
From: Colin MacKenzie
Sent: 18 March 2008 08:28
To: Duncan Fraser; Rebecca Andrew; Alan Coyle; Steve Sladdin; Andy Conway
Cc: Nick Smith
Subject: FW: Edinburgh Tram

Duncan and Colleagues,

Please see attached correspondence shedding light on the reasons behind the absence of approval to **tie** for Contract Award Notice on Friday.

Not aware of any update following yesterday's meetings between **tie** and BBS.

Kind regards,

Colin MacKenzie
for Council Solicitor

From: Gill Lindsay
Sent: 17 March 2008 14:10
To: Colin MacKenzie
Subject: FW: Edinburgh Tram

Colin

For awareness and appropriate circulation pl.

From: Willie Gallagher [mailto:Willie.Gallagher@tie.ltd.uk]
Sent: 16 March 2008 21:19
To: Gill Lindsay; Andrew Holmes; Renilson, Neil; david_mackay [REDACTED]
Subject: FW: Edinburgh Tram

Let's hope so!!!

Willie

From: LAING Ian [mailto:Ian.Laing@pinsentmasons.com]
Sent: 16 March 2008 20:41
To: Andrew.Fitchie@dlapiper.com; richard.walker@bilfinger.co.uk; mgallagher@biggartbaillie.co.uk; flynn.michael@siemens.com; herbert.fettig@siemens.com
Cc: Willie Gallagher; Graeme Bissett; Steven Bell; Geoff Gilbert; MOIR Suzanne; Jim McEwan; Stewart McGarrity; Matthew Crosse
Subject: Re: Edinburgh Tram

Andrew

I am sure we are all worried. Let's hope tomorrow brings some good news and we don't have to debate what has been said over recent months.

Regards

Ian.

Ian Laing

Partner
Pinsent Masons LLP

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Mobile +4 [REDACTED]
Internal Ext - [REDACTED]

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----- Original Message -----

From: Fitchie, Andrew <Andrew.Fitchie@dlapiper.com>
To: LAING Ian; richard.walker@bilfinger.co.uk <richard.walker@bilfinger.co.uk>; mgallagher@biggartbaillie.co.uk <mgallagher@biggartbaillie.co.uk>; flynn.michael@siemens.com <flynn.michael@siemens.com>; herbert.fettig@siemens.com <herbert.fettig@siemens.com>
Cc: willie.gallagher@tie.ltd.uk <willie.gallagher@tie.ltd.uk>; graeme.bissett@tie.ltd.uk <graeme.bissett@tie.ltd.uk>; steven.bell@tie.ltd.uk <steven.bell@tie.ltd.uk>; geoff.gilbert@tie.ltd.uk <geoff.gilbert@tie.ltd.uk>; MOIR Suzanne; Jim.McEwan@tie.ltd.uk <Jim.McEwan@tie.ltd.uk>; Stewart.McGarrity@tie.ltd.uk <Stewart.McGarrity@tie.ltd.uk>; Matthew.Crosse@tie.ltd.uk <Matthew.Crosse@tie.ltd.uk>
Sent: Sun Mar 16 14:31:35 2008
Subject: RE: Edinburgh Tram

Ian

I am very worried by this. This does not accord what was said on Friday to tie. None of the five on our end of the call has any recollection of there being a discussion about "restatement of position" at all.

I asked you and Richard directly when you had first known about this new Consortium position that it would not give any contractual indemnity at all in relation to third party liability. The clear answer that we heard was that you had first known about this "about two hours before making the call" and you did not take issue with me saying that this was entirely new.

kind regards

From: LAING Ian [<mailto:Ian.Laing@pinsentmasons.com>]
Sent: 16 March 2008 11:58
To: Fitchie, Andrew; richard.walker@bilfinger.co.uk; mgallagher@biggartbaillie.co.uk; flynn.michael@siemens.com; herbert.fettig@siemens.com
Cc: willie.gallagher@tie.ltd.uk; graeme.bissett@tie.ltd.uk; steven.bell@tie.ltd.uk; geoff.gilbert@tie.ltd.uk; MOIR Suzanne; Jim.McEwan@tie.ltd.uk; Stewart.McGarrity@tie.ltd.uk; Matthew.Crosse@tie.ltd.uk
Subject: Re: Edinburgh Tram

Andrew

Thanks. As we mentioned on Friday, BBS has always aligned the issue of Clause 77 with the quality of the OCIP insurances to be taken out by tie. BBS don't therefore see this as a withdrawal rather a restatement of where we are.

Regards

Ian.

Ian Laing
Partner
Pinsent Masons LLP

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Mobile + [REDACTED]
Internal Ext - [REDACTED]

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To: LAING Ian; richard.walker@bilfinger.co.uk <richard.walker@bilfinger.co.uk>; mgallagher@biggartbaillie.co.uk <mgallagher@biggartbaillie.co.uk>; flynn.michael@siemens.com <flynn.michael@siemens.com>; herbert.fettig@siemens.com <herbert.fettig@siemens.com>

Cc: willie.gallagher@tie.ltd.uk <willie.gallagher@tie.ltd.uk>; graeme.bissett@tie.ltd.uk <graeme.bissett@tie.ltd.uk>; steven.bell@tie.ltd.uk <steven.bell@tie.ltd.uk>; geoff.gilbert@tie.ltd.uk <geoff.gilbert@tie.ltd.uk>; MOIR Suzanne; Jim McEwan <Jim.McEwan@tie.ltd.uk>; Stewart McGarrity <Stewart.McGarrity@tie.ltd.uk>; Matthew Crosse <Matthew.Crosse@tie.ltd.uk>

Sent: Sun Mar 16 11:10:27 2008

Subject: RE: Edinburgh Tram

Ian

Where the confusion arose was the discrepancy between what you and Richard had explained unequivocally on Friday evening about BBS's new position, which you restate below, and the further e-mails from BBS on Saturday. Thank you for the confirmation that BBS is working on this.

tie is keeping CEC abreast of developments, as it must - hence my desire, in advising tie and CEC, to have the clearest possible understanding of what is being said by BBS to tie at this point.

On that, am I correct in also understanding that BBS's current position is also a withdrawal of the indemnification for tie and CEC in respect of claims from breach of the Third Party Agreements and undertakings and of DPOFA (the Operator is treated at the moment as a third party) caused by BBS negligence and breach of contract? If I am wrong about this, please could this be confirmed.

Regarding timing, my instructions are that Monday is critical. There is no suggestion that matters regarding BBS's window of opportunity to review their consortium position have changed from what Willie said on Friday evening: BBS's position requires to be clearly explained on Monday to tie when BBS is ready to do so after your morning meetings, within tie's overall time frame already emphatically stated: the Contract suite needs to be placed and signed before the end of March this year to preserve access to ETN's Transport Scotland funding.

Hope this assists.

kind regards

From: LAING Ian [<mailto:Ian.Laing@pinsentmasons.com>]

Sent: 15 March 2008 20:42

To: Fitchie, Andrew; richard.walker@bilfinger.co.uk; mgallagher@biggartbaillie.co.uk; flynn.michael@siemens.com; herbert.fettig@siemens.com

Cc: willie.gallagher@tie.ltd.uk; graeme.bissett@tie.ltd.uk; steven.bell@tie.ltd.uk; geoff.gilbert@tie.ltd.uk; MOIR Suzanne

Subject: Re: Edinburgh Tram

Andrew

As you know, this is a legally complex area and confusion arises easily.

As matters stand, the BBS position is that BBS will not accept liability for uninsured third party losses. This exclusion from liability applies both to the Clause 77 indemnity and to losses arising from breach of contract. As uninsured third party losses could arise from negligence this position holds true in relation to negligence claims (although an analysis of the policy may provide comfort on this point and this exercise is, I understand, ongoing).

I appreciate the need for clarity at this point in time but you will also appreciate that BBS is working hard to understand whether they are able to move on this. That work is also ongoing and the position set out above must be seen in that context.

I note your view that this is a consortium issue. You will recall that I was clear in our discussion on Friday evening that the BB and Siemens position on this was and is consistent.

Whilst the timing of any report to CEC is of course a matter for you and tie, I had understood that BBS would be given time to undertake appropriate investigations. If BBS is able to soften its position it would be a great shame if CEC had been told something else. As you have seen Herbert's e-mail, you are aware that internal meetings on Monday are critical to the expression of BBS's final position on this and I hope that tie remain able to give us the necessary time.

Regards

Ian.

Ian Laing
Partner
Pinsent Masons LLP

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From: Fitchie, Andrew <Andrew.Fitchie@dlapiper.com>
To: LAING Ian; richard.walker@bilfinger.co.uk <richard.walker@bilfinger.co.uk>; mgallagher@biggartbaillie.co.uk <mgallagher@biggartbaillie.co.uk>; flynn.michael@siemens.com <flynn.michael@siemens.com>
Cc: willie.gallagher@tie.ltd.uk <willie.gallagher@tie.ltd.uk>; graeme.bissett@tie.ltd.uk <graeme.bissett@tie.ltd.uk>; steven.bell@tie.ltd.uk <steven.bell@tie.ltd.uk>; geoff.gilbert@tie.ltd.uk <geoff.gilbert@tie.ltd.uk>
Sent: Sat Mar 15 15:55:23 2008
Subject: Re: Edinburgh Tram

Ian
Martin

Following Richard's email to Willie earlier this afternoon, we are confused.

Richard's points focus on the exposure to consequential loss for BBS arising from simply executing the works in compliant fashion, and the fact that no counter indemnity from tie is sought by BBS. This was the subject of the earlier lengthy con call yesterday pm., but before your call telling Willie that no third party liability would be accepted by BBS at all, under any circumstances - this is consistent with Herbert's e mail this morning which I have also seen. So that I conclude that BB and S at this stage in the procurement have different requirements.

Put simply, my personal view is that this is a Consortium issue and should have been dealt with in the consortium agreement.

Please would you express today as soon as you are able on clear instructions, exactly what the Consortium's position is.

We are now investing time and effort (as no doubt BBS are) to analyse the issue so that an urgent report can be provided to tie and CEC first thing on Monday. This risks being less than fully informative because we have no clear statement, from both the BBS members.

Your assistance on this is very important indeed for all the obvious reasons which we discussed on the call last night.

Thanks for any action you are able to take today.

Kind regards

Andrew Fitchie
Partner
DLA Piper Scotland LLP
T: +44 (0) [REDACTED]
M: +44 (0) [REDACTED]
F: +44 (0) [REDACTED]

----- Original Message -----

From: LAING Ian <Ian.Laing@pinsentmasons.com>
To: Fitchie, Andrew; mgallagher@biggartbaillie.co.uk <mgallagher@biggartbaillie.co.uk>

Cc: willie.gallagher@tie.ltd.uk <willie.gallagher@tie.ltd.uk>; geoff.gilbert@tie.ltd.uk <geoff.gilbert@tie.ltd.uk>
Sent: Sat Mar 15 15:15:06 2008
Subject: Re: Edinburgh Tram

Thanks Andrew.

Regards

Ian.

Ian Laing
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From: Fitchie, Andrew <Andrew.Fitchie@dlapiper.com>
To: LAING Ian; mgallagher@biggartbailloe.co.uk <mgallagher@biggartbailloe.co.uk>
Cc: willie.gallagher@tie.ltd.uk <willie.gallagher@tie.ltd.uk>; geoff.gilbert@tie.ltd.uk <geoff.gilbert@tie.ltd.uk>
Sent: Sat Mar 15 15:12:07 2008
Subject: Fw: Edinburgh Tram

Ian

I have been instructed to forward a copy of this to you, following yesterday evening's call in which the BBS Consortium's entirely new position on this matter was explained by Richard Walker and yourself.

Thank you for making the call.

Martin- copy for your information
Kind regards
Andrew Fitchie
Partner
DLA Piper Scotland LLP
T: +44 (0) [REDACTED]
M: +44 (0) [REDACTED]
F: +44 (0) [REDACTED]

----- Original Message -----

From: Willie Gallagher <Willie.Gallagher@tie.ltd.uk>
To: Graeme Bissett (external contact) <graeme.bissett@[REDACTED]> Stewart McGarrity <Stewart.McGarrity@tie.ltd.uk>; Fitchie, Andrew; Geoff Gilbert <Geoff.Gilbert@tie.ltd.uk>; Matthew Crosse <Matthew.Crosse@tie.ltd.uk>
Sent: Sat Mar 15 12:10:56 2008
Subject: FW: Edinburgh Tram

Andrew,

Can you please copy this to Ian Lang, I do not have his contact details.

Willie

From: Willie Gallagher
Sent: 15 March 2008 12:10
To: Richard.Walker@bilfinger.co.uk; flynn.michael@siemens.com
Cc: 'Fitchie, Andrew'; Steven Bell
Subject: Edinburgh Tram

Richard,

We are deeply disappointed over the breakdown of our negotiations last night. Like you, we thought the deal was agreed on Price, Scope & Contracts.

We now have this one remaining difficult issue to resolve – our requirement for indemnification by BBS on third party claims. Your proposal for no indemnification, regardless of breach of contract, negligence etc. is unacceptable to CEC. For the avoidance of doubt, I have had this confirmed by the CEC Solicitor last night after we spoke. We have nowhere to go on this point, the Public Sector cannot give an uncapped warranty on the issue in question.

We are now working to an extremely tight timetable. To enable us to draw down the £20m funding from Transport Scotland, we need to conclude contracts by 31st March – this is a Monday. If we can place the PIN on Monday evening, this would enable us to hit the 28th March. Realistically, this is therefore the drop-dead date for processing.

Over the weekend, we are reviewing all our Insurance Details which have already been passed to BBS as part of our negotiations.

We plan to meet again on Monday at 10am. I am happy for this to be in Edinburgh or Germany if necessary. If we can conclude an agreement by lunch-time on Monday, I will have the necessary arrangements in place to enable me to sign-off and place the PIN.

Please give me a call at anytime. If you wish to meet tomorrow, Sunday, that will be fine.

Regards,

Willie

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