

Current status of tram legal workstream

Legally privileged – prepared in contemplation of litigation

1. Purpose

- 1.1 The purpose of this note is to set out where matters currently stand in relation to the possible termination by tie of the contract with the Infraco.
- 1.2 It is not intended to be a detailed analysis, as much of the information received from tie is still awaited.
- 1.3 Once that information is received external advice will be taken on the issues which arise. Any comments or views made in this note should only be treated as preliminary/indicative at this stage. The thinking may change once the actual position becomes clearer.
- 1.4 This note is simply meant to be an update as to the present status of the legal workstream and the issues encountered to date in relation to termination.

2. Background

- 2.1 A contract exists between tie and the Infraco in relation to the construction of the tram line.
- 2.2 At Financial Close, CEC entered into a financial guarantee in relation to the obligations of tie.
- 2.3 tie engaged DLA Piper Scotland (“**DLA**”) as solicitors to advise tie on the Infraco contract negotiation and drafting.
- 2.4 tie has recently indicated that negotiations to resolve the dispute have come to an end and has put CEC on notice that it may seek to terminate the contract as a result of alleged breaches by Infraco. CEC’s consent to that would be required in terms of an operating agreement between CEC and TEL (the parent company of tie).
- 2.5 tie had continued to use DLA as its advisers in relation to the potential termination, but following adverse comment from CEC tie have engaged McGrigors. Richard Keen QC is also advising tie (and we assume TEL) in relation to the project.
- 2.6 Recognising the potential for conflict and the need for independence in being one step removed from the dispute, CEC has engaged Shepherd & Wedderburn and instructed Nicholas Dennys QC, a pre-eminent UK senior counsel in this field. They will provide CEC with an independent legal opinion in relation to the potential approval of any request by tie for consent to termination.

3. Key issues

- 3.1 There are a number of key high level issues.
- 3.2 They relate to:

- 3.2.1 tie's ability to terminate;
- 3.2.2 Infraco Default;
- 3.2.3 timing
- 3.2.4 quality of factual information and the evidential basis for termination;
- 3.2.5 effect of termination for Infraco Default;
- 3.2.6 effect of termination for tie Default;
- 3.2.7 effect of purported termination where there has been no Infraco Default;
- 3.2.8 strategy likely to be deployed by Infraco;
- 3.2.9 meeting with Infraco;
- 3.2.10 decision making; and
- 3.2.11 PR and political matters.

4. Ability to terminate

- 4.1 tie can terminate if there is an Infraco Default (a breach of contract by the Infraco that has a material and adverse effect on the carrying on of the works).
- 4.2 Infraco can terminate if there is a tie Default.
- 4.3 There is no provision in the contract for tie to simply walk away at this stage, trigger a tie Default and accept the financial consequences.
- 4.4 Notwithstanding the terms of the contract, both parties could agree to terminate on a commercial settlement basis.

5. Infraco Default

- 5.1 Whether or not there is an Infraco Default is going to be critical.
- 5.2 Similarly interpretation of the contract (which in places is far from clear and sometimes contradictory) is also going to be critical.
- 5.3 tie has served various remediable termination notices (“RTNs”), some of which Infraco have responded to and some of which they have not. Where a response has been submitted Infraco do not accept that they are in default.
- 5.4 Ascertaining and assessing the factual evidence that underpins tie's allegations of Infraco Default will be a time consuming exercise. A great deal of evidence will need to be explored in detail.
- 5.5 McGrigors on behalf of tie are presently working with DLA and tie to identify and collate the relevant factual information.

6. Timing

- 6.1 tie's advisers have indicated that if they aim for a December Council meeting they will not have sufficient time to provide anything other than a heavily caveated report. That will mean that CEC will not be able properly to assess whether or not it should approve any request by tie to terminate the contract. This could give rise to serious adverse consequences for CEC. There would in such a case be a real risk of a successful judicial review on the grounds that no reasonable authority would approve such a request on the basis of incomplete information. In addition, wrongfully terminating or purporting to terminate the contract where tie cannot establish Infraco Default could give rise to a claim by the Infraco for damages for which CEC, as financial guarantor, would be liable.
- 6.2 tie's advisers are presently considering how long it will take to carry out a preliminary assessment of the relevant contractual provisions, the RTNs and the associated factual matrix. At the moment, CEC's best guess is that this could take until the January or February Council meeting.
- 6.3 tie's advisers are also presently considering how long it will take to carry out a comprehensive assessment of the full factual matrix and supporting evidence and the grounds for termination. At the moment CEC's best guess is that this could take until the March Council meeting.
- 6.4 Whilst there are political pressures to arrive at a decision on this, it is essential that any decision is only taken on the basis of full facts and information in order to:
- 6.4.1 correctly assess risk and potential outcomes, and
 - 6.4.2 avoid, or lay the groundwork for the successful defence of, a judicial review action and other potential litigation by the Infraco.

7. **Quality of factual information**

- 7.1 CEC is taking its lead from tie as per the terms of the operating agreement. As ultimate shareholder it could take a more proactive approach, assess the full factual matrix itself and decide whether or not it wishes its subsidiary to terminate. However, given that CEC was not involved in the detailed contractual negotiations, given that it has limited rights of reliance and given that it has not been involved in the detailed operation of that contract it would still require tie's active co-operation and practical knowledge.
- 7.2 The approach being taken is to allow tie to reach its own view and then for TEL to submit a formal request for approval in terms of the operating agreement if it wishes to terminate. At that stage CEC would assess the terms of the request in the light of the information available to it, utilising separate and independent legal advice from Shepherds and Nicholas Dennys Q.C. That legal advice would not re-explore the factual circumstances and would rely on tie and its advisers to present the factual position accurately to it. This basis has been chosen to avoid unnecessary duplication of work given the time pressures under which all parties have been required to work.
- 7.3 Notwithstanding the above, as you are aware (and as we have seen from some of the adjudications to date) I have real concerns as to the quality of the factual information coming from tie. CEC will be exposed to the risk that it will, of necessity, be reliant on the quality of the factual information provided. If tie were not a wholly owned subsidiary, one may have thought to seek warranties that such information was accurate but that is not a realistic option here.

7.3 We need to consider how best to address that risk as it will be essential that elected members are aware of issues such as this. In effect any report to Council will need to set out: the background; that there has been a request by tie (after taking significant legal advice) to terminate the contract for an Infraco Default; that there has been an irretrievable breakdown between the contracting parties; that CEC has limited factual information; that CEC is solely relying on tie and TEL for the provision and accuracy of that information; that, on the basis of the information available to it, CEC has taken its own legal advice; and what that advice is.

8. Effect of termination from Infraco Default

8.1 This is the best solution, if there is an Infraco Default.

8.2 This is presently being analysed by tie and its advisers and will in turn be reviewed by CEC and its advisers.

8.3 At the moment the position is not clear but it is fair to say that I have not yet witnessed a high degree of confidence. However, as indicated above, this needs much more detailed analysis.

9. Effect of termination for tie Default

9.1 We are awaiting tie to provide information as to the likely quantum of claim for any tie Default.

9.2 In the event of tie Default, Infraco would have the option to terminate or to continue with the contract.

10. Effect of incorrect termination

10.1 If the contract is terminated for an alleged Infraco Default that tie cannot subsequently prove in court, the present thinking is that, given the contract wording, the contract would remain in place.

10.2 This has obvious implications as to whether or not CEC/tie can carry on with the project with another contractor, should it wish to do so. It also informs tie's possible strategy and role going forward.

11. Infraco's possible strategy

11.1 Infraco are most likely to seek to thwart any attempt to terminate the contract and effect progress with the project through another contractor in order to force CEC/tie to negotiate an expensive exit.

11.2 With that in mind I would expect:

11.2.1 further letters to the elected members;

11.2.2 repeated efforts to engage in a PR battle;

11.2.3 interdict proceedings seeking to prevent CEC taking a decision to approve any request by tie to terminate;

- 11.2.4 if a termination is approved and a notice of termination is served by tie, judicial review being taken against CEC and interdict and specific implement actions being raised against tie to keep the contract extant.
- 11.3 Any such action would delay progress, result in lengthy court battle and effectively sterilise the project.
- 11.4 Counter strategies need to be thought through. Tie are not yet in that position. CEC will discuss this next week with its advisers but if a decision is taken to approve termination with full facts and information one would hope that interim interdict could be headed off and judicial review could be successfully defended. It will not, however, stop the actions being raised. The position in relation to specific implement may well be different. Advice will need to be taken once the full factual matrix is available as to whether or not it could be successfully defended. One possible argument could be that to continue with the contract would be contrary to public policy. Whilst this is extremely hard to prove it may explain (in part) the motive behind the recent action against David Mackay for the use of the word “delinquent”.

12. Decision-making

- 12.1 tie is understandably concerned that open and transparent public decision making at Council will put Infraco on notice as to its thinking even if that matter were placed on a B agenda.
- 12.2 With that in mind, tie would like CEC to delegate its decision making to TEL. That is not appropriate legally or politically. It may, however, be technically possible for CEC to delegate the matter to a committee, should it wish to do so.

13. Meeting with Infraco

- 13.1 As you know, I think it would inform CEC’s decision making to meet with Infraco in order to listen to their arguments and any information which they feel CEC does not hold.
- 13.2 I have drafted you a letter of response to Richard Walker setting out the basis upon which CEC would be willing to meet Infraco.
- 13.3 It is imperative that this is not a mediation, negotiation, settlement discussion or adjudication. It should simply be an opportunity to make sure that we have as much information as we need, and the meeting will need to be carefully managed to ensure that is the case.
- 13.4 With that in mind, the attendees at that meeting should be limited.
- 13.4 The PR implications will need to be carefully handled.

14. PR and political

In any dispute of a highly visible nature there is also a PR battle to be won and this needs careful strategic thinking by both tie and CEC.

15. Conclusion

- 15.1 There are a number of issues which are of immediate concern.

15.2 They are as follows:

- 15.2.1 the need for accurate factual information to be provided by tie in a timely manner and carefully analysed by the legal advisors;
- 15.2.2 that information is taking longer to come from tie than CEC had originally hoped;
- 15.2.3 that the only contractual ability for tie to terminate is for an Infraco Default;
- 15.2.4 that, if it is subsequently shown that there is no Infraco Default, the contract would remain extant;
- 15.2.5 that the project, during such period, would be sterilised; and
- 15.2.6 that open decision making whilst necessary politically may pre-warn Infraco.