
From: Graeme Bissett [graeme.bissett@[REDACTED]]
Sent: 12 August 2009 08:04
To: Stewart McGarrity; Andrew Fitchie
Cc: 'David Mackay'; Richard Jeffrey
Subject: FW: Trams Governance Report
Attachments: Edinburgh Tram Project Governance Arrangements - 5.08.09 exJJ.doc

Stewart, Andrew

We are at the 11th hour and I would expect only fundamentals will be capable of being changed, if any. If CEC Legal respond by saying no across the board to the issues below, there is nothing more that can be done and tie will need to sweep up the consequences, especially in relation to the matters which will interest BSC. Of the others, the last one should get an answer as it may have ramifications for the balance of content in the underlying documents. The process is of course the wrong way round, the documents (OAs etc) should have been completed prior to the report. Even more frustratingly, the Council CEO has delegated authority from back in March to execute all of this except the Board numbers and Richard's appointment.

I have a practical issue today in that I will be out of contact from 10-1 and then from 2-4.30, though I will keep the blackberry on. I have just had a constructive note from Jim, which I will forward, but there remains the risk that his approach still gets stuck in the mire. I have asked the CEC folks to direct all correspondence on this paper today to all three of us and I am grateful for any time you could devote while I am out of contact. The wording changes needed to effect all of the points in my email of last night are in the draft agreed last week, a copy of which is attached for reference and which CEC Legal also have.

I'd suggest we now await a redraft from CEC and take it from there.

Regards
Graeme

Graeme Bissett
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From: Graeme Bissett [mailto:graeme.bissett@[REDACTED]]
Sent: 11 August 2009 18:26
To: 'Colin MacKenzie'; 'Jim Inch'; 'Steve Renwick'
Cc: 'Nick Smith'; 'David Mackay'; 'Richard Jeffrey'; 'Stewart McGarrity'; Andrew Fitchie (andrew.fitchie@dlapiper.com)
Subject: RE: Trams Governance Report

Colin and colleagues, there are a number of important issues in the attached draft, which is identical to the one circulated by Colin an hour ago except that I have highlighted in red the relevant paragraphs which require attention.

The most important issues relate to BSC's interests.

I mentioned earlier today : *Inclusion of references to the MoU : this was debated at length and it was agreed that highlighting this new document will be likely to open up a line of argument from BSC in the context of the main contractual dispute which would seek to question the robustness of delegated authority offered by the Council to tie and TEL. The spurious nature of BSC's arguments has not impeded their enthusiasm to engender dispute on a number of other issues. At a minimum, the matter will incur time and cost to manage and the conclusion was that in any case the main document is the revised TEL / CEC Operating Agreement, with all other documents (share transfers, MA / AA, 288s, Board minutes, possible further internal approval documents) captured as "related documents". This is a view supported strongly by DLA.*

This point has not been reflected. There is a fundamental contractual dispute underway between tie / CEC and BSC and it cannot be over-emphasised that BSC will utilise all the ammunition it can muster when the serious mediation or adjudication gets underway. The problem is now compounded by the reference included in 3.5 that the MoU supercedes the existing operating agreements between tie and CEC on which BSC relied in considering the robustness of tie's delegated authority in May 2008. It is unlikely BSC will ignore this and the debate will be opened up for no good reason and with unpredictable consequences.

In addition, in new para 3.3 the previously discarded wording about the project being well underway has been retained, despite agreement that it implies BSC are working properly. On any measure, BSC's construction work is very far from being "well underway". If there is a good argument not to change this to the wording previously agreed, maybe it could be explained.

Finally on BSC, the change drafted in new 3.4 attempts to cover off the fact that the arrangements described in the paper do not change any legal rights or obligations, but the wording talks only about "contracts among the parties" (ie CEC / TEL / tie) when the objective was to make it plain that all contractual rights and obligations are unchanged including those in which BSC has an interest. The dropping of the reference to "guarantee arrangements" also weakens the impact.

Other points :

The two references to Gogar require to be modified because no agreement is in place between CEC / TS / tie and there is an open question about TS's ability to allocate the delivery role without a procurement process.

The first indented paragraph in 3.4 is factually incorrect as it ignores the powers reserved by the Council, this was amended in the previously agreed draft.

In 3.8, should the change to the first indented paragraph about Council approval for programme slippage also be included in the second indented paragraph about baseline cost ?

For the record, the comment in the margin against para 3.10 on remuneration that :We must be clear that Council controls overall budget for salaries and bonus for tie and TEL. runs counter to the agreement reached on how remuneration policy principles will be handled and will be unlikely to be acceptable to the tie or TEL Boards based on previous dialogue. Since the comment has no bearing on the content of the report it can presumably be ignored for present purposes ?

In 3.12, the extract from the existing TEL / CEC Operating Agreement that the Council has an obligation to waive its rights to claim against any director, officer or employee of TEL (save

in respect of any criminal, fraudulent or wilfully negligent action by any such person); has been deleted ; this was regarded last year as a critical clause by the Directors. The general point raised by this deletion is that the paper cannot be a substitute for proper negotiation of the underlying agreement. Does the delegated authority sought for the Council Chief Executive enable him to agree a fully-agreed set of documents with a number of important inclusions which are not mentioned in this paper ?

Regards
Graeme

Graeme Bissett

m : [REDACTED]

From: Colin MacKenzie [mailto:Colin.MacKenzie@edinburgh.gov.uk]
Sent: 11 August 2009 16:43
To: Jim Inch; Steve Renwick; Graeme Bissett
Cc: Nick Smith
Subject: FW: Trams Governance Report
Importance: High

Jim,

As discussed with Steve, please find attached a further revision to the draft Council report. I trust this reflects your requested amendments and takes into account Graeme's comments.

Regards,

Colin MacKenzie
for Council Solicitor
City Chambers
Edinburgh

Tel: [REDACTED]

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