of CEO's meeting under DRP but tie/CEC need to decide who from the client side has mandate to move to next stage of no agreement is reached? tie Rep Or CEC?

ALREADY COMMENTED ON ABOVE.

Clause 18

OK

NOTED.

Regards

Steven

Steven Bell

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