
From: McLaughlin AC (Ainslie)
Sent: 05 October 2010 18:28
To: Middleton DF (David); Reeve W (Bill)
Cc: PS/Transport Scotland; Fairweather S (Sharon); Adamson L (Lucy); Gordon W (John) (DD); Ramsay J (John)
Subject: RE: Immediate- Trams update

Follow Up Flag: Follow up
Flag Status: Completed

David

It seems to me there are 2 issues being mixed up in the various charges being levied against us and the project. The first is that somehow the money being paid out to the consortium is not justified; and the second is that as we held the purse strings (or most of them) we ought to have been able to sort out the contract by withholding payment.

Just because the contract is not going well, it doesn't follow that the contractor is not entitled to be paid for the work done to date. As you already point out money has been paid for rolling stock and utilities and folk seem fine with that. I guess the problem is that people can see something for that, but as far as the tram line is concerned they still see a building site. But there is a depot emerging at Gogar, a couple of bridges over the railway nearing completion and tracks on Princes Street and at Stenhouse. The fact that those may have cost more than was originally envisaged is to do with flaws in the contract rather than as you say the consortium deciding to go off on their own tack.

If CEC simply refused to pay the consortium's legitimate costs then they would be in default and would be liable for significant damages, which the courts would almost certainly uphold. If TS effectively forced CEC into that position by withholding grant because we didn't like where the contract was going then CEC would still be liable, but SG/TS would arguably be culpable for the subsequent fall out.

Like it or not, once a contract is signed then the parties are legally committed to it. As with the Scottish Parliament the final cost may be much more than the initial tender but the contractor is still entitled to fair payment.

The issue about whether TS should have exerted more influence and control through the grant arrangements is trickier to explain. The decision on the project governance was made some time ago, and well before TS's time. The decision to let CEC manage the contract was not an unreasonable position. It was a local project and CEC are a large authority used to managing big projects. Audit Scotland did not, as far as I know, have any difficulty with the governance arrangements when they were asked to look at the project before the contract was let.

Under the arrangements put in place for this project we have little in the way of levers. That does not mean we have been asleep at the wheel. We are clearly concerned at the contractual disputes and we are in close and regular touch with TIE to ensure that they are fully engaged in trying to resolve matters. While that is process is ongoing we continue to pay out grant where CEC have furnished certified invoices for work properly done under the contract. Stopping legitimate grant payments would simply jeopardise the taxpayers' money even more if it led to CEC either having to borrow to make up the shortfall or worse forced them to default on the contract.

I suppose we get into even murkier waters now that we know the cost is rising beyond the original budget and the scope may be curtailed. The grant conditions ostensibly give the right to stop further payments or even ask for our money back. For the reasons I have already given I don't think the former is sensible and I doubt the latter is practical even if it was enforceable. But once we know what CEC intend to do then we can take a view on continued grant payments. At the moment the payments are as I understand reduced almost to a trickle anyway.

It may well come out in the wash that having the major funding party remote from the decision making and management of the contract is not a sensible way to manage projects like this in the future. However, that doesn't take away from the fact that the responsibility for the current predicament rest with CEC to resolve.

Ainslie

From: Middleton DF (David)
Sent: 05 October 2010 16:08
To: McLaughlin AC (Ainslie); Reeve W (Bill)
Cc: PS/Transport Scotland; Fairweather S (Sharon); Adamson L (Lucy); Gordon W (John) (DD); Ramsay J (John)
Subject: RE: Immediate- Trams update

Ainslie, Bill

Cab Sec raised Trams at today's discussion on capital. This is probably going over ground we have gone over before but he senses the Sunday Herald will keep going at the notion we were 'asleep on the job' and just signed cheques with our hands over our eyes. He would like some further reassurance around what we can defensibly say we did to satisfy ourselves before we paid out money. We've paid money for rolling stock and utilities : fine. He also gets that there is no necessary relationship between % paid and % work done. I think he also understands that we have paid out on the basis of a contractual agreement with CEC/tie. He also sees how he would defend himself in public debate if anyone says he should have 'done something'. But if we, like other sane onlookers, knew that the project itself was not progressing, what is our defence for continuing to pay out money? Is it just a contractual defence and does the contractual position cover all proprieties? Or are those squarely for CEC?

My guess he doesn't want an over complicated answer, he is just seeing himself on Newsnight when things blow up as they might almost any time. It is about getting the line clear intellectually not just the words.

On reflection there may be a distinction between costs rising and the mis-spending of money. As far as I am aware all disputes thus far ('all' may be too strong) are contractual and not that BB went digging into the ground in the wrong way out at Saughton and subsequently sought higher recompense. But I had better not think too much as this is not my territory.

Can you think about this for the meeting on Thursday. It may just be about underlining the role of CEC. But that will beg the question amongst the chattering classes as to what we could or should have done?

I appreciate some of this will await Bob Black and friends in the fullness of time.

David

From: Robertson G (Graham) **On Behalf Of** Cabinet Secretary for Finance and Sustainable Growth
Sent: 30 September 2010 13:17
To: McLaughlin AC (Ainslie); Cabinet Secretary for Finance and Sustainable Growth
Cc: PS/Transport Scotland; Reeve W (Bill); Ogilvie M (Morag); Minister for Transport, Infrastructure and Climate

Change

Subject: RE: Immediate- Trams update

Ainslie,

Mr Swinney has seen and noted with thanks. He would like to meet with TIE/CEC, alongwith Mr Stevenson within the next week or so. We will try and progress such a meeting and will let you know what we are able to arrange.

Thanks

Graham

Graham Robertson

DPS/Cabinet Secretary for Finance and Sustainable Growth

Telephone: [REDACTED]

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From: McLaughlin AC (Ainslie)
Sent: 28 September 2010 16:02
To: Cabinet Secretary for Finance and Sustainable Growth
Cc: PS/Transport Scotland; Reeve W (Bill)
Subject: RE: Immediate- Trams update

Graham

I met Richard Jeffrey on 17 September and spoke to him on the phone last Thursday. I have set out below where things have got to since TIE last met the Cabinet Secretary on 26 August.

Project Carlisle

- Negotiations on Project Carlisle, which would take the tram from the airport to St Andrew's Square, are not going well. The timetable is drifting on and the 2 sides have made little progress in converging on an mutually acceptable deal.
- The initial price submitted by the contractor in mid August would, if accepted, result in a total project cost of £660m. TIE responded towards the end of August with a counter offer that would have completed the tram project to the city centre for around £540m.
- Following this initial exchange both sides entered into detailed face to face negotiations which although initially promising have since stalled. The latest offer on the table from the contractor is to complete the tram only to Haymarket Station for a total project cost of £640m. TIE have rejected this and also consider that the latest terms and conditions offered would **not** result in a guaranteed fixed price.
- Effectively, this is no different from the contractor's opening offer as it would leave TIE to pick up the cost of completing the link from Haymarket to St Andrew's Square. The contractor has since written to TIE expressing their doubts about concluding a deal on Project Carlisle.
- Richard Jeffrey has already tipped off the Council that TIE will not be in a position to report any progress on resolving the present contractual disputes at the next Council meeting on 14 October.

Project Notice

- Project Notice is the code name for terminating the contract on the grounds of breach by the contractor. Failure to reach agreement on Project Carlisle is not, however, grounds for termination. Project Notice is a separate but parallel course of action being taken by TIE in the hope of bringing pressure to bear on the contractor to reach a deal.
- The processes leading towards termination are continuing. TIE has already issued 4 formal notices to the contractor outlining areas where they believe the contractor is in breach. The contractor has 30 working days to respond and TIE have just received the first responses back from the contractor. TIE is proceeding to issue the final batch of 4 notices over the next week or so.
- The effect of this is that TIE could be in a position to terminate the contract from around the end of November. There is no formal timetable stipulating when the termination notice is issued following receipt of the last response from the contractor, but to be credible TIE would have to act within weeks rather than months.
- Richard Jeffrey confirmed that the attitude of the TIE Board is hardening further in favour of terminating the contract. TIE are aware, however, that before terminating they would have to refer back to the funding parties. Nevertheless, Richard believes that without substantial progress soon on Project Carlisle he and his Board are increasingly likely to recommend termination.

Current contract progress

- There is still no work being done on the on-street sections. Work on the off-street section between the airport and Haymarket remains ongoing but still slow and patchy. The tram tracks along Princes Street are showing signs of breaking up. TIE have asked the contractor to come up with remedial proposals and this may well end as a further reason for termination.
- Richard also expressed concern about retention of key staff. The Finance Director left recently and the morale in the team is understandably low. Richard understands that incentive packages to retain key staff would be difficult to justify in the present climate let alone the current state of the contract.

Ainslie

From: Robertson G (Graham) **On Behalf Of** Cabinet Secretary for Finance and Sustainable Growth
Sent: 28 September 2010 12:24
To: McLaughlin AC (Ainslie)
Cc: Cabinet Secretary for Finance and Sustainable Growth; Ramsay J (John); PS/Transport Scotland
Subject: Immediate- Trams update
Importance: High

Ainslie,

Mr Swinney has asked if he could have a note in his box tonight which gives him a "chapter and verse" update on where we are on the Trams project. With apologies for the short deadline that will mean the note has to be with us by **16:30 this afternoon.**

Thanks

Graham

Graham Robertson

DPS/Cabinet Secretary for Finance and Sustainable Growth

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