

Memorandum

To Tom Aitchison
Chief Executive

From Dave Anderson
Director of City Development

Date 11 August 2010

Our ref DA/JAT

Your ref

PRIVATE AND CONFIDENTIAL

TRAM PROJECT

I had a meeting this morning of the governance transition plan sub group.

At the meeting Alan Coyle and Nick Smith gave me a debrief on yesterday's meeting with Richard Jeffrey; and, in particular, the implications of Lord Dervaird's advice on Clause 80.13 of the contract, concerning **tie's** ability to instruct BSC to carry out work.

The potential to apply clause 80.13 was regarded by **tie** as a key potential weapon in their armoury and both DLA and McGrigors provided legal advice to this effect.

Lord Dervaird's ruling appears to leave **tie** with remediable breach notices under clause 90.1.2 as the last credible mechanism in the contract through which to achieve a positive change in contractor behaviour. BSC will have 30 business days to remedy notified breaches but could challenge each notice by placing these into the dispute resolution process, which would cause further delays. It would also take us beyond 16th September, the date of the Council meeting.

Given that **tie** appears to have lost 80.13 I am now deeply concerned about the project.

I understand that David Mackay has advised you that **tie** still believe it would be possible, with a fully engaged contractor, to deliver the full scope of line 1a for just over £600m. Richard Jeffrey gave me the same advice when we spoke on the phone yesterday.

Whilst I continue to have confidence in David's and Richard's judgement, it would be prudent to consider how best to manage the new risks associated with the project.

Dave Anderson, Director, City Development

Level G/1 Waverley Court, 4 East Market Street, Edinburgh EH8 8BG

Tel [REDACTED] Fax 0131 529 3498 dave.anderson@edinburgh.gov.uk



I understand also that **tie** is preparing a counter-proposal to the initial 'guaranteed maximum price' received from BSC.

Given the apparent loss of 80.13 from **tie's** armoury it would seem that the threat of termination, consequent upon a failure by BSC to remedy a valid notification of contract breach, remains the final lever available to **tie** to secure completion at an affordable price.

Taking account of this situation we shall clearly need to commence detailed plans for mitigating the financial, operational and reputational risks to the Council that would flow from termination of the BSC contract. Following agreement at last week's IPG Marshall will be leading a preliminary workshop tomorrow to review, in detail, the implications of terminating the contract.

If **tie** were to proceed to terminate, with just cause, they would be able to call in parent company bonds of £25m and to reclaim advances of around £15m. We would need to set up a litigation workstream to pursue BSC for damages and to commence a new procurement workstream. We would also need to consider seriously whether **tie** remains the best mechanism for completing line 1a, or whether the Council, as authorised undertaker under the trams act, may have to step in.

Any termination that were to happen, without just cause, would be financially disastrous leading to loss of profit claims, demobilisation costs, reinstatement costs and potential damages, not to mention the threat of Transport Scotland requesting repayment of the SG grant.

Simply grinding it out through trench warfare with BSC with every claim being contested through the DRP process, would inevitably see the project run out of cash in around 18 months time. Given current productivity levels that does not seem a credible option.

A further option may be simply to negotiate a price for the immediate exit of BSC from the contract, with **tie** exercising 'step in' rights to work with the sub contractors to complete the project, at least as far as York Place.

If, as now seems very likely, the current contract will require to be terminated, we shall need to be very careful about separating out the interests of **tie** from those of the Council.

Given all of the above, my strong advice is that we should defer consideration by Council of the future governance arrangements report, or produce a version that provides a general overview of progress and would allow TEL to progress the key appointments they need to make.

We also need an urgent meeting with David and Richard to discuss the way forward.



Dave Anderson
Director of City Development

cc Donald McGougan
CEC-000000013622.doc

CEC00013622_0002