
From: Nick Smith
Sent: 10 January 2008 11:06
To: Gill Lindsay
Cc: Colin MacKenzie
Subject: tie Agreement
Attachments: Operating Agreement v23 100108.doc

Gill

I have now reviewed all the latest comments/proposals on the tie Operating Agreement. I now attached the latest revised version reflecting the various proposals.

I also comment on the outstanding issues as follows:

- TS have now queried the reduction in obligations to “best endeavours” from absolute obligation in relation to certain of tie's obligations under the Agreement. TS are of the view that where the Council is under an obligation then this should in turn be passed direct to tie. Rebecca is going to speak to TS to get a view on where they have specific concerns. The Agreement should then reflect an absolute obligation for those parts. I understand from Graeme's email to Rebecca that tie are now resisting this and asking the Council to negotiate another letter with TS. I am not sure this is appropriate.
- tie wish CEC to mirror the commitment in 2.20 to comply with the governance diagram. The governance diagram has CEC at the top of it – ie the governance arrangements seek to ensure compliance by CEC's wholly owned subsidiaries, not by CEC itself. In my view this is therefore not required as we are not dealing with entities of equal stature here.
- 2.12 - 2.15 – Donald and Andrew have previously been asked to confirm that the insurance clauses are satisfactory from the Council's perspective.
- 2.24 – I appreciate tie's concerns about this, but this was a Council direction and tie will simply have to deal with claims settlement via the governance arrangements.
- 2.25 – the issue re bonus approval still appears not to be settled. All CEC want is some oversight of the bonus arrangements and benchmarks. tie are highly resistant to this. Given they are a wholly owned subsidiary spending public money, I can see no justification for refusing the minimal oversight which has been requested. CEC has a significant interest here. The argument that it is too intrusive simply makes no sense and transparency is paramount vis a vis best value in my view.
- 3.1 – tie simply need to confirm that this drafting is acceptable in terms of alignment with the Council report.
- 3.5 – appointment of TMO. Council appointed DCD or nominee as TMO in December report. This is all that can be reflected in the Agreement.
- 3.9 – waiver of claims against individuals. Margaret Rae has confirmed that members are covered by a CEC policy if they sit on the tie board. However, we have previously been advised that tie is unable to obtain insurance for its own employees etc against claims from a parent. Therefore the waiver has been suggested. If CEC does accept this, it will require to ensure that claims against independent contractors are not waived too, where they are for example also in the role of directors or officers. Such contractors require their own insurance and evidence of insurance should be provided by tie and/or these individuals. Can you please confirm that you are happy for CEC to waive its rights in this regard.
- 11.1 – issue of agency. I have adjusted the wording to accommodate the VAT issue whilst still preventing general agency rights being granted.
- 3.2 – Cllr Wheeler concern - I'm not sure it is necessary or appropriate to list what exactly CEC is guaranteeing. It is likely sufficient to say that CEC will guarantee certain aspects on terms acceptable to CEC. That is de facto what happens anyway.

- 3.3 – Cllr Wheeler concern - I'm not sure what finance could provide re being more specific about payment. The present drafting gives the ability to be fluid and tie have accepted the clause as drafted.
- I have added some wording to 3.8 re other projects.


Can you please provide any further views or concerns re the above. I would then recommend that our views are sent to Andrew and Donald for their further deliberation/decision.

Finally, with regard to the TEL agreement, tie have not commented at all on Jenny's draft which Colin sent to tie many weeks ago. You will recall that this was the draft which had previously been part-negotiated. What Graeme has now produced instead is a mirror of the tie agreement with the names changed. However, although I am not fully aware of TEL's remit, it appears to me that simply reproducing the tie agreement will not be all that is required. TEL will have an active role in operational matters beyond the building phase so this needs reflected. What I will need to do is pull together the two agreements so that all the points are covered. It will then need to be reviewed by the clients to ensure it does everything required.

Kind regards

Nick

Nick Smith
Senior Solicitor
Legal Services Division
City of Edinburgh Council
City Chambers
High Street
Edinburgh EH1 1YJ

(t) 
(f) 0131 529 3624