
From: Graeme Bissett [graeme.bissett@[REDACTED]]
Sent: 03 December 2007 13:40
To: Nick Smith
Cc: Colin MacKenzie; Duncan Fraser; Rebecca Andrew; 'Fitchie, Andrew'; 'Tracey Kinloch'
Subject: RE: Operating Agreement

Nick, here are my comments on the v9 version received on 28.11.07.

I have not yet received a workable copy of the TEL agreement so there will need to be a parallel set of comments when it emerges. Some TEL matters are highlighted below but these cannot be regarded as exhaustive.

1. A fundamental issue to address is the medium by which tie receives delegated authority from CEC to enter into the contracts – you have seen the emails which highlight BBS’s request for urgent clarification on this. Andrew’s advice is that this is enshrined in the Operating Agreement ; we understand that the Council wishes to create the authority by Council minute on 20/12. Either way the wording needs to be developed and agreed on our collective side and communicated to BBS urgently.
2. In a similar vein, BBS are now expressing disquiet about the lack of confirmation from CEC on the performance guarantee terms. Again you have the detail. The Operating agreement will need to reflect the arrangement when the final form is agreed.
3. Does this agreement encompass all of tie’s projects and the possibility of future projects ? If not, we must develop an agreement which does in tandem with the agreement for trams, as the other projects are underway and tie cannot be in a position of acting ultra vires. Do you anticipate that the current agreement will run in parallel with this new one, even though it accommodates EARL ? The logical approach would be to have a single new agreement.
4. Following point 3, the “Tram monitoring Officer” is defined as the person who monitors “the company” – we need to be clear about this : is he /she active on tram matters only or all projects plus other corporate matters ?
5. What delegated authority does the TMO have, or does tie assume he / she has full power to commit the Council ? I now see #3.5, but this is open-ended and gives no steer on what authority the TMO has ; it will therefore not be clear day-to-day what authority tie can act upon. Can there not be a clear statement of the TMO’s delegated authority ?
6. As noted previously, I think the attempt to define a full menu of specific services provided by tie will prove futile and potentially dangerous as it cannot be comprehensive. The operational services required of tie can be summarized in relation to the tram project and the other projects tie is undertaking. Mechanics like reporting and audit together with specific prohibitions on action can be properly defined in addition to the operational services required of tie.
7. #2.1 defined as project, not company ; see 3 above. Ditto 2.4.

8. #2.3 tie cannot “ensure” delivery of a world-class system – this needs a best endeavors qualification. I also don’t like the attribution of a judgemental phrase like “world-class” in a legal document, the reference to the Business case is sufficient to define the quality standard.
9. #2.5, tie cannot “ensure” that the Council complies with the publicity conditions in the Funding Agreement, needs a best endeavors qualification. I acknowledge the relationship with the Funding Agreement where similar requirements exist and we need to make sure these are sensibly aligned.
10. #2.6 – as point 9 in relation to Council compliance with legislation.
11. #2.8 – as point 9 in relation to third party performance ; tie cannot procure a level of efficiency from third party contractors, but it can be required to seek that this is delivered, failing which tie will be required to take action appropriate in the circumstances.
12. #2.11 and #2.12 – you have suggested wording for these two clauses from Tracey Kinloch to codify responsibilities for insurance arrangements, with the addition of a new clause (“2.15” on Tracey’s note) relating to Liability and PI insurance.
13. #2.21 requires all hiring of people with salary > £75k to be approved by the Tram Monitoring Officer. However, the Business Case sets out the resource plan for the project and it is tie’s responsibility to take best endeavors to ensure adequate resourcing under #2.4. The responsibility for recruitment and the relative level of pay and rations should be a tie responsibility not requiring specific approval. The Remuneration Committee formally handles all senior level remuneration, including new recruits.
14. #2.22– similar to 2.21, but this catches all “bonus schemes” which require approval by “the Council” not simply the TMO. This is a very intrusive proposal and effectively means the Remuneration committee has no role in this area. It also raises questions of confidentiality. I understood the concern was to have tie commit to bonus schemes only where the performance measures were aligned with project milestone achievement. I would doubt if anyone would resist that requirement, but individual by individual approval is unlikely to be appropriate.
15. #2.26 – agree the concern and suggest we revert to the previous wording which prohibited tie from knowing breach of contract compliance unless with approval from the TMO.
16. #2.27 – this is also affected by the point at 3 above. For tram matters, all issues outwith tie’s delegated authority will be referred first to the TPB, then it is the TPB’s responsibility to deal with matters requiring TEL or Council approval. The current structure of delegated authority between the tie team, TPB and TEL will be reviewed and if thought appropriate re-approved by the TPB this Friday. We don’t expect the limits to change, based on informal discussions to date. We are awaiting the terms of the authority delegated by the Council to its TIE and Tram committees and then to the TMO to ensure these matters are all properly aligned.
17. #2.28 – this new clause asks tie to warrant that it has complied at all times with the present Operating Agreement and (with or without a materiality qualification) will necessitate a wholesale review of its terms and of the actions taken by the Board since the agreement was enacted. This cannot be a good use of resource and it is not clear to me what the Council is trying to achieve here. The lack of this clause would not prevent the rest of the agreement standing on its own feet, so I suggest it is deleted. I appreciate that it may help confirm in the mind of BBS that everything to

date has been done with proper process, but we should be able to argue that this is so, in the absence of any contrary evidence.

18. #2.29 – See also 9 above. I do not believe it is in the interests of tie and the Council to have every announcement / item of publicity (undefined) approved in writing by the TMO before issue. Needs some qualification, aligned with TS deal.
19. #2.30 – what is the scope and frequency of the proposed “review by a peer review panel” ? The tie directors will need to know what they are agreeing to comply with.
20. #3.1 – you have removed my suggestion that the Council must act reasonably in assessing the validity of tie’s expenditure before providing funding. This will cause difficulty because the directors must have a reasonable basis for assuming they have the funding to cover expenditure commitments they undertake. A lack of any codification of the Council’s approach to approval leaves this more exposed than it should be. Please reconsider the inclusion of the reasonableness requirement.
21. #3.2 – can you suggest wording to cover appointment to (and removal from ?) the tie Board.
22. #3.3 the “liaison officer” appears not to be the same as the TMO, so can the relationship be addressed, including delegated authority if any, so that people know what the role of the liaison officer is.
23. #5.1 – I doubt if the directors will be prepared to enter into an open-ended indemnity to the Council. Moreover, it has no balance sheet. The real value of the indemnity is therefore zero and I’d suggest the clause is removed. In addition, you have wording from us which requires that the Council agrees not to claim against any individual director, officer, employee or self-employed contractor, which we believe is a necessary protection.
24. #8.2 – the one-way assignment ability in favour of the Council underlines the need for tie to ensure that it is under no potentially onerous conditions. Can assignment not require mutual agreement ; tie is a wholly-owned subsidiary so the Council can empty the tie Board whenever it wishes, if an assignment were resisted by the tie Board.
25. #11.1 states that the agreement is between two independent parties, please see comments in final para below about competition law.

There is an underlying point to all of this. The more we try to draft the agreement as if it were between two third parties, the more difficulty there is in agreeing the language. More importantly, we have had legal advice against the development of a comprehensive agreement of a third party nature because it mitigates against the concept of a “single economic entity” in the context of a competition law and the proposed integrated operations. We must bear this in mind when addressing the wording. A more informal approach will enable us to reach agreement quickly and help to reduce the risk under competition law. Andrew will advise us on this, my interest is in reflecting the reality of the parent / subsidiary relationship to enable us to finalise these matters quickly.

I hope this is a comprehensive view of all the issues. Please let me know if you can attend the proposed meeting at 8.30am on Wednesday morning.

Regards
Graeme

Graeme Bissett

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From: Nick Smith [mailto:Nick.Smith@edinburgh.gov.uk]
Sent: 28 November 2007 16:43
To: Graeme Bissett
Cc: Colin MacKenzie; Duncan Fraser; Rebecca Andrew
Subject: Operating Agreement
Importance: High

Graeme

As promised, I attach a further version of the Operating Agreement. This is revision marked from your proposed changes for your ease of reference. As mentioned previously, it only represents my changes and these have yet to be formally approved by the relevant directors, so please accept the draft with that caveat.

Most of the comments/changes are self explanatory but specific comments:

- The issue of the schedule versus overarching obligation is being considered.
- The issue of the indemnity is presently being discussed. We note Andrew's concerns.
- 2.21 - The intention is indeed to deal with employees or contractors rather than catch all delivery contractors, but I can't really see a way round this. Any useful suggestions gratefully received (except removal!).
- 2.12 - I understand the suggestion that the insurance should have a "market aligned indemnity". The question is whether the cover CEC require/expect is "market aligned" or not, given that this is a highly bespoke project. This will need to be discussed.
- We have added a publicity obligation to deal with such matters following discussions with TS.
- Re preamble 7, given this is simply to deal with tram, I'm not sure the addition of "general regulation" is required.
- 2.26 - the issue here is that CEC wishes tie to comply with all contractual arrangements, but not where tie and CEC consider that it would be prudent to put tie in breach deliberately (unlikely I know, but still needs considered). Hence the consent wording.
- 3.1 - The Council's discretion should not be fettered by reasonableness here.
- The agency issue needs clarified. In a normal agency situation, x negotiates for principal Y to enter into a contract with Z. In the present situation, tie is acting as principal contracting entity, albeit with a PCG from CEC. Accordingly, I am not convinced that 11.1 is not correct as stated.

I will try to get further instructions to enable use to finalise matters asap. Otherwise, I hope this draft addresses some of your concerns.

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Kind regards

Nick

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