
From: Colin MacKenzie
Sent: 18 January 2008 17:41
To: Gill Lindsay
Cc: Alan Squair; Nick Smith
Subject: EDINBURGH TRAM: LETTER FROM DLA

Importance: High

Gill,

As indicated in my message yesterday I would write to you about risks in the context of the relationship with DLA. We also had a telephone discussion, during which you expressed your preference for a letter from DLA without any caveats.

I have gone back through the file to consider the correspondence with Andrew Fitchie in the run-up to the Council meeting on 20 December 2007. Early in that dialogue I queried whether the appointment of DLA had been put in place. I also wrote to you on 7 December. Can you please confirm the nature of the appointment of DLA: is there either a Duty of Care or full agency in place ? Clearly that is part of our internal due diligence. It would be helpful to have a copy of the formal arrangements for the file.

As you will be aware Sharon Fitzgerald had asked precisely what it was you wanted to go in the DLA letter. Ultimately we received a letter dated 16 December from Sharon /Andrew, with advice from the latter that said letter be not appended to the Council report.

Following my lengthy meeting on Wednesday with DLA, BBS and their agents I do have concerns about the contractual framework (which is quite unusual) and the risk potential for the Council. I shall summarise the position as follows:

1. CEC is the authorised undertaker of the Tram; some of these powers are shared with **tie**
2. Transport Scotland is providing the lion's share of the funding for the Project
3. CEC will be contractually bound to Transport Scotland in respect of all grant obligations
4. **tie** is the contracting authority for MUDFA, Tramco and Infracore
5. CEC is to provide a full financial Guarantee in respect of **tie's** contractual obligations to BBS
6. Parent company Guarantees will be provided in respect of Bilfinger Berger and Siemens, respectively, in favour of **tie**
7. The Operating Agreement between the Council and **tie** is much weakened, as far as the Council is concerned.
8. All of the commercial discussions have been driven (quite properly) by **tie**, but with no Council input, notwithstanding the Council's position as secondary funder and Guarantor.
9. There are no contract delivery dates in the SDS contract, whereas there is a defined programme anticipated for the BBS contract.
10. BBS have indicated that any attempt by the Council to make them liable for a loss of grant precipitated by BBS would be resisted. In fact BBS said the imposition of such a condition would be a "deal breaker."

Against that background there are a significant number of risks which have to be resolved or minimised before the Chief Executive is in a position to authorise **tie** to issue the Contract Award Notice, and not less than ten days thereafter, close the contract with BBS. Whilst progress is undoubtedly being made towards satisfying the Chief Executive, it is clear that not all risks will be closed out, and a risk analysis will be required before authority is granted. Officers still view the situation with nervousness and point to Network Rail issues and the novation of SDS contract to BBS as among the most significant risks to the Council. As you will recall from this week's meeting of the

LAC, Andrew Fitchie was unable to dispute that there could even be collusion between SDS and BBS to the detriment of the Council.

Against that background I have considered DLA's letter of 16 December 2007, and your desire to see an updated letter of comfort with no caveats. I suspect that DLA will not be in a position to provide an updated version of their earlier letter without caveats. From the various updates received today, there are a number of issues in said letter which are not presently resolved, and indeed which may not be resolved in a week's time. Before I go back to DLA to ask for comfort I would be obliged if you could set out precisely what you want them to say in their final letter before the Chief Executive deliberates on whether and when to exercise his delegated authority. Would you wish to add to your list a question to DLA about point 10 above and the implications for the Council ?

The timing of any letter from DLA is a relevant consideration: presumably DLA would only wish to provide a letter for you shortly before you make your joint report to the Chief Executive, in order to capture the most up to date position re overall risk. Any earlier statement would of lesser benefit to the Council.

Regards,

Colin MacKenzie
for Council Solicitor