
From: Nick Smith
Sent: 12 November 2010 16:45
To: Alastair Maclean
Subject: FW: Tram Project

A flavour for you.

Kind regards

Nick

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Please note that I am not in the office on a Monday

From: Colin MacKenzie
Sent: 15 August 2007 16:33
To: Gill Lindsay
Cc: Alan Squair; Nick Smith
Subject: RE: Tram Project

Gill,

Thanks for copying me in to your e-mail. The Team has discussed the implications of your proposal to Graeme Bissett, informed by subsequent discussions with Lesley McCourt and Alasdair Sim of **tie**. This raises an issue which is of major concern to the Team.

As you may know, the Council is likely to be asked to guarantee all of **tie's** obligations in relation to Infraco (and that is likely to extend to Tramco obligations since that contract will be novated to Infraco). In short, the Council will be expected to stand behind **tie** for all significant purposes. Whilst the word from the Chief Executive has been to avoid being overtly negative in the report to Council, when it comes to fundamental issues of risk on contracts worth in excess of £350 million, I would be failing in my professional obligation not to draw such concerns to your attention, or indeed to members before a crucial decision is taken. The Council therefore needs to be absolutely sure that the Infraco and Tramco negotiations have been carried out in its best interests. The final contract (s) must represent the best possible protection which the Council could expect in a project of this size, complexity and political significance. In the next couple of months the Council will need to be appraised of all risks in order that it can homologate **tie's** award of the contracts or indeed grant a letter of guarantee backing up **tie's** obligations.

In these circumstances I believe it will be impossible for the internal Team to provide the expected level of comfort in relation to the two outstanding contracts. To do so would require a full review of all the negotiations to date by persons familiar with this type of project. Legal Services has neither the experience nor manpower to undertake such a comprehensive task, even if time were available. As mentioned in my initial observations to Chris Highcock on the draft Council report, there has been absolutely minimal involvement of Legal and City Development officers in these contracts. Accordingly, I would refer you to the Options paper previously submitted to you. To progress matters a decision will have to be taken by the Council to either (i) accept that **tie** have considered the Council's interests to date and have appropriately negotiated the contracts on that basis; or (ii) have a formal independent legal review carried out on negotiations to date. I would be surprised if there is any Council officer willing to commit to a position of expressing absolute trust in all of **tie's** actings over the last three years, when the Council has been largely excluded from the role of principal or client.

It is impossible to overlook the fact that the three main contracts (including MUDFA) were procured by **tie** as the contracting party. External legal advisers have spent at least two years supporting **tie**, but not the Council directly, in negotiating these contracts. Two months before the award of Infraco and Tramco it would appear that some form of Council "sign-off" is to be expected. This is not the way a normal agent/principal arrangement would operate. One must presume that the Directors of Finance and City Development, as well as elected members, will expect the views of the Council Solicitor to be set out in the relevant report to Council.

Although nothing in writing has been received, I understand what has been offered is that the Council will be treated as a joint client by DLA along with **tie**, from the preferred bidder stage onwards. This might be useful in theory, but given the Council has not been involved in the lengthy and complex negotiations to date, it is not clear what comfort or assistance this will actually provide in practice. To provide any effective input at this late stage (and I am not sure that this might have procurement implications) would require the Council to fully understand all the previous negotiations and be satisfied that the position to date is acceptable. Whilst **tie** has indicated that they are not expecting the Council to conduct a full review of the documentation, it could be said that by drawing the Council in as joint client, we have walked into a trap. The late involvement of the Council as an uninformed client may well let **tie** off the hook.

Furthermore, **tie** has indicated that all major principles are agreed with the two final bidders, and it is not practicable for the Council to input to detailed drafting. I would be more concerned about the risk profile of these contracts for the Council as Guarantor on behalf of **tie**. There is still the possibility of an external independent review on behalf of the Council, but that would have to be a full review of all documentation and risks contained therein. Anything less conducted by DLA in behalf of the Council would have to be predicated on the basis that the Council trusts all that **tie** has undertaken to date.

We are now told that the commercial negotiations are actually being led by **tie's** in-house legal team, and that DLA have not been involved at all stages. If that is indeed the case, the Council coming in at this late stage as joint client of DLA would give a lot of comfort to **tie** ! The information is that DLA have simply been providing advice on specific issues as negotiated between **tie** and the bidders direct.

It is important that this issue is tackled urgently, lest **tie** accuses the Council of dragging its feet. Without an independent review or a high level decision to homologate **tie's** past actions, officials may not be able to provide the comfort which will inevitably be sought by members.

On the role of DLA acting for both **tie** and the Council a number of significant practical implications arise. Who pays DLA ? What if there is a conflict between the Council and **tie**: how does DLA reconcile that with its duties to two clients ? Against the background of two years without significant involvement in the procurement of these two contracts, can the Council now become an effective client ?

I would be grateful for your guidance and recommendation on how best to proceed in the circumstances. Given the nature and significance of this issue, it may be that you would wish to obtain appropriate input from the two relevant Directors.

On another note, it is being made clear to us at various meetings that certain aspects of the MUDFA contract, and of the contract between **tie** and the SDS are possibly heading towards claims and resulting overspend. Please could you advise when you consider that the Council Solicitor is obliged to draw such facts to the attention of members given the risk responsibility now carried by the Council on any and all overspend, which is looking ever more inevitable.

Colin MacKenzie
for Council Solicitor

From: Gill Lindsay
Sent: 10 August 2007 13:44
To: Graeme Bissett; Jim Inch; Andrew Holmes; Donald McGougan; Colin MacKenzie
Cc: David Mackay; 'Willie Gallagher'; 'Susan Clark'
Subject: RE: Tram Project

Graeme

Thank you. It was good to see you. Moving forward on your point 6, as discussed, what is needed here is a legal acceptance that DLA regard this Council as a joint client with Tie or the ultimate client ie a direct client /legal adviser relationship and not

merely a duty of care, to reflect the new relationship and positioning. I see no difficulties in achieving this as we will be seeking this now at point of preferred bidder and recommending terms to the parties.

As soon as this is received, we would wish to receive from DLA in this capacity, a risk analysis of the Infraco contract, highlighting all and any particular and unusual risks and how these risks are to be managed, a clear positioning of the relationship between the Council and the ultimate successful bidder and DLA's recommendation to the Council that this be provided by the Council in the commercial circumstances. As early notification and receipt of the above as possible is needed as this will determine the extent and type of additional diligence the Council may wish to undertake. Colin MacKenzie is leading on the project from Legal and forms a team with Alan Squair and with Nick Smith from our commercial team.

We have our scheduled Legal Affairs Group Monday and can pick up on this and other issues then.

Kind regards

Gill

From: Graeme Bissett [mailto:graeme.bissett@citypoint.co.uk]
Sent: 07 August 2007 12:49
To: Jim Inch; Andrew Holmes; Donald McGougan; Gill Lindsay; Colin MacKenzie
Cc: David Mackay; 'Willie Gallagher'; 'Susan Clark'
Subject: Tram Project

The document I referred to this morning is attached. Some minor changes to the operation and membership of the sub-committees were agreed earlier this year, but they don't affect the main operations.

Please give me a call if you want to discuss. I thought it might also be useful to summarise the main actions we agreed :

1. CEC to address the formal Council / TEL and Council / tie relationships in this context in particular the extent to which the documentation of delegated authority from the Council to TEL and tie requires to be revised. This would be focussed on the Operating Agreements and will need to link specifically with the TPB. The remits and delegations contained in the attachment should be a useful basis from which to address these issues.
2. CEC will consider "Sounding Board" meetings as a means of ensuring that Councillors are kept abreast of progress
3. A tram project progress report will be submitted to the Council meeting on August 23rd and drafts will be shared with tie and TEL over the next week. This will incorporate any necessary approvals to the formal governance arrangements.
4. A detailed execution programme through to Financial Close in January 2008 is in place but the roles and responsibilities of CEC, tie and TEL people needs to be refreshed. Tie is leading on making this happen and I will report on the actions underway tomorrow. We will also seek to finalise the overall critical milestones with Transport Scotland at the meeting today and I'll summarise the shape of the agreement and the next steps, also tomorrow.
5. You agreed to look at dedicated senior people representing CEC working day to day within the tram project and based at CityPoint. Duncan already is doing so and Andrew mentioned that Ian Spence would lead for CEC on all planning matters. Rebecca fulfils the role for Finance and I hope a similar named senior person can also do so for Legal.

6. I will contact DLA about the legal relationship between DLA and the Council and set up a meeting to discuss how this can be concluded to the Council's satisfaction.

I hope that is accurate but please let me know if not and happy also to discuss any points arising from the attachment.

Regards

Graeme

Graeme Bissett

m : +44 [REDACTED]