
From: Willie Gallagher
Sent: 25 May 2008 17:17
To: Graeme Bissett (external contact); Stewart McGarrity
Cc: Steven Bell
Subject: RE: DLA Report

I have dinner scheduled with Malcolm Reed on Tuesday evening, I will discuss how we work together with him at the meeting.

From: Graeme Bissett [mailto:graeme.bissett@virgin.net]
Sent: 25 May 2008 14:04
To: Stewart McGarrity
Cc: Willie Gallagher; Steven Bell
Subject: RE: DLA Report

You can never discount leaking, but my concern is the use of the information and its dissemination by TS who may not appreciate the commercial and other sensitivities. We have agreed that the regular reporting coupled with the 4-weekly CEC / TS meeting is the defined limit of information flow and this is how it should be handled, absenting a major specific issue or heavy-duty PQ, and augmented by a more sociable level of senior communication such as the dialogue between you / GH and Willie / BR. JR using our reports to draft PQ answers with no tie input is a clear area of risk. It must make more sense for us to know what question is being asked, tailor the information needed and then review (with no power of veto) the answer.

Regards
Graeme

Graeme Bissett

m : [REDACTED]

From: Stewart McGarrity [mailto:Stewart.McGarrity@tie.ltd.uk]
Sent: 24 May 2008 15:06
To: Graeme Bissett (external contact)
Cc: Willie Gallagher; Steven Bell
Subject: RE: DLA Report

Graeme,

Relevant extracts from the Grant Letter are appended to the bottom of this message.

This may be nothing but a general fish for information by John Ramsay (and we can deal with those accordingly) but I did get my lug bent by others at TS that "Ministers" have asked TS to be more involved/informed re what's going on in the Tram project. We would in any case have ensured the financial and programme outcome was adequately disclosed in the next 4 weekly TS report which is due end of this coming week. Financial Close and the emerging concerns of Ministers have occurred in the period between reports. Guy Houston was kept up to date by me as much as possible as events unfolded and I think Willie had a pretty good dialogue going with Bill Reeve. It's a dispiriting situation that we should be concerned about providing commercially sensitive information to TS in the first place.

A senior meeting between CEC and TS to discuss would be a very good idea - as much to mark the achievement of Financial Close as anything else. The Grant conditions specify open access to records as below - but it is couched as a formal audit type process under 10.1 which all parties would wish to avoid resorting to. The adequacy and extent of regular reporting is at the sole judgement of TS as at 16.1 - they can simply withhold the cash if they dont judge our reporting and doisclosure to be adequate. John Ramsay has inordinate power in this regard.

Should tie and CEC be a wee bit concerned that the financial reconciltations (in the Close Report) provided by CEC to J Ramsay have been used to answer a PQ from McLetchie but we dont know what the specific questions or answers were?

Stewart

Grant Letter extracts

Inspection of the Council's Accounts and Records

10.1 *If the Scottish Ministers consider it necessary to gain access to and inspect the Council's accounts and records to verify the proper use of the Grant in accordance with Clause 3, the Council shall on 3 Business Days notice issued by the Scottish Ministers, make all accounts and records available to the Scottish Ministers, their representatives, the Auditor General for Scotland, his/her respresentative and such other persons as the Scottish Ministers may reasonably specify from time to time. The Council shall provide such reasonable assistance and explanation as the person carrying out the inspection may from time to time require. Should the Scottish Ministers exercise this right of inspection, the Scottish Ministers shall subject to Clause 12 keep the contents of the accounts and records confidential. However the duty of confidentiality shall not prejudice the Scottish Ministers from using the information in the management of the Grant nor from any action the Scottish Ministers wishes to take in accordance with Clause 13.*

10.2 *If the Scottish Ministers considers it necessary to gain access to and inspect the accounts and records held by tie to verify the proper use of the Grant in accordance with Clause 3, the Council shall procure that on 3 Business Days notice issued by the Scottish Ministers, tie makes all accounts and records available to the Scottish Ministers, their representatives, the Auditor General for Scotland, his/her representatives and such other persons as the Scottish Ministers may reasonably specify from time to time. The Council shall procure that tie shall provide such reasonable assistance and explanation as the person carrying out the inspection may from time to time require. Should the Scottish Ministers exercise this right of inspection, the Scottish Ministers shall subject to Clause 12 keep the contents of the accounts and records confidential. However the duty of confidentiality shall not prejudice the Scottish Ministers from using the information in the management of the Grant nor from any action the Scottish Ministers wishes to take in accordance with Clause 13.*

Publicity and Confidentiality

12.3 *The Scottish Ministers may publish or disclose this Agreement or any part of it, any information concerning this Agreement or matters arising out of or in connection with it, the performance of the Council under this Agreement and any other information as it may deem appropriate from time to time. The Scottish Ministers shall use reasonable endeavours to notify the Council prior to publishing or disclosing any such information directly relating to the Council, and shall take into account any representations which the Council may make in connection therewith.*

12.4 *The Council shall and shall procure that tie and TEL shall do all things necessary to facilitate the Scottish Ministers' compliance with the Scottish Government's Publication Scheme (as required by section 23 of the Freedom of Information (Scotland) Act 2002) in force from time to time.*

12.6 *Notwithstanding any of the foregoing provisions of this Clause 12, or any other provision of this Agreement, either Party may disclose any information:*

12.6.1 *for judicial purposes;*

12.6.2 *which is or becomes public knowledge (other than by breach of this Clause 12)*

12.6.3 which is in possession of the Party disclosing it without restriction as to its disclosure before receiving it from the disclosing Party; or

12.6.4 which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure.

Project Management and Controls

16.1 The Council shall comply with Transport Scotland's project monitoring and control procedures from time to time applicable including but not limited to the project reporting and review specified in Annex 2. The Council shall ensure that it and **tie** take all reasonable steps to provide information comprehensively and timeously when requested by the Scottish Ministers.

From: Graeme Bissett [graeme.bissett@virgin.net]
Sent: 24 May 2008 10:38
To: Stewart McGarrity
Cc: Willie Gallagher; Steven Bell
Subject: FW: DLA Report

Stewart, you should be aware of this exchange. We have strong desire to preserve relationships, but this feels like the thin end of a wedge here. Can you summarise (or cut and paste) the information provision obligations on CEC / tie within the grant letter so we know where we are starting from.

It is possible we need to have senior-level discussion with CEC and TS to clarify matters rather than engage request by request with the scribes.

Regards
Graeme

Graeme Bissett

m : [REDACTED]

From: Graeme Bissett [mailto:graeme.bissett@[REDACTED]]
Sent: 24 May 2008 10:34
To: 'Gill Lindsay'; 'Fitchie, Andrew'; 'Alan Coyle'
Cc: 'willie.gallagher@tie.ltd.uk'
Subject: RE: DLA Report

Just to add my own support to Gill and Andrew's views. It is not in anyone's interest that we appear to be unhelpful to the main project funder, but we / CEC must have a right to maintain legal privilege. In addition, I believe that FOISA needs to be borne in mind here - the ability to withhold information is dependent not only on the content but also the interest of the requested party. TS do not have the same interest in the contracts as does tie or CEC. Note the recent publication of the PFI contracts for ERI etc. None of us want to be in a position where TS have information that we / CEC would not be required to disclose but which becomes disclosable through a request to TS. More practically, we can help them by seeking to know the question being asked and then providing specific information for a response, rather than giving them more extensive documents.

I am not comfortable that they have a copy of the Close Report. This was prepared by tie specifically for CEC and contains two sections which have sensitive commercially confidential information, and more general commentary affecting third party contracts and our contractors. We should get a written acknowledgement from TS that they understand the commercial sensitivity of the material and will take appropriate steps to maintain confidentiality and not to make public any content, whether under FOISA or otherwise.

As a general point, there are signs that TS are returning to previous bad ways when it comes to requests for information. We should be robust within the terms of the Grant Award Letter, otherwise time will be wasted and confidentiality threatened.

Regards
Graeme

Graeme Bissett

m : [REDACTED]

From: Gill Lindsay [mailto:Gill.Lindsay@edinburgh.gov.uk]
Sent: 23 May 2008 18:32
To: Fitchie, Andrew; Alan Coyle
Cc: Graeme Bissett; wilie.gallagher@tie.ltd.uk
Subject: RE: DLA Report

Alan

I entirely agree with Andrew's view. If legal professional privilege is waived at all it will be more difficult to resist requests from other parties who may consider they have similar requirements. It could also be commercially and financially detrimental to a number of parties. Can you please ensure that it is not copied without specific further liaison and we adopt Andrew's view of requesting the question and offering to advise as appropriate.

Thanks Alan
Gill

From: Fitchie, Andrew [mailto: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

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. 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
T: +44 [REDACTED]
M: +44 [REDACTED]
F: +44 [REDACTED]

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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

Alan Coyle | Finance Manager (Tram Project) | Financial Services | City Development Team | Level 2/5
Waverley Court | 4 East Market St EH8 8BG | alan.coyle@edinburgh.gov.uk |

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