
From: Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]
Sent: 23 May 2008 17:29
To: Alan Coyle
Cc: Graeme Bissett; Gill Lindsay; wilie.gallagher@tie.ltd.uk
Subject: RE: DLA Report

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FOISA Exempt and Legally Privileged

Alan

Thanks for the note. My view summarises as:

- DLA Piper's letter of 12 May 2008 was specific legal advice given to **tie** and to CEC regarding the Project's Close and, as such, it is privileged from production to any third party.
- It contains direct reference to a sequence of advice to **tie** and to CEC in relation to the evolution of the ETN contract suite, procurement risk and the way in which the commercial negotiations were closed by **tie** under difficult circumstances. It also comments on **tie's** position to achieve risk rebalance sought during the final negotiations.
- it is distinguishable from **tie's** own views contained in the Close reports in that it is legal advice, as opposed to the expression of an experienced professional financial, engineering and commercial judgment on outcome and risk. While it might be logical in TS's eyes for TS to see this, it is not necessary for them to do so in order to form a view on how **tie** and CEC reached their decisions.
- The Project remains inside the time window during which technically legal proceedings bringing a challenge against the award of the contract could be mounted. Disclosing **tie's** legal advice in other public arena about the likely incidence and means of defending that challenge is not desirable in my opinion.
- The letter gives views -admittedly of a general nature - on certain aspects of the contracts which are there to assist CEC in understanding why risk is allocated in a particular way way. Those views -if made the subject of public discussion or reporting - may have commercial value to the BBS Consortium which would otherwise not be available to them.

It is of course **tie** and CEC's prerogative to share that advice with Transport Scotland but I would recommend strongly that CEC seek to understand with precision what question is being asked and whether DLA Piper's legal advice has any bearing on TS's ability to formulate an answer to that question, before any of our legal advice is given to Transport Scotland. The provision of those DLA Piper letters of advice to TS will effectively waive any future rights of **tie** or CEC to re deploy the Solicitor - Client privilege and may also impact the position with regard to other DLA Piper's project advice during the procurement being subject to further blanket demands for disclosure.

If it were decided that the DLA Piper advice letter were to be disclosed to TS, my current position would be (without instruction from yourselves or **tie**) that it ought only be on the basis of (i) complete and confirmed confidentiality i.e. TS cannot disclose it to any party, not even their advisers (ii) non reliance that is to say TS is not entitled to rely upon it.

Happy to discuss - not in the office until Tuesday morning.

kind regards

Andrew Fitchie
Partner, Finance & Projects
DLA Piper Scotland LLP



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From: Alan Coyle [mailto:Alan.Coyle@edinburgh.gov.uk]
Sent: 23 May 2008 16:13
To: Fitchie, Andrew
Subject: DLA Report

Andrew

Transport Scotland have requested I send them a copy of the DLA Report on the Infraco Contract Suite. This request arises as the DLA Report is referred to in the Close Report, which they have a copy of, to provide information in order for TS to answer a Parliamentary Question.

Would you have any issue with us providing a copy of this to TS (highlighting the need for confidentiality) given this was legal advice given to CEC as client.

Regards
Alan

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