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**From:** Anthony Rush [rush\_aj@ ]  
**Sent:** 12 December 2010 19:59  
**To:** Richard Jeffrey; Mandy Haeburn-Little  
**Cc:** Brandon Nolan; Nigel Robson; Jim Molyneux  
**Subject:** RE: JD meeting with BSC

Richard,

My thoughts for your meeting with JD tomorrow morning:

### **Thoughts on transcript**

Walker's introduction is plainly an attempt to form an alliance with CEC as parties injured by tie. But he has obviously not considered that tie may have been writing the report in terms approved of by CEC. Nor does he refer to the risk allowance (£32m) and risk review included by tie in the Financial Close Report. Appendix 1 to the Close Report describes the risk arising from inter alia development of the design after BDDI including CEC approval. The conclusion of that risk review being:

*"It is the view of tie and CEC Project team that these factors can be relied upon to manage the exposure successfully."*

Although the pre-contract record requires further investigation and maybe the individuals to be interviewed there is no reason not to conclude that there is some support for saying that there had been a substantial amount of work undertaken to minimise the Council's exposure to financial risk. But, the reality has shown that either the risk review was optimistic, or BSC have a lot of responsibility for what has happened. However, it should be noted that Infracore had carried out a due diligence on the design in November 2007 and there would be good reason for tie and CEC not to have assumed the level of change required from BDDI.

It should also be noted that Clause 3.2.1 of Schedule Part 4 asserts (that is by agreement between the parties) that the Pricing Assumptions were *"in order to fix the Contract Price against a developing factual background"*. So it is reasonable to assume that BSC knew what tie were saying.

Walker's assertions about Schedule Part 4 have little relevance, tie have long since accepted that the Contract Price is subject to additional payment for pricing assumptions and notified departures.

Walker is not claiming that there was gentleman's agreement pre-contract. He now asserts that it related to BSC claims immediately after Contract award. There is no evidence of this and indeed he takes some time to go over EOT 1, which was I understand eventually settled at less than what was been claimed by BSC.

Walker also asserts that tie have been unreasonable in refusing lengthy extensions of time to produce Estimates. I don't agree with this. It appears to me that BSC have failed to take reasonable steps to comply with the requirements of Clause 80.4. A Notified Departure is de facto a tie Change and there is nothing in my mind implied or expressed which says that BSC should not issue an Estimate even if tie expresses a belief that there isn't a Notified Departure.

I would expect a responsible contractor to refer a refusal by tie to accept a Notified Departure to dispute resolution and not leave it unresolved. It may be difficult, but Infracore signed up to it knowledge of the state of the design – indeed in December 2008 they gave tie a detailed explanation of the time required to produce approved designs and Estimates.

We will say that it is BSC who haven't managed the change process and this has caused confusion in tie's management.

The recent debacle on Section 5 drainage shows just how confused BSC is. The Leader should refer to this.

Walker refers to three risk areas for them:

1. CEC Approvals;
2. Contaminated Land; and
3. Utilities

A very large proportion of CEC Approvals apply to On-street works which would be removed under Project Carlisle. In our offer on 24 September we offered to pay up to £8 million for contaminated land and of course any risk associated with utility diversions was removed.

They are clearly concerned about being “thrown out” – whatever some may believe there is positivity in the action taken by tie on termination. EK tells me this weekend that they expected us to fail to pay monies due to them so that termination would be by tie default - says something for their own ethical standards. In the same theme Walker puts the interest of BB’s shareholders before performance of the Contract (page 30). It would seem to me that the former is synonymous with the latter

Walker also wrongfully accuses RJ of rejecting mediation and asserts zero trust in tie and that they don’t want to work with tie. Sadly AM reserves CEC’s position on this.

Walker expresses a hope that mediation will finalise Carlisle scope.

**What I would like the Leader to say.**

- If Mr Walker is accurately representing the views of the Infraco members he is forming their views on partial and limited knowledge.
- We have no plans to renovate CAF.
- The Consortium’s performance is not acceptable to CEC who have kept in close touch with what has transpired before and after May 2008.
- There are substantial problems with the timing and content of submissions for approval to CEC requiring queries numbering in the tens. Yet the Consortium persists in not correcting this.
- The design isn’t as a matter of fact complete.
- CEC accept tie’s advice that the requiring the Consortium to complete the On-street works may not be best value for the taxpayer. But if a contract change cannot be agreed requiring the Consortium to perform the contract, at least until a clear material and adverse breach is established, that is what will have to happen.
- Mr Walker’s perambulations about risk show that it should be possible to agree a certain price and programme for the Infraco Works from the Airport to St Andrews Square should be possible and CEC require tie and BSC to use the services of a mediator to attempt to do this.
- Mediation should be conducted on professional lines to achieve a full and final binding settlement.
- If mediation is agreed the management of the project by both parties will change.

Tony

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**From:** Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]  
**Sent:** 10 December 2010 13:09  
**To:** AJRush; Mandy Haeburn-Little  
**Subject:** FW: JD meeting with BSC

For info.

I will discuss with Jenny Monday am

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**From:** Richard Jeffrey  
**Sent:** 10 December 2010 12:49  
**To:** 'Jenny Dawe'  
**Cc:** Tom Aitchison  
**Subject:** RE: JD meeting with BSC

Additional notes,

- Whilst I have up to this point advocated listening only, it is important that being passive is not interpreted by them as accepting their view of the world, indeed I am coming to the view that some assertiveness may be well placed
- If Jenny is not used to dealing with Germans, it may be worth getting a briefing from someone who is. The culture is very direct, and they understand directness in return, they do not always pick up on some of the British understatement. Just to be clear, Keysberg is very charming, and Schnependahl is very quiet, so I do not mean they are rude or aggressive.
- It will greatly strengthen our position if Jenny shows strong solidarity with tie.
- Any arguments about the contract, however valid, do not excuse BSC's behaviour (e.g. design –the 'secret' agreement between BB and SDS; lack of progress or 'holding to ransom' - Keysberg actually said this). BB have said from the beginning 'this contract will never get a tram built', they have made no effort to try to make it work. Here BB and Siemens are different.
- They may talk about trust, integrity and honour. You might ask, as demonstration of their good faith and trustworthiness, that they give you a copy of the secret agreement between BB and SDS, which they have admitted exists, and Siemens are very keen to point out that it was only signed by BB. This would be a very aggressive step and is a point of real difference between BB and Siemens! You might also ask about the ongoing press briefings by Donald Anderson which are now little short of a smear campaign (which Richard Walker claims he is not sanctioning but does not deny, indeed he tells me that he thinks Donald Anderson might now be conducting his own campaign, but Walker is afraid to rein DA in as he 'does not want to make an enemy of him')
- They may talk of pre-contract agreements, we have investigated this and so far found no evidence, do they have any evidence to support this? otherwise it starts to look like defamation.
- They have often tried to personalise issues, in particular they don't like David Mackay, Tony Rush or Steven Bell (or me I suspect), this is unfair and misses the point. It is also true that their team have not always acted consistently, I suspect because they do not have a commonly held view on matters.
- Any suggestion that they have been delayed by tie/CEC (e.g. design approvals, utilities etc) is only half the story, and is seeking to cover up their own deficiencies. They may raise tram stops and Murrayfield underpass, both of which are their current 'cause celebre', but we suspect not as black and white as they claim. You may ask if the design has been delayed at all by lack of co-ordination or information flow within/between the consortium members
- Any suggestion by them that their behaviour is driven by concerns that they will not be paid what they are due is disingenuous, they have a cast iron guarantee from CEC
- Tie has been flexible in agreeing the on-street agreement for Princes Street (on which BSC have badly let us down) and offering to amend the contract to achieve project Carlisle

- Key elements of any 'deal' going forward must be a completed approved design (which they claim they have submitted but the correspondence trail is clear, they have not submitted anything capable of being approved), and price certainty.
- CEC welcomes the move towards mediation, but remains resolute in its support of tie and its administration of the contract

Regards

Richard

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**From:** Jenny Dawe [mailto:Jenny.Dawe@edinburgh.gov.uk]  
**Sent:** 10 December 2010 08:42  
**To:** Richard Jeffrey  
**Subject:** RE:

Thanks Richard, much appreciated.

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**From:** Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]  
**Sent:** 10 December 2010 08:36  
**To:** Jenny Dawe  
**Subject:** FW:

Andy, copy of the briefing note provided by me to Donald/Alastair for their meeting with BSC. Nothing has really changed here. I will also forward the latest correspondence on mediation.

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**From:** Richard Jeffrey  
**Sent:** 02 December 2010 11:39  
**To:** 'Alastair Maclean'; Donald McGougan  
**Cc:** Tom Aitchison  
**Subject:**

Alastair, Donald,

Assuming the planned meeting with BSC goes ahead tomorrow, I thought you might be interested in my thoughts in preparing for the meeting.

We do not know how open BSC will be with a note taker present, but we assume they will adopt the following approach;

- What might be BSC's objectives for the meeting?
  - They are rational, commercial organisations, so their principal objective is to maximise their commercial position.
  - To soften up CEC and convince CEC of the 'weakness' of CEC's position and the strength of BSC's position. Such an approach is to their advantage whatever course the contract takes, whether it is litigation, mediation to find a mutually agreed termination, or carrying on.
  - To present the consortium as united and to seek to create divisions within the different parts of the client
  - To seek to elicit any information on the likelihood and timing of any decision on Termination of the Infraco Contract or any other course of action that tie/CEC are considering including appetite for mediation.
- What tactics might they adopt, what arguments might they deploy?
  - That tie knew full well at the time of contract signature that this was not a fixed price contract
  - They were surprised at the council report that talked of 95% fixed price, they never believed the contract offered that level of price certainty

- That tie have failed to understand or accept the basic principles of the contract, and that DRP findings support this (the most recent one earlier this week on landfill tax has been found in their favour)
  - In particular that tie have not accepted the responsibility for the cost of changes (BDDI-IFC) and management of the process of change (clause 80), again supported by DRP findings
  - That the main causes of delays are all to the clients account, utilities, design changes, delays in agreeing design changes, delays in approving design
  - That their action in ceasing / abandoning works in October is only the consequence of their correct contract interpretation and not an attempt to pressurise tie/CEC
  - That tie have not kept CEC fully informed, either at the time of contract signature or subsequently.
- Given that we agreed that this meeting was for CEC to be in 'listening mode' I do not think it wise to get into any counter arguments, but if you want briefing again on any of them, please let me know.
  - I apologise for stating the obvious here, but regardless of your personal views on the strength of the contract, the way in which it has been administered, or the strength of our position, it is vital that you do not give any hint of accepting their version of events, to do so will simply strengthen their resolve whatever course of action is followed. They will be looking for signs of weakness and dissent. I would ask you not to rise to any of the bait that Walker will throw down.
  - It will be interesting to see their proposal on a way forward. With a note taker there it may be difficult for them to say anything other than they want to complete the tram, at least to a sensible mid-point. I do not believe that this is necessarily their jointly held and settled position. I do not believe the consortium has a settled position, but they may all know what they want for their own companies. Contractually and commercially it would be difficult and unwise for them to say what they really want at this stage in the process.
  - They will seek to impress upon you the need for any mediation to be directly with CEC, rather than tie.

Happy to discuss,

Regards

Richard

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