
From: Fitchie, Andrew
Sent: 30 May 2008 14:19
To: [REDACTED]
Subject: Re: ETN - DLA Report

Legally privileged

Graeme

If CEC want to hard ball:

1. I think the cloak of legal privilege is not persuasive. The additional report was not generated for legal reasons or because it was needed to complete legal advice. I could not back this argument since the legal privilege extends to our output, not tie's

2. The better position would be to explain to TS that tie is (a) under confidentiality duties under the contract even when disclosing info to TS (b) the report distils and discloses some of those eventual contractual positions (need to refresh on the language).

Sharing the information with TS and in the public domain without permission could therefore risk putting tie in breach of the Infraco Contract- since confidential info can only be given to TS if there is a legal requirement to do so. The flaw here is that 'Confidential Information' has to be specially designated as such (BBS have never done this) before the restriction applies. If asked Infraco- Siemens in particular- would in my view be highly likely to say that this info is indeed confidential to them.

3. Technically in this period tie are still open to challenge so that there are communal strategic reasons for TS, CEC and tie to keep legitimate but tight control on procurement related information. If tie were challenged by the EU commission as opposed to a bidder, the Scottish Ministers (not CEC) would take the first pain in terms of investigation/infracton proceedings.

I agree with your analysis that this second guessing is likely to absorb time and cost for tie.

I had missed Alan's direct
E mail to me and will reply to that over the weekend.

Lastly- Is tie/CEC not entitled to understand first why does TS need this information? It cannot just be "because we want to read it."

Kind regards
Andrew Fitchie
Partner
DLA Piper Scotland LLP
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----- Original Message -----

From: Graeme Bissett [REDACTED]
To: 'Alan Coyle' <Alan.Coyle@edinburgh.gov.uk>; 'Donald McGougan' <Donald.McGougan@edinburgh.gov.uk>; 'Stewart McGarrity' <Stewart.McGarrity@tie.ltd.uk>; 'Gill Lindsay' <Gill.Lindsay@edinburgh.gov.uk>
Cc: 'Rebecca Andrew' <Rebecca.Andrew@edinburgh.gov.uk>; 'Willie Gallagher' <Willie.Gallagher@tie.ltd.uk>; david_mackay [REDACTED] <david_mackay [REDACTED]>; Fitchie, Andrew

Sent: Thu May 29 13:37:28 2008
Subject: RE: ETN - DLA Report

Alan, you could argue that the paper was written under the legal privilege umbrella of the DLA letter and is therefore in the same legal condition, therefore not to be disclosed for the same reason.

The Deal Terms paper was written with the possibility of forced publication in mind. Its primary purpose was to inform all the key players in tie, TEL and CEC about the course of events which made price and risk profile adjustments necessary and to explain why the outcome was acceptable in value for money terms and in comparison to alternative routes.

If you feel the paper should go to TS, on one level therefore there is no risk in wider circulation. However :

1. To explain the events and outcomes properly required a fair old level of detail, elements of which can be challenged even if the aggregate position was acceptable and what really mattered. In the hands of the press, there is scope for mischief-making by focusing on the debate on elements rather than the whole.

2. Similarly, the paper addresses the positions adopted by consortium members and our reaction to them, which raises the risk that if publicized 1) the consortium might have useful information for any future dispute between tie and them ; and 2) disclosure could affect relationships. The latter is less of a concern because I do not think the consortium were left in much doubt about tie's feelings about their behaviour during the final negotiations. However, giving your commercial partners detailed information about our risk contingency is not smart.

Accordingly, I'd recommend CEC and TS reach an understanding as to how FOISA requests will be handled, especially if different decisions on disclosure might be made by the two different bodies on the same information given their different economic and commercial interests in the contracts.

Finally, if the paper is given to TS, we should expect a range of second-guessing questions which will enhance non-one's life. If this does transpire, I think the debate should be escalated because of wider concerns about TS officials seeking to re-enter the management of the contract, which was explicitly not what the Minister proposed when the £500m was agreed last year.

Regards

Graeme

Graeme Bissett

m : +44 [REDACTED]

From: Alan Coyle [mailto:Alan.Coyle@edinburgh.gov.uk]
Sent: 29 May 2008 12:01
To: Donald McGougan; Stewart McGarrity; Graeme Bissett; Gill Lindsay
Cc: Rebecca Andrew
Subject: FW: ETN - DLA Report

Dear All

Following John's response below, comments on how to proceed with this matter would be appreciated. He accepts the position with regard to the DLA report, we are left with the issue of Graeme's report in the events history.

Alan

Alan Coyle | Finance Manager (Tram Project) | Financial Services | City Development Team |
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From: John.Ramsay@transportscotland.gsi.gov.uk
[mailto:John.Ramsay@transportscotland.gsi.gov.uk]
Sent: 29 May 2008 10:44
To: Alan Coyle
Cc: Rebecca Andrew; Donald McGougan; Stewart.McGarrity@tie.ltd.uk;
Andrew.Fitchie@dlapiper.com; Gill Lindsay; [REDACTED] Duncan Fraser; Dave
Anderson; Scott.Prentice@transportscotland.gsi.gov.uk;
Steve.Milligan@transportscotland.gsi.gov.uk; Bill.Reeve@transportscotland.gsi.gov.uk
Subject: RE: ETN - DLA Report

Alan

Thanks for your reply.

As you probably know, the issue of confidentiality has been raised before, particularly that of commercial confidentiality, and I had thought that we had long since settled any doubts between ourselves on such. But for continued re-assurance, can I restate that Transport Scotland is aware of such responsibilities and continues to handle them in a professional and appropriate manner, across all projects. However, we cannot provide any assurance that contradicts FOISA but the regulations include exemptions for the situation context of commercially sensitive information, and you may be assured that Transport Scotland has always applied these. Also I fully appreciate the points you make with regard to the DLA Piper report and accept your position.

I note that your response refers only to the DLA Piper report - if you recall we also asked for sight of the additional paper referred to in the "Close Report" - viz "The detail behind the a further round of negotiations instigated by Bilfinger Berger and the final position reached has been documented separately for CEC".

John Ramsay

Project manager - Edinburgh Trams

Rail Directorate

Transport Scotland

Buchanan House

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Tel [REDACTED]

mobile [REDACTED]

From: Alan Coyle [mailto:Alan.Coyle@edinburgh.gov.uk]
Sent: 27 May 2008 10:39
To: Ramsay J (John)
Cc: Rebecca Andrew; Donald McGougan; Stewart McGarrity; Fitchie, Andrew; Gill Lindsay; Graeme Bissett (external contact); Duncan Fraser; Dave Anderson
Subject: ETN - DLA Report

This email has been received from an external party and
has been swept for the presence of computer viruses.

John

Following your request to see further documentation in the form of the DLA report on the Infraco Contract Suite, it is not CEC's intention to be unhelpful, however, there are sensitivities around legal professional privileges with regard to the legal advice given to CEC/tie by DLA and as a result it is privileged from production to any third party.

All information you require should be contained within the Close Report and CEC are happy to answer any specific queries you may have.

With regard to the Close Report we have provided, 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. It would be helpful if TS could provide a written acknowledgement 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.

Please give me a call if you wish to discuss, additionally we are happy to meet to discuss any issues around this matter.

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 <mailto:alan.coyle@edinburgh.gov.uk> |



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