
From: Nolan, Brandon [Brandon.Nolan@mcgrigors.com]
Sent: 01 October 2009 17:58
To: Jordan, Stuart
Cc: Kilburn, Keith; Fitchie, Andrew
Subject: RE: tie best case on Misalignment

Follow Up Flag: Follow up
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Dear Stuart,

Thanks for sharing these thoughts. I would be very happy to discuss either this evening or tomorrow morning.

Kind regards

Brandon

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From: Jordan, Stuart [mailto:Stuart.Jordan@dlapiper.com]
Sent: 01 October 2009 14:16
To: Nolan, Brandon
Cc: Kilburn, Keith; Fitchie, Andrew
Subject: tie best case on Misalignment

Dear Brandon,

With apologies for not being in touch yesterday, I have had a look at the contract for the best available argument for tie, as asked. I think this needs to be shown in 2 parts:

- 1 - The case to say that the items identified for Misalignment are dealt with entirely there and are not additionally (and may not be chosen instead to be) something else; and
- 2 - The case to minimise Infraco entitlement within Misalignment.

It has to be acknowledged that there are strategic questions to settle as the idea of ringfencing Misalignment entitlement within the express words of the Novation Agreement may not be the better (cheaper) option if it admits that implementation of changed work is a Mandatory Tie Change.

(bullets)

on part 1:

i) Deed of Novation cl. 4.8 (which deals with alignment of Deliverables immediately pre-contract with IPs) provides that the post-workshop reports will detail the changes "determined" at the workshops, and will append tie Change

Orders or instructions. Payment to SDS is confirmed and amendments to Deliverables will be a Mandatory tie Change and a Client Change. Has to be acknowledged that this looks like it deals fully with design cost and the further words therefore seem to go on to deal with implementation cost. Best argument however remains that this intends to formalise the extra design cost and to authorise the implementation. In favour of that argument, the parties would have to have agreed later for tie Changes to be issued or the actual works would not match ERs, read with the change register.

on part 2:

i) Infraco priced the ERs and the IPs. The IPs have not changed through Misalignment exercise - the Deliverables have changed to match them. Question whether this is the case however: on both trackform and OLE, the item as described in cl. 4.7 refers to existing IPs and the task to allow them to be implemented (which supports this argument) but the exercise is described generally in DoN cl. 4.7 as determining the development of IPs and consequential changes to Deliverables. As a matter of fact, did the IPs change from contract issue?

ii) Infraco are not arguing for entitlement on the express words of DoN cl. 4.8 Mandatory tie Change but (I understand) on Pricing Assumption 3. This is not applicable if changes consequent to the Misalignment exercise are agreed to be dealt with exclusively under cl. 4.8. Consider however Conditions cl. 4.3. The DoN does not have the same priority as the Conditions but the approach to 4.3 remains the same: it cannot be said that Infraco entitlement under Sched Part 4 remains intact in all circumstances. Apart from the limitations within that schedule which take us back into the rest of the contract, the schedule does not work where the contract does not take us into it. Another way - cl.4.3 makes reference to the "right" to claim entitlement. That right needs to be understood in full with its limitations inside and outside schedule Part 4. cl.4.3 does not provide that this entitlement will exist in all circumstances or otherwise attempt to expand this "right" but refers to it and the rest of the contract as they are. The words are circular and add nothing to the contract.

iii) The Misalignment acknowledged an Infraco problem - that, at contract, the IPs did not conform to ERs (presuming it is correct to say that the ERs are represented by the Deliverables developed to contract date, subject to the separate misalignment exercise, but nonconformance will be a matter of fact anyway) thus in breach of their warranty on compliance in Conditions cl.4.4. Links to:

iii) There is no presumption in the contract that the workshops will result in agreement to amend Deliverables to match IPs - in contrast to the prior agreement to align Deliverables with ERs which is set out in a letter. The exercise is to examine and "determine" the development of IPs (not Deliverables) although it is anticipated that Deliverables may change to accommodate the IPs. Without any requirement on tie to agree anything they could have simply refused to allow discrepant IPs to remain and to require that they are. This supports the idea of the common intention that tie are not required here to agree more expensive solutions. Without this exercise, any "better" solution represented in IPs would have to be presented as an Infraco Change.

There is rushed and there's a bit more here but I am on a plane in an hour. I will make more notes and maybe we can discuss later or in the morning.

Kind regards,

Stuart

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