
From: Iain McAlister [imcalister@acutus.co.uk]
Sent: 14 June 2010 09:09
To: Susan Clark
Cc: Tom Hickman
Subject: RE: J086 - [329] - MUDFA 8 Mediation (Confidential)

Susan,

As I recall we were suggesting at that time that there could be around 19 days associated with MUDFA Revision 8 relative to the Section C Completion Date. (ref. Section 4 of our summary Report). We subsequently revised this assessment to zero for the MUDFA Revision 8 Expert Report on the basis that a little more mitigation on intermediate section 1B (probably by working a few weekends on the critical activities) could mitigate the 19 days.

I hope and trust that this helps clarify.

Kind regards

Iain

From: Susan Clark [mailto:Susan.Clark@tie.ltd.uk]
Sent: 14 June 2010 08:26
To: Iain McAlister
Cc: Tom Hickman
Subject: RE: J086 - [329] - MUDFA 8 Mediation (Confidential)

Iain

Thanks for sending this through.

What I'm trying to get a handle on is of the 9 months we offered in November, how much of this was due to the MUDFA Rev 8 delays only the reminder being delays post the MUDFA Rev 8 dates at end March 2009.

I don't think that this report makes that clear – does it require a level of interpretation?

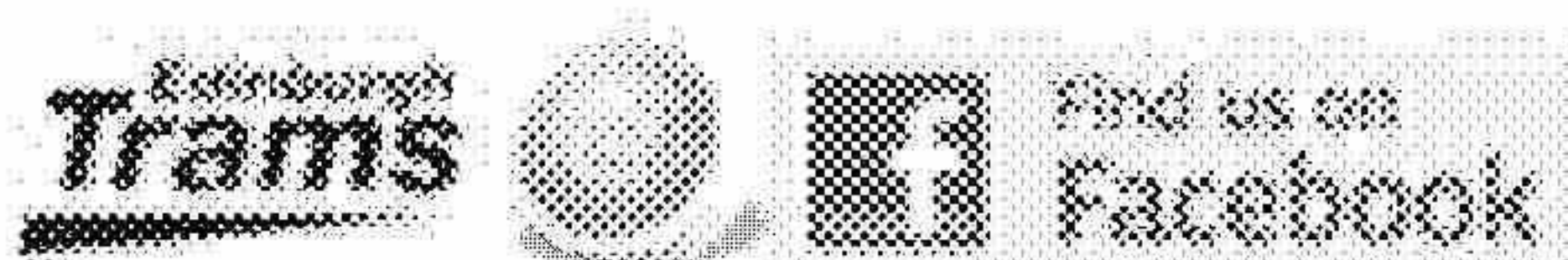
Susan

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From: Iain McAlister [mailto:imcalister@acutus.co.uk]
Sent: 10 June 2010 08:40
To: Susan Clark
Cc: Robert Burt
Subject: FW: J086 - [329] - MUDFA 8 Mediation (Confidential)

Susan,

Thank you for your contributions at yesterday's meeting. I'm getting to work on them now.

In relation to the "9/6 months offer", I referred to an email I sent to you late last year. A copy of it is below. However, I note that while that email explains the thinking and strategy behind the offer it does not refer to the actual time that might be offered. As I recall, we discussed that at the time but it was not put in print until later. I therefore attach a copy of our "Summary Report" from the end of last year. Paragraphs 1.6.6 to 1.6.11 address this issue. I hope you and/or Stephen find this helpful in dealing with any questions relating to the basis of the offer. You may also recall that we discussed the fact that there would inevitably be other issues that would add to tie's liability for MUDFA delays. These could not be assessed at that time because the Infraco had submitted only notices but we all felt that tie would inevitably be liable for some additional time.

If you wish to discuss any of this further, just let me know.

Kind regards

Iain

From: Iain McAlister
Sent: 30 October 2009 15:30
To: Susan Clark
Cc: Robert Burt
Subject: J086 - [329] - MUDFA 8 Mediation (Confidential)

Susan,

As requested, please find as follows my reflections on last night's discussion.

Principal Objectives of the Parties

BSC - To secure the best possible commercial outcome from the Contract

tie - To deliver the Tram Project in good time and in the most cost effective manner (within the terms of the Contract).

Objective of the Parties in resolving the "MUDFA 8" Dispute

BSC

1. To seek a third party decision to support the principle (contractual interpretation) that the Infraco is not required to include what it claims to be "acceleration measures" in the Estimates it presents for its claims for EoT arising from **tie** Change.
2. By establishing this principle the Infraco will maximise the EoT it secures thereby;
 - a. reducing its risk of exposure to liquidated and ascertained damages;
 - b. secure relief from the consequences of parallel delays that may otherwise be to its account;
 - c. provide evidence to support claims for recovery of its prolongation costs;
 - d. increase its opportunity to secure additional revenue for any acceleration that **tie** may instruct to mitigate the accumulated **tie** Change delays.

tie

1. To defend its position (contractual interpretation) that **tie** Change estimates should include delay mitigation measures that facilitate the most cost effective implementation of each **tie** Change.
2. By successfully defeating the Infraco's approach to the preparation of **tie** Change Estimates, **tie** will undermine the Infraco's apparent confidence that its current approach to **tie** Changes will secure for it the best commercial outcome. Further, it will make the Infraco realise that its current approach actually increases its risk of exposure to liquidated and ascertained damages and cause it to incur additional costs that it will/may find difficult to recover under the terms of the Contract. Consequently, if the Infraco is to secure for itself the best commercial outcome it needs to work more closely and openly with **tie** to agree and implement all reasonable mitigation measures that are in the best interest of the Project. The Infraco can then pursue its entitlement to additional revenue within the terms of the Contract and with the backing of **tie** in terms of it being an agreed approach in respect of, for example, mitigation.

The Current Situation

BSC's current approach appears to be in direct conflict with **tie**'s principal objective, as noted above, (unless **tie**'s interpretation of the Contract is wrong). This dispute over contractual interpretation appears to be a major obstacle to progressing the Project. It is creating a situation where **tie** cannot forecast, with any degree of accuracy, when the Project will be complete and what will be the out-turn cost.

Options for Resolution

1. Accept the Infraco's position (contractual interpretation and method of delay analysis) and administer the Contract on that basis from here-on.
2. Secure a third party decision on the correct interpretation of the Contract and thereafter administer the Contract on that basis. (This will most probably be achieved by the Infraco continuing to pursue this dispute through the DRP. It is important to remember that the Infraco could decide to abandon this dispute before an independent decision is obtained. This could happen if it decides that its currently presented case is likely to fail.)
3. Negotiate some sort of compromise that allows both parties to secure their objectives.

Considerations on Option 3

1. A negotiated compromise is often seen as a best solution (as Stephen has suggested), and this may be the case here. However, there are several matters that I consider **tie** need to be very careful about.
 - a. The compromise should not be contrary to the Contract provisions and/or establish precedents that diminish the Employer's contractual entitlements.
 - b. Would the compromise resolve issues both now and into the future or merely postpone the resolution of what is a fundamental difference over contractual interpretation.
 - c. In that the Infraco is seeking to secure entitlement for past events (which **tie** can immediately grant by issuing appropriate notices/orders) and **tie** is seeking to secure timeous and cost effective implementation of work yet to be undertaken (which the Infraco can promise/offer but might not necessarily deliver), can the compromise be formulated in such a way that **tie** will actually secure its side of the deal?
2. The focus of the dispute, as currently formulated, is EoT but, from the Infraco's perspective, the underlying objective is almost certainly money. The Infraco will seek to maximise and secure whatever deal is in its best commercial interest. (This is not meant as a criticism of the Infraco, merely a simple statement of fact.) The Infraco will only agree to a compromise if it truly believes that the negotiated compromise is in the best interest of its shareholders. I think it is very important that **tie** does not lose sight of this in preparing any proposals and during any negotiations.
3. It appears to me that if some sort of compromise or deal is to be reached the Infraco needs to be persuaded that its current approach will not deliver the best commercial outcome. That said, if **tie** is to secure best value for its stakeholders it needs to strike a reasonable and justifiable balance between achieving timeous delivery of the Project and the costs associated with doing so.

Thoughts on Strategy

1. I believe that **tie** will only secure a good/reasonable compromise if it can establish for itself a position of strength from which to negotiate. To-date, the Infraco has presented an assured, forceful and determined face in relation to this dispute. (Whether it actually believes it will win, or it is actually bluffing, is impossible to tell.) **tie** needs to communicate to the Infraco that it is confident of its own position and through this make the Infraco question itself (**the “Stick”**). I would recommend this be achieved through presentation of the reasoning and evidence recently put together by the **tie** team. **tie** should aim to deliver a strong and confident statement of its case (both contractual and factual) whilst being guarded against polarising positions and driving the Infraco into an entrenched position.
2. Stephen has suggested we should consider seeking some sort of viable compromise. The timing of its introduction into the discussions will be extremely important. I would suggest it not even be hinted at until we are satisfied we have made the Infraco team fully aware of the strength of our case. (I would not even mention it to the mediator until we feel that position has been established.)
3. In terms of broaching the subject of a compromise/deal, I would start by explaining the position **tie** needs to address, i.e.;
 - a. Cannot operate the Contract because Infraco is not providing the required information
 - b. Need to mitigate the delays and deliver the Project in the most cost effective manner
 - c. Need to provide an acceptable audit trail as **tie** is a publicly accountable body
 - d. **tie** recognises there is, and will almost certainly continued to be, entitlement to EoT and associated adjustment to the sums due. However, it feels it is being frustrated in its efforts to deal with these in accordance with the Contract because of the Infraco’s departures from the prescribed contractual processes.
 - e. **tie** is also aware that the Infraco has issues of its own that appear to be preventing it from progressing the Project as **tie** would like it to do. (I would suggest that the Infraco be directly asked if there are reasons, other than utilities and access issues, that are preventing readily available work from commencing. This could be an ideal opportunity, if it has not already been done, to drop into the conversation the amount of effort **tie** is currently putting in to recording delay attribution so that in the future it has the necessary information to secure its stakeholders’ fair entitlements under the Contract.)

I would conclude by asking the Infraco if it had any suggestions as to how the problem might be resolved rather than **tie** trying to put an outline deal on the table. (After all, it is the Infraco that put this dispute into DRP one day after the first meeting to discuss what is clearly an incomplete estimate for a significant and complex **tie** Change.)

4. I’m guessing that asking the Infraco to kick-off the “compromise” negotiations may not be that productive. They will most likely stick to their previously stated position i.e. **pay us to accelerate to attempt to recover time from our “EoT entitlement”**. From that position I would suggest we ask them for a list of the acceleration measures they consider could be effectively employed. I’m guessing they will focus on increasing resources and the likes. This could provide the basis from which to formulate some progress.
5. I think it is accepted by both parties that the current programme is driven by resource constraints. Lifting these and removing from the programme the preferential logic associated with them would be a big step forward in mitigating delay. **tie** could propose that it would be prepared to reimburse the Infraco for the cost of any increased under-utilisation of key resources over and above that shown in the original Programme. In return the Infraco would remove all resource constraints from its programme and work with **tie** to agree a new programme for completion of the Project. (**tie** should expect the Infraco to approach this matter in an Open Book manner and that it would be based on the terms and conditions of the established contracts that the Infraco has in place with the resource providers. **tie** needs to have early sight of these documents to make sure there is no creative accounting or advance manipulation of the terms to facilitate over-recovery of costs.) It would be necessary for the parties to agree how many resources should be deployed at any point in time and the Infraco would need to accept that the LaD’s mechanism would remain in place. EoT would continue to be assessed as per the Contract mechanisms but any delay analysis would have to be freed-up from unnecessary and unreasonable resource constraint.
6. While point 5., above, deals with resources, I think there could also be a similar approach to other delay mitigation measures, the terms and conditions for which would depend on their nature.
7. If the Infraco was prepared to accept such an approach then there could be scope for a global award of EoT at this point in time (**the “Carrot”**). If so, I would strongly recommend this be clearly defined as covering/subsuming the delays associated with a long list of notices/claims etc.. **tie** should make it clear that

such an award subsumes many delays for which it considers the Infraco to be accountable (i.e. a significant part of the "Carrot" is letting the Infraco off-the-hook for delays that it might have proved liable.). It is my opinion that any global award of EoT should be clearly limited to relief from LaD's and not necessarily have prolongation costs attached. Claims for prolongation costs should be justified as those costs actually incurred only as a direct result of **tie** Change, CE's, etc..

I offer all of the foregoing in response to Stephen's request from last night. (I've discussed this with Robert and incorporated his thoughts and contributions.) I hope you find it useful and that it stimulates further debate. I feel it is very important that the legal team participate in these deliberations. Great care should be taken to make sure that **tie** and its stakeholders' position under the Contract is not unnecessarily compromised in the efforts to get the Contractor to progress the Project at a much faster pace than it has to-date.

Kind regards

Iain

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