

Introduction

Carillion initiated a dispute on the 3rd August 2010 based on their Application for Payment and **tie**'s Certification No 43 with a resultant difference between the parties of £13,069K.

The internal stages of the Dispute Resolution Process (DRP) did not settle the dispute and on the 9th & 10th of November 2010 the Dispute was heard at Mediation.

The differences between the parties can be identified under five broad headings namely; Remeasured Works; Changes; Enabling Works; Disruption Claim; **tie** Deductions.

tie had previously appointed construction experts to support analysis of a number of the key areas in dispute. These included:

Expert	Area / Heading
CQS (Chris Ward)	Remeasurement
Ian Allan Associates (Ian Fletcher & Richard David)	tie Changes & tie Deductions
Acutus (Robert Burt & Anne Connelly)	Disruption Claim
RLF (Chris McLagan)	Enabling Works

1. Remeasured Works

Prior to mediation the parties agreed the value of the measured works. This value was abated by **tie** due to certain Contract Deliverables not provided by Carillion and certain other work now being carried out by other contractors as a result of entering into an Exit Agreement.

During the course of the mediation proceedings Carillion provided the outstanding Contract Deliverables and the parties agreed that an abatement of £26K was appropriate for the works carried out by other Contractors.

2. Changes

At the commencement of the Dispute Resolution Process (DRP) 17 items of Change were identified by Carillion as being in dispute with a difference between the parties of £3,125K. During the DRP and prior to mediation 4 items were withdrawn by Carillion, and a further 1 item agreed between the parties. This removed 315K from the dispute and left 12 items to be agreed.

5 of these items were a matter of principle;-

- *Under pressure water connections* - Carillion asserted that they were entitled to additional payment in respect of water services pipes which were connected under pressure. **tie** disagreed. **tie**'s position being that to connect service pipes under pressure was good industry practice and that this was as articulated by Carillion in their method statement prior to the agreement of the Contract. These arguments were discussed during the mediation process but no further evidence or opinion was presented by either party.
- *Method of measurement for multiple trenches* – **tie** asserted that where the same service was installed in one trench that Carillion were entitled to payment of excavation of one trench. Carillion's opinion was that this was not the correct interpretation of the preamble of the Bill of

Quantities. Again these arguments were discussed during the mediation process but no further evidence or opinion was presented by either party.

- *Additional under pressure gas connections* – Carillion asserted that it had been necessary to carry out additional gas terminations and connections as a result of third party/stakeholder requirements (i.e. additional intermediate connections) over which they had no control. **tie** had advised that they had no knowledge of the requirement for additional connections and that intermediate connections were not a measurable item as described in the Preamble to the Bills of Quantities. Carillion intimated that they would provide additional evidence of the third party/stakeholder requirements and of their entitlement to additional monies but did not do so during the Mediation process.
- *Water supply connections* – **tie**'s position was that these connections were enumerated in the Bill of Quantities and paid per connection all as clarified and described in the Preamble to the Bill. Carillion asserted that while they accepted this was appropriate for metallic connections that in circumstances where the existing pipe work was constructed with lead there was a legal obligation which required to pipes to be replaced. Carillion asserted that they were entitled to be paid the difference between what they allowed in respect of a metallic connection and the actual cost of replacing the lead pipe work. During the course of the Mediation proceeding Carillion presented additional evidence which supported their claim that lead pipe work had indeed been replaced but not as to their entitlement to be paid for the replacement.
- *Utility Abandonments* – Carillion submitted an application for monies under the heading of abandonments however **tie** have been unable to ascertain exactly what Carillion consider is additional to their Contract obligations. During the course of the mediation proceedings Carillion provided additional information showing the build up of the sums they claimed. This however did not inform which parts of the sum may be additional to their obligations.

Carillion's Application for Payment No 43 requested payment of £1.282K for the above changes. **tie** were of the opinion that there was no entitlement and in Certificate No 43 had certified £0. **tie** however recognised that the items mainly turned on a matter of principle. Should a third party be requested to decide on the matters that there was a significant risk that monies would become due. **tie** assessed this risk as circa £990K.

The remaining 7 items were a matter of valuation;-

- *Bye-pass Valuation* – **tie** asserted that Carillion had incorrectly used derived rates for this work and that the change should be valued on fair rates and prices.
- *CCTV* – Carillion submitted invoices for this work and assert that as the work was out with the 'worksite areas' that the cost of the works should be paid and that the schedule 4 rates and prices did not apply. During the course of the mediation proceeding Carillion submitted evidence to support their assertions.
- *Logistic Support* – Carillion submitted time sheets and applied an hourly rate to ascertain the value of the works. **tie** was of the opinion that the wrong rate has been applied and that Carillion had not substantiated that the hours claimed were solely associated with logistic support.
- *Gas main at the mound* – Carillion are of the opinion that **tie** has incorrectly valued the works and that they have not taken proper cognisance of the values in the Works Order Proposals.

During the course of the mediation proceeding Carillion submitted evidence to support their assertions.

- *NPO* - Carillion asserted that **tie** should pay for additional costs associated with work carried out outwith normal working hours. **tie** agreed with this claim in situations where **tie** had instructed Carillion to do so but did not agree with the method of calculating 'normal working hours' nor that the costs for staff overtime had been adequately vouched.
- *Rhino Barrier* – **tie** accepted that this was a Change to Carillion's scope of work but did not agree the method by which Carillion had calculated their entitlement. During the DRP process Carillion provided additional information which provided more clarity of the calculation.

Carillion's Application for Payment No 43 requested payment of £ 2,989K for the above changes and in Certificate No 43 **tie** certified £1,577K. **tie** however recognised that if Carillion were able to provide further substantiation or demonstration of their entitlement the items that the amount due to be certified would increase and further that should a third party be requested to decide on the matters that there was a significant risk that additional monies would become due. **tie** assessed this risk in the range of £115K to £875K.

Thus on conclusion of the exchange of information during mediation and in consideration of the risks associated with referral to a third party **tie** and their advisors assessed that it would be appropriate to settle the Change items in the range £1,690K to £3,550K.

3. Enabling Works

This work was generally associated with traffic management requirements in advance of road closures and side entry manhole construction. It was a variation to Carillion's original Scope of Works. **tie** certified 'to account' the sum of £6,583K for many months pending receipt of further substantiation from Carillion of the cost they had incurred. Carillion's Application for Payment No 43 was for £7,504K.

Carillion submitted a significant quantity of information (45 lever arch files) as substantiation of their entitlement immediately prior to the date when Certificate No 43 became due. Pending review and checking of this information **tie** maintained their 'on account' payment. Prior to **tie** concluding their review of the information, Carillion referred the account to DRP.

On reviewing the information it became clear that Carillion's submission lacked proper vouching and contained errors. It was therefore apparent that without further documents it was not possible for **tie** to accurately value the works. **tie** therefore split their assessment into four broad headings:-

- Cost accepted by **tie** - £1,036K
- Costs rejected by **tie** - £546K
- Labour and subcontractors costs which were not agreed - £1,019K
- Costs which had insufficient vouching to allow proper allocation - £4,903K.

tie then assessed that it may be possible for Carillion to provide proper vouching for the 'insufficient vouching' heads. **tie** assessed that this may substantiate between 50-90% of the items under the insufficient vouching head of claim. This assumption meant that the value of the works would be in the region of £3,500K to £5,500K.

During Mediation significant time was allocated to review the documents presented and Carillion were able to provide further backup evidence to substantiate their claim. Based on the sample of documents reviewed, **tie** assessed that Carillion would be able to provide further vouching and that they may be able to demonstrate costs at the higher end of the range. Carillion were also able to

provide evidence that number of items which **tie** under the head of 'rejected costs' were properly vouched and allocated. They also provided further evidence of their claim under the heading of 'labour costs'.

Thus on conclusion of the exchange of information during Mediation and in consideration of the risks associated with Carillion being able to provide proper vouching records to a third party **tie** and their advisor assessed that it would be appropriate to settle the Enabling Works in the range £5,500K - £7,000K

4. Disruption Claim

Over a period of months Carillion submitted a disruption claim under the heading of 'Schedule 4 Rates and Prices' and by December 2009 the amount of the claim was £13,145K.

Upon review it was found to be global in nature, lacking in substantive evidence and in **tie**'s opinion not in accordance with the requirements of the Contract. Several meetings and further reviews with Carillion, **tie** and Acutus took place where it was identified that the Carillion 'entitlement model' contained a number of core errors and anomalies. In June 2010 Carillion resubmitted their claim and had reduced it to £8,849K. At commencement of the DRP process **tie** had certified £1,200k in respect of Carillion's application for £8,849K under this heading.

An independent report was commissioned from Acutus to provide an opinion to **tie** on the quantum of the claim. Acutus concluded that the claim was a 'global claim', fluid in nature and had not separately identified the elements for which **tie** may be culpable. In analysing the quantum of the claim they also identified a number of anomalies and discrepancies.

Carillion have provided significant quantities of substantive evidence which demonstrates actual disruption, however problems with back-up records make it very difficult make an accurate evaluation of the entitlement to additional monies. Carillion have however provided a superficially compelling argument which may provide a persuasive case if presented in adjudication. Notwithstanding that Carillion's submission did not provide a 'cause and effect' analysis as required by the Contract, Acutus concluded that there still remained a risk to **tie** for matters such as a change in shift patterns, inefficient production; plant disruption; additional preliminary costs; and traffic management. The range of that risk was assessed as being in the region of £2,700K to £5,430K.

During the DRP process Carillion produced additional vouching and other information including QC opinion. That opinion appeared to confirm that Carillion's method of valuing their claim was not necessarily out with the terms of the Framework Agreement.

In consideration of all the above and in recognition of the risks to **tie** if referred to a third party **tie and their advisors** considered that it was appropriate to settle the Claim in the range £2,000K to £6,500K

5. tie Deductions

Within Certificate No 43 **tie** deducted the sum of £1,298K for cost incurred as a result of defaults and claims made against them for which they considered Carillion was responsible. Carillion did not accept any liability for the claims and indicated they were of the opinion that the deduction had been made without substantiation or authority under the Contract.

During the course of the DRP process **tie** was able to provided Carillion with additional information and indicate clauses within the terms and conditions of the contract which allowed **tie** to make deductions. **tie** also confirmed that they were awaiting further substantiation of the costs from third parties particularly statutory authorities.

tie identified that there was significant risk against recovery of the value of sums deducted without a major input from the statutory authorities.

Summary

While **tie** consider that it has maintained a robust position in respect of Carillion's entitlement under the Contract it must consider the possibility that should the matter be referred to adjudication that a third party may not concur with **tie** position. This would have the most significant impact in respect of Carillion's disruption claim and while Acutus supports **tie**'s position a significant residual risk remains in this regard.

tie must also consider the significant costs, both tangible and intangible, associated with defending an adjudication in what is likely to be a prolonged referral. Therefore with due regard to all of the above **tie** considers that it is appropriate to settle the all of outstanding matters at a final account sum acceptable to both parties that being £62,500,000. This agreement does not remove any responsibilities that Carillion have under the contract in respect of Collateral Warranties or Latent Defects and Carillion are rectifying defects previously notified to them.

A more detailed analysis of the position at the commencement of the dispute and the assessed risks to **tie** is detailed on the attached Appendix.