DLAP Comments 5.03.10

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Bilfinger Berger–Siemens– CAF Consortium

BSC Consortium Office
9 Lochside Avenue
Edinburgh Park
Edinburgh
EH12 9DJ
United Kingdom

Phone: [redacted]

Our ref: RJW/RJ03032010-1

03 March 2010

Bilfinger Berger Civil-EDI
Date Sent: 3 - MAR 2010 BIW
File Number:
Action:
Distribution:

tie Limited
City Point
65 Haymarket Terrace
Edinburgh
EH12 5HD

For the attention of Richard Jeffrey - CEO

So the allegation is that: RJ is knowingly misrepresenting matters.

Dear Richard,

Edinburgh Tram Network Infraco
Infraco Contract: Response to tie letter INF CORR 4262/RJ

was this registered at the Tuesday meeting?

I refer to your letter reference INF CORR 4262/RJ received Monday, 1 March 2010.

I am extremely concerned that you now see fit to refer to the proposed OSSA agreement as something proposed independently by Infraco in terms of which Infraco are seeking to set aside the Infraco Contract in order to obtain additional benefits for ourselves. This is so far from being correct, as you must know, that I am led to conclude that your letter must have been written purely with a view to being shown to a third party in order to justify tie's actions to date. It is therefore essential that I take the time to correct your misrepresentation to explain how the OSSA proposal came to be made, and to answer the other inflammatory and unsubstantiated accusations which you make in your letter.

on what basis?

The Proposed On Street Supplemental Agreement ('OSSA')

but what type of OSSA was being discussed?

Both parties have been discussing the OSSA for some 6 months and it is astounding that tie can be asserting now for the first time, that entering into such an agreement would put tie in breach of European Procurement Law. Surely this is something which tie, as a wholly owned subsidiary of a local authority, must have considered prior to now and taken advice on. We thus fail to understand why then have you engaged in lengthy negotiations and discussions with us if this was never an option open to tie.

tie letters to be examined at the time and their email from Robert Sheeler / 'paper thin' justification for not starting.

recession; they agreed to work; blackmail

The OSSA was developed following a very similar and successful ~~agreement reached~~ on Princes Street. You must acknowledge that the overwhelming reason why this agreement came about, and the whole rationale for discussing a supplemental agreement in similar terms now, is the ongoing delay caused by the fact that the MUDFA works remain incomplete almost 2 years after their intended completion date. The Princes Street agreement created a vehicle for facilitating the commencement and completion of the works, thereby allowing works to progress notwithstanding this substantial delay, in circumstances where tie had been unable to administer the clear contract mechanism for instructing and agreeing the consequences of delays caused by others and changes. It has been shown that this form of agreement works and helps to significantly resolve the areas of dispute. We do not understand why tie consider that they could enter into such an agreement on Princes Street but that the similar agreement now being proposed is in breach of EU Procurement Laws.

because it was discrete and brought beneficiaries within limited not open ended.

You also appear to labour under the misapprehension that what is now being proposed would for tie, alter the risk transfer as contained within the Infraco Contract and create a potential for double recovery under any Supplemental Agreement. This is not correct. The OSSA does not alter the risk transfer contained within the Infraco Contract. As has been shown in the recent adjudications, the Contract is not a 'fixed price' contract standing the existence and impact of Schedule Part 4. It follows that the cost of the project

this is so wrong I am not sure where to begin.

perhaps, but see: 7.3.10, 7.3.15, 77.1.2(d)

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I do not follow

was always likely to increase, whether this be through the Clause 80 (and 65) mechanisms, or through an OSSA which assists tie in the difficulties that it is currently facing administering the Infraco Contract.

In terms of your other concerns, what is being proposed would give tie control over costs via its audit rights which should eliminate any potential for double recovery. If this is of such concern to tie, then words to the effect that Infraco shall not be entitled to recovery under the OSSA in respect of any matter already dealt with in the Infraco Contract, can easily be inserted. Concurrent delay is not a legal term or a concept dealt with in the Infraco Contract. In any event, the MUDFA works are so far behind the original programme with no finite reliable dates for completion available even now, that I fail to see how Infraco can have caused any material delay to the project to date.

But CEC does, even if this is correct.

As indicated in our letter dated 1 March 2010 (ref 25.201.1/KDR/4843]) tie does not have any Best Value obligations in terms of Public Law, the Local Government in Scotland Act 2003 applying to local authorities and not to a wholly owned subsidiary of a local authority. That however is a matter for tie. Our obligations in terms of Clause 73 provide only that we assist with providing information and personnel in respect of best value reviews being carried out by tie. I fail to see how we can have fallen short of these obligations in any way. Indeed your ever widening range of arguments away from the core issues suggests that tie are "clutching at straws" in a naive attempt to somehow find arguments to either support their position or detract from the real issues.

Turning now to the numbered points contained within your letter:

what is meant?

1. Infraco's entitlements to recovery in respect of the delay to the MUDFA works are covered by Clause 80 of the Infraco Contract. This is a matter covered by the Schedule Part 4 Pricing Assumptions.

can tie identify these?

2. Whilst we have taken mitigation measures, clearly such measures are limited by tie's conduct. If tie fails to issue a tie Change Order, or neglects to refer a dispute to Schedule Part 9, Dispute Resolution Procedure, and subsequently issue a tie Change Order in accordance with Clause 80.15, then Infraco are specifically prohibited from progressing with the works. We have made our position on this clear. In addition, information provided to us on availability of areas has been consistently unreliable. To have reacted to this in all circumstances would have resulted in tie incurring far higher costs. An example is Leith Walk where even tie accepted that meaningful progress was not possible. The Infraco planner has gone to great lengths over the past 12 months in numerous meetings and workshops to agree workable programmes and in so doing, demonstrate what mitigation measures are possible, if any. He has addressed all of tie's concerns and suggestions regarding feasible mitigation measures. Unfortunately, the result of this process has been a dawning realisation by tie of the full extent of their liability for delays to date and Infraco's substantial entitlements. As we have seen elsewhere, when this realisation occurs, tie have traditionally 'back-tracked' from the ongoing discussions and negotiations.

factual rebuttal required

untrue Tie have continually confused mitigation with acceleration. If tie wish to accelerate the works, then they should say so.

3. tie's offer was at best vague and fell short of Infraco's entitlement to remuneration for the 9 months offered. We were also concerned at tie's failure to acknowledge the cut-off date for the offer of 31 March 2009. Without express wording, the concern is that a third party would conclude that the offer was in respect of all events and circumstances up to and including 13 November 2009 when the offer was made. This would effectively deny Infraco a further 6 month extension of time to which we are entitled (to 31 March 2009) and expose us to the application of Liquidated and Ascertained Damages.

not understood

4. The further 16 month delay is at present our best estimate of the overall extension to which we are entitled. Taking the ongoing MUDFA delay alone justifies a significant part of such an extension, before even considering the extent of the scope increase and number of changes in

not according to tie

respect of which we have a clear further entitlement. This extension is a result of a detailed analysis jointly with your staff in respect of which substantiation has been provided.

5. Whilst we welcome tie's acknowledgement that we are entitled to 6 months prolongation costs, this currently falls 3 months short of our entitlement to 31 March 2009.

6. It is fundamentally incorrect to state that Infraco have given notice that they are de-mobilising "Key Sub-Contractors" engaged in On-street works. Infraco have advised tie that they are reducing supervision and attendance including transferring staff to other projects and in some case redundancies. This has been done in mitigation of tie's liability for prolongation costs caused by lack of access to the Site as a result of the ongoing MUDFA works. Your comments on failure to appoint Key Sub-Contractors are answered below.

7. The Infraco has complied with their obligations under the Infraco Contract in managing the SDS Provider. If you are going to make contrary allegations of this manner, please substantiate them. Despite exhaustive audits, tie have not been able to point to one instance where late design has caused any delay to the works. Delay by the SDS designer in producing the IFC design is in any case a Compensation Event. Finally, even were there a breach by Infraco in this regard (which is not accepted), we fail to see how this can have resulted in any loss to tie standing the ongoing and substantial MUDFA delays.

bold statement

8. Please substantiate this statement and provide details of CEC's assertions. General accusations of this nature are not helpful.

9. I understand that the credit value negotiated between Infraco and tie Representatives reached a point where there was a principle difference regarding the "planning drawings" which was agreed to be excluded from the credit value. There was general agreement to refer the applicability of the "planning drawings" to Schedule Part 9, Dispute Resolution Procedure for determination. The remaining value of the credit was resolved by calculation and or commercial settlement. There is still an outstanding issue relating to PA12 credit which has not been agreed.

on what basis is this warning issued?

10. As noted at the start of this letter, it was my clear understanding that both parties were in agreement that the OSSA was the best way of moving the project forward. Please be careful of misrepresenting the background to this matter to third parties, particularly where they rely on the information provided.

legal advice when a proposal was concrete

11. Please see my comments above in relation to the astounding statement made by tie to the effect that it is only after 6 months of detailed negotiations on the proposed OSSA that tie have come to the conclusion that what is being proposed will cause any difficulties under European Procurement Law. Please provide a copy of any legal advice you have obtained in this regard and an explanation as to why tie have taken so long to discover this matter.

no entitlement and not prepared to disclose this.

I have dealt with your 'Best Value' accusations above. Turning to the matter of whether we have failed to appoint Key Sub-Contractors for civil works and/or obtain the required warranties, this again is an entirely erroneous statement which you should know to be so, which ignores entirely tie's involvement in the approval of Key Sub-Contractors and of the terms and conditions upon which they are to be appointed.

tie is required to give consent to the appointment of Key Sub-Contractors. This has been done. Thereafter, tie is required to approve the form of sub-contract for any work which is to be sub-contracted to each Key Sub-Contractor in advance of the sub-contract's execution. tie have approved the form of sub-contract for one sub-contractors (Farrans). The Subcontract has not yet been executed as there was an outstanding matter relating to the Collateral Warranty for Edinburgh Airport Limited. This has been resolved. The sub-contract is with Farrans for checking. They have advised of a drafting error which is being checked. There are no other obstacles to executing the order tie have not yet approved the sub-contract for other Key Sub-Contractors (Barr and Grahams), despite the fact that Infraco has demonstrated that these proposed

no, it has not.

does not understand what 67.14 says.

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does he know of this? I do not think so.

what are these?

sub-contracts (which are in the same form as that for Farrans) comply with the requirements of Clauses 28.4.1 and 28.4.2. All Key Sub-Contractors have agreed to provide to tie a Collateral Warranty as required by Clause 28.7, subject to certain minor amendments which require to be finalised. The Infraco Contract states that Collateral Warranties are to be provided to tie prior to the date of execution of the relevant sub-contract. As no sub-contract which requires a Collateral Warranty has been executed, there is no breach of contract by Infraco. In these circumstances, should you seek to apply Clause 67.14 in the way threatened, then this will be in clear breach of the Infraco Contract.

this is highly unlikely.

You should also note that the thinking behind delaying execution of sub-contracts was to mitigate tie's exposure to prolongation and other claims standing the remaining uncertainty surrounding when many of these sub-contractors will be given access, again as a result of the MUDFA situation.

Your letter purports to relate to the ongoing negotiations on the OSSA. It is astounding therefore to find in the third last paragraph of your letter, an undisguised threat to terminate the Infraco Contract as a result of our *'delinquent behaviour in ignoring ...instructions pursuant to Clause 80 for the Off-Street works'*. Not only does it ill behove tie, an allegedly professional organisation, to use such intentionally inflammatory language, you provide no substantiation and no information whatsoever on which instructions we are *'ignoring'* pursuant to the Clause 80 for the Off-Street Works. We do not consider that we are ignoring any such instructions, or that in so doing, we are in breach of Clause 80.

We would advise extreme caution if you proceed to serve the notice threatened under Clause 90.1.2 or otherwise unilaterally seek to bring the Infraco Contract to an end without due cause. In these circumstances tie would be in material breach of contract and we shall use the combined resources of the Infraco members to pursue compensation in accordance with the provisions of the Infraco Contract.

Yours faithfully,

provide

R J Walker
Chairman - Infraco Consortium Board

cc: Michael Flynn – Infraco Consortium Board (Siemens)
Antonio Campos – Infraco Consortium Board (CAF)

(•) not so. 90.4 would apply if BSC provided w' R. Plan and tie is then free to elect what to do at that point.

(•) BSC can, i.a.e, contest the 90.1.2 Notice.