
From: Colin MacKenzie
Sent: 24 August 2007 15:56
To: Gill Lindsay
Cc: Alan Squair; Nick Smith
Subject: RE: Recommendation to the Council to accept FBC and the Infraco Contract

Importance: High

Gill,

Further information, as requested, has been received this afternoon from Andrew Fitchie re DLA's original appointment.

Since the receipt of DLA's draft letter of appointment there has been a significant change of direction in terms of an instruction from the client to instruct a fully independent legal review. As indicated to you yesterday in my e-mail, this is a course of action supported by the Team. There is a clear distinction between the two options, namely becoming a joint client with **tie** and seeking an independent review on behalf of the Council. Without requiring to analyse them in detail, I believe these options may be mutually exclusive.

In your memo to me of 17 August you may have misunderstood several matters which I set out in my e-mail of 15 August. I will be writing to you in response to said memo in due course, but it is necessary to deal with certain relevant matters at this stage. My e-mail was written in advance of the receipt of Andrew Fitchie's draft letter. Having now considered Andrew's letter, and with the benefit of a client instruction that we seek an independent legal review, I and the team remain of the view that the Council's best interests may not be served by instructing DLA along with **tie**.

I did not, and do not, advocate the "do nothing approach"; it is merely one option for the Council. I am firmly in favour of an independent legal review, perhaps more so this week than when I wrote to you on 15 August. I did express my concern at the meeting with Directors and Graeme Bissett, indicating that following my meeting with Andrew Fitchie on 5 July I would be surprised if DLA were to meet Graeme's expectation that DLA would have no problem with acting directly for CEC. Andrew Fitchie on 5 July was emphatically clear that he acted only for **tie** and could not advise the Council on the Scottish Power and Telewest contracts. [There was no reference then to the Council as "ultimate client"].

When we met on 20 August you expressed the view that Andrew Fitchie's draft required some amendments. I agree that it is not in the form which could be said to best meet the Council's interests. However, I feel duty bound to raise with you my concerns about the suggested relationship of " joint client". These concerns are shared by the team. I bring these concerns to your attention, not in any sense to contradict your suggestion to the meeting on 7 August and communicated to Graeme Bissett on 10 August, but to genuinely assist the debate before an irrevocable step is taken in instructing DLA along with **tie**.

Comments on Andrew Fitchie's draft are as follows.

DLA's revised letter is based almost entirely on a letter which had previously been provided to **tie** and was intended to be passed to the Council in 2005. Broadly speaking, the new letter simply makes it clear that DLA will now regard CEC as a joint client (as opposed to the previous offer of a simple extended duty of care). However, this is caveated on the basis that DLA are (and have always been) instructed by **tie** and that such instructions are assumed (and have been assumed) to take into account all of CEC's requirements, objectives and best interests.

It is not clear to what extent the Council has been consulted over the past four years in relation to the complex deal structure and negotiations. Accordingly, I consider it unlikely that it will be possible for the Council to categorically accept that such instructions have always taken the Council's requirements, objectives and best interests into account. This leaves the Council with the position that unless it is prepared to so accept and approve **tie**'s actions to date, the new DLA letter places the Council in no real better position. The critical issue is that DLA are unlikely to be able to advise CEC what the outcome of the negotiations would have been had DLA received their instructions direct from CEC for the past four years.

I therefore conclude that unless such a decision can be taken to effectively trust and approve **tie**'s actions for the past few years as always being in the Council's best interests, creating a joint client relationship will put the Council in no substantive better position than simply having a duty of care in CEC's favour. Indeed, having considered the issues further, it could be said that accepting the joint client instruction (particularly re paras 1 and 2 of the letter) could be seen as a tacit acceptance by the Council of **tie**'s actions to date as being in the Council's best interests.

Finally, whilst it is correct for Andrew Fitchie to state that there has to be a commonality of interest on the project, he goes on to note that there will be and will have been detailed discussions to achieve such commonality. The Team is certainly not aware of any such discussions ever having taken place and, if that is the case, there is the question of whether such commonality has actually indeed ever been reached.

One must therefore ask whether it is appropriate at the eleventh hour for the Council to take a share in the client role with **tie** on the procurement of contracts where the Council is not a contracting party, and indeed may only be called upon to give a financial guarantee. As previously indicated the OJEU Notices for all major contracts was in the name of **tie** as contracting party; all subsequent tendering, selection etc has been by **tie**. I believe that the Council has not even been represented on the Evaluation Panel.

In my e-mail of 15 August I sought your guidance on the way forward. Nothing new has been added to the debate, having considered the contract documentation between **tie** and DLA. The clear choice now appears to lie between an independent legal review as instructed by the client, on the one hand, and a joint client relationship with **tie** and DLA on the other. My recommendation is for the former. If it is still your preferred course of action to instruct DLA could you please explain the basis upon which you consider the above concerns to be unfounded as it will be necessary to report the position to the client. In such circumstances we would also appreciate your comments on the amended wording for the DLA letter.

Regards,

Colin MacKenzie
for Council Solicitor

From: Gill Lindsay
Sent: 23 August 2007 23:53
To: Colin MacKenzie
Subject: RE: Recommendation to the Council to accept FBC and the Infraco Contract

Colin

We can discuss next week. Meantime pl action to completion as agreed DLA letter. Target was to complete this week.

Gill

From: Colin MacKenzie
Sent: 23 August 2007 12:57
To: Gill Lindsay
Cc: Alan Squair; Nick Smith
Subject: FW: Recommendation to the Council to accept FBC and the Infraco Contract

Gill,

Please see message from Duncan Fraser set out below. This follows a meeting which Duncan convened this morning, such is his concern about the timescales set for the approval of the Preferred Bidder.

The possibility of an independent Legal review was discussed at the Property and Legal Issues Group meeting on 21 August. An informal instruction was given to Legal by Finance and City Development requesting that such a review was urgently initiated. We discussed this yesterday at our daily Tram meeting. I provided you with a copy of the Finance Briefing to Councillor Mackenzie. The first critical date in that report involving the Council is the meeting on 25 October when the FBC v1 and TPB's Preferred Bidder selection will be approved. You advised that an independent Legal review was premature and you wished to wait for the submission of the risk matrix by DLA.

Duncan Fraser called to ascertain the position and I advised him of the outcome of our discussion. He is clearly very concerned that the contractual risks should be reviewed externally on behalf of the Council, and has his Director's support in that regard. We have discussed this within the Team and are fully supportive of this stance in the best interests of the Council. Increasingly we feel that DLA may not be in a position to give the assurances/comfort required by the Council. I will be writing to you separately on this matter.

Colin MacKenzie
for Council Solicitor

From: Duncan Fraser
Sent: 23 August 2007 11:25
To: Andrew Holmes
Cc: Donald McGougan; Rebecca Andrew; Robin Goodwin; Colin MacKenzie
Subject: Recommendation to the Council to accept FBC and the Infraco Contract
Importance: High

"Business Case

Currently tie is preparing the final business case. The out come of the Government decision to make the Council "funder of last resort" significant changes the risk profile of the Council. Consequently it will be incumbent upon the Council working with tie to determine the risks inherent in the bespoke Infraco Contract (including novation of the Tramco and SDS contracts) and assess what headroom is to be recommended for budgeting purposes. The time available to do this is very short, because the FBC requires to be reported to the Full Council on 25 October 2007.

It can be anticipated that there will be scrutiny from members of all parties as the the affordability and liability of entering into this contract. The Council currently does not have this information, as it was not party to the development on the Infraco contract nor negotiations. Guidance is sought as to the procurement of resources necessary to provide a risk assessment and analysis of the Infraco contract for the Council within the set time scales available to the Council"

It is my understanding that the DLA letter of comfort does no comprehensively cover all the Council's interests or liabilities. We are unfamiliar with the bespoke contract and have very limited time to gain the information that will be require assure the Council's interests under these new "risk transferred" circumstances. There is a recognition in my role as co-ordinator that the legal and financial representatives agree that external resources are required as a matter of extreme urgency to enable the risks to be understood and translated into a financial statement that informs the budget setting exercise, on which The Directors of Corporate, Finance and CDD will no doubt be questioned. It is my role to draw this critical issue to your attention so as to facilitate a means to move the agenda forward to a satisfactory conclusion.

Recommendation:-

A team familiar with contract law and related financial risks to this form of contract be appointed to work with CEC and tie to inform the Council as to what risk it is exposed to and how best to cover these risks both legally and financially.

Regards

Duncan Fraser

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