
From: Anthony Rush [rush_aj@██████████]
Sent: 29 July 2010 21:26
To: 'Fitchie, Andrew'; Richard Jeffrey; david_mackay@██████████
Subject: RE: Legally Privileged and FOISA exempt

I have had the dubious benefit of getting a quick appraisal from Jim of the proposal he has just collected – I will give more thought and response when I have seen it – suffice it to say that the story is “its just a starter – we hadn’t got time to go back to the sub-contractors and submit by your deadline – we will negotiate”.

But I make some comment in red on Andrew’s input.

Tony

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 29 July 2010 15:56
To: Richard.Jeffrey@tie.ltd.uk; david_mackay@██████████
Cc: Anthony Rush
Subject: RE: Legally Privileged and FOISA exempt

Confidential

Gents

Reading Richard's thoughts and Tony's note, I have set down potential moves by **tie** and and some recommendations:

A. Hauesserman visit

1. I am in no doubt that this will be probe for information. I had a 'let's have a chat' in March 2009 when Daniel was here for the celebration of the M80 Close at function rooms in the Castle. After two and half hours of being told that **tie** were unreasonable (this included Mrs Walker and Richard Walker telling me how he was 'honest john'), I am afraid that I told them all to stow it.

2. Pinsents answer to Hausserman and his boss but I have no doubt that he has been instructed to examine Carlisle from a risk standpoint.

Recommended action: AF to meet DH with a brief to deliver certain messages from **tie**. **Please could we discuss the messages. I think they are fishing – they are also playing for time on the Murrayfield Adjudication – go and have a nice dinner – say nowt.**

B. Reading tea leaves

1. I agree with Richard's analysis that there may be a BSC corporate school of thought that says that a big messy dispute is a lot easier to control initially than **a live project and tie**, Tony Rush and Carlisle. Just pay lawyers and move on, turning your back on Scotland/UK public sector work. Put another way: litigation risk is better than project risk. Maybe

2. I do not fully understand the Darcy and Wakeford approach, other than to assume that while Carlisle is in train, they regard themselves as broadly excused as far as making any form of independent and positive, open decision or commitment that could assist the Project. This is consistent with BB being cash positive and not change its fundamental views - but puzzling if Siemens are hurting financially. Wait and see comments on Siemens to come later

C. Thoughts on Tactics

Possible Action: if B1 is true/close to true, a logical move by **tie** is to make the demise of the project look like producing a very bad immediate financial outcome for BSC e.g. a call on both PCGs and on £25 million pounds of

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bonds. As previously advised, we need to be certain that there is a clear breach letter on file which is at least 14 days old in order to support the 'on demand' rights under the two bonds. We need to discuss this on Monday

Possible Action: If the timetable for achieving a breakthrough is August 31, a judgment is made as to whether the issue of remediable termination notices would cause Carlisle to stall or be the propellant to closure. recall that an RTN does not have to lead to termination and cannot be treated as a repudiation. A logical response to this afternoon's productions - if unacceptable following requests for better quality - could be a set of RTNs, with **tie's** version of Carlisle included as an acceptable core for the Infraco's contractual remediation plan. Ditto

D. Funding Impact

Communication to BSC of Scottish Govt. view that BSC are not acting as if Carlisle is reality and this brings with it the real possibility that the guillotine will drop. This only works if BSC are serious about Carlisle but have the pressures on tie to force an outcome reached a stage whereby it would be better to know without further charade that BSC are not interested/not capable of turning Carlisle into a truncated but delivered scheme.

E. Darcy/Wakeford

I am not entirely clear where this sits or if further input from our end is needed. **Recommendation:** In order to keep the pressure on, a short and crisp note back to D/W would seem right. Apologies if this is behind the pace following Board meeting yesterday. Agree that we should respond

F. DRP Murrayfield Underpass

My view is that there is risk in assuming that a win on this DRP will stimulate BSC do to anything. One BSC view could be that this is a discrete adjudication and the ruling is neither important nor binding. This would run against the view that Lord Dervaird is unlikely to get it wrong but, in fairness, the first BDDI-IFC ruling, though it analytical rigour was suspect, resulted in **tie** forming its view in that way, of necessity.

If that is so, how should the time before that decision falls be used given that time is now a highly relevant negotiating component and my view is that BSC may be counting on this to force **tie** to accept a Carlisle deal that is sub optimal ie

we will see if tie's risk of a time out obliges them to come to the table and close on Airport to Haymarket too early. If they do not, we are no worse off in terms of risk than we were 4 months ago -since we regard all DRPs as subject to appeal". I will comment later

G. The Contract

The contract contains formal warning notice provisions. So far these have not been deployed by **tie**. It is, in my view, time for **tie** to reconsider using them - even if this results in denial or counter accusation from BSC. Agreed

kind regards

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From: Anthony Rush [mailto:rush_aj@[REDACTED]]
Sent: 29 July 2010 09:41
To: Fitchie, Andrew; Richard.Jeffrey@tie.ltd.uk; david_mackay@[REDACTED]
Subject: RE: Legally Privileged and FOISA exempt

Thanks Andrew,

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Not negative – constructive.

I am going to collect the proposal myself at 3pm.

EK's feed-back on the current state of it.

 They are still pulling the price together.

 Having problems with CAF

 The Programme is within 3 months of our requirements (I had thought this to be best case and can deal with it)

 But in line with your call from Hauesserman – EK is waiting for the go ahead (I assume approval of conditions) from the legal team in Germany.

We can assume that your pal will be fishing – or is he giving us a message that Germany are not satisfied with PM or the way PM have been used?

Tony

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]

Sent: 29 July 2010 09:21

To: rush_aj@[REDACTED]; Richard.Jeffrey@tie.ltd.uk; david_mackay@[REDACTED]

Subject: Re: Legally Privileged and FOISA exempt

Tony- this is carefully thought over. I will call as soon as I get Brandon what I have promised.

New point: I was called last night by Daniel Hauessermann (European Counsel) of BB. I had a good relationship with Daniel and was also on the otherside from him on the M80 on some difficult issues. He is Edinburgh on Monday Tuesday- to meet Pinsents I have little doubt. He would like to meet up "for old times sake" - which I will obviously do. We should discuss whether I keep mum or give messages. We should discuss.

I too have reservations about the BSC UK senior team to take tough decisions (Involving risk). Easy for me to say but the idea that after two years Darcy should be somehow ambushed/ shocked that there were actions which David and Richard wanted commitment on is, in truth, pitiful.

Even a win for tie on 80.13 can only force a boost to BSC effort if they want the job. If they do not want it, they may well rather take their chances with litigation.

I cannot judge Ed's real authority but having worked in a German company for a very senior hired gun (divisional director so effectively Darcy level) I know that they can really only out rank management if what they produce generates revenue opportunity.

I have concluded that one part of BSC thinking is an end game where the Scottish Govt is involved, the grant is under threat and they throw in tie Default (a) or (c). This would suit Siemens.

Sorry to seem negative.

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Andrew Fitchie
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From: Anthony Rush <rush_aj@[REDACTED]>

To: Fitchie, Andrew

Cc: david_mackay@[REDACTED] <david_mackay@[REDACTED]>; Richard Jeffrey <Richard.Jeffrey@tie.ltd.uk>

Sent: Thu Jul 29 07:58:20 2010

Subject: Legally Privileged

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I have of course been thinking about my conversation last night with Richard and David.

I think we agree with Swinney when he says that not setting aside the 80.13/34.1 issue and getting on with the Works is a sign of bad-will/faith by BSC. I have been telling EK this for some time and our 13 point list handed to Darcy and Wakeford on Monday de-facto gave them the same message.

We did not get an immediate answer – the 24 hours delay implies that discussion with higher authority may have been involved. Whatever, their answer is in relation to the key-points 1 and 12 amply supports John Swinney's observation.

Two future events concern me:

• What they may deliver today.

• The decision on 6 August.

I fear that neither will give us confidence that we can turn back the "sands of time".

From a negotiating point of view I would very much like us not to play the "pressure from Government" card – it invites more obstinacy from BSC. But, I have to say I am inclined towards thinking that it is safer to believe that EK is just a point of contact – maybe even over stepping his authority – rather than place our confidence in him.

I also accept that we cannot avoid intense scrutiny and pressure from stakeholders.

Taking everything into consideration, I am minded to suggest that David should speak to Enekel this morning and apprise him of the Minister's position and ask him to intervene and agree with what was put to Darcy and Wakeford on Monday. Moreover, to advise that they should be careful not to submit a proposal today which may inflame feelings – completion being an important factor as well. If we have to speak to them I think it should be sooner rather than later. Although hitherto I have thought waiting until 6 August was the best tactic – that may be seen in some quarters as being too late.

Like all such circumstances one cannot be certain what is the right thing to do and I am by no means certain in this case. If it is at least worthy of talking about I shall be at my desk all morning – intending to leave for Citypoint at about 1400.

Tony

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