
From: Anderson, David [David.Anderson@shepwedd.co.uk]
Sent: 10 November 2010 10:07
To: Nick Smith
Cc: Alastair Maclean; Carol Campbell
Subject: Infraco - Meeting

Dear Nick,

I refer to our call yesterday when we discussed the proposed meeting which is due to take place between CEC and representatives of Infraco. I understand from our conversation that Infraco have written to the Council on two occasions seeking to make representations with regard to their position under the Contract and (presumably) deliberately using language which hints at an intention to judicially review any decision by CEC which is contrary to their interests on the basis of unreasonableness. The suggestion seems to be (although I haven't had sight of the letters) that any decision taken by CEC would be susceptible to challenge on the basis of unreasonableness if CEC have not given Infraco an opportunity to speak directly to them.

In passing, although I have not considered the position in any detail from a judicial review perspective, I would question whether there would be any basis for challenging a decision at judicial review simply on the basis that that CEC had failed to meet with Infraco. The reasonableness of any decision will depend on the information and advice available to CEC at the time that decision is taken. If CEC have available to them, for example, the advice of senior counsel confirming that the proposed course of action was reasonable and justifiable on the basis of the information available, then in my view this would afford a great deal of protection against any allegation of unreasonable decision making.

As discussed, although I understand the thinking behind having such a meeting, I am concerned at Infraco's motivation in seeking it, particularly when it is clearly part of a wider strategy both in terms of PR and a potential challenge to any decision ultimately taken by CEC. I thought it would be helpful to set out the concerns that I have with regard to how the meeting might be conducted and then set out my thoughts as to how those concerns might be managed.

A Concerns

1. A key concern is that CEC are not the principal contracting party with Infraco and therefore the question immediately arises as to what the status of the meeting is and what impact it may have on the existing contractual arrangements. In a private sector context I would typically resist a parent company meeting with a party contracting with the parent's subsidiary because it can lead to a blurring of the lines of responsibility.
2. Further I have a concern as to how tactically CEC should manage the meeting. My assumption is that although Infraco may present the meeting as an opportunity to explain themselves they will try to position CEC so that it feels obliged to undertake to do something further, for example commit to further meetings or to express a view on the matters which Infraco are raising. In a meeting it can be difficult to stonewall without appearing rude and leaving yourself open to accusations at a later date that CEC were simply going through the motions and had no intention of approaching the matters Infraco wished to raise with an open mind.
3. Those parties representing Infraco will have a far greater grasp of the detail of the position purely by reason of the fact that they are dealing with the tram Project on a daily basis whereas those representing CEC will inevitably not have that degree of knowledge. Therefore, going into the meeting Infraco will have an advantage if detailed matters of fact are to be discussed.
4. I assume Infraco will have a clear agenda in relation to what they wish to get out of the meeting. We will not know what that is and it may or may not become apparent as the meeting progresses. Therefore, Infraco will be in a better position to manoeuvre the conversation in a particular direction.

B - Recommendations

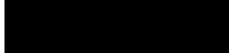
In light of these concerns I think that CEC should approach the meeting very cautiously and should take the following steps:

1. In advance of the meeting CEC should make clear that it is there to listen and does not intend to express a view on the merits of any of the issues raised by Infraco.
2. Infraco should be asked to provide an indication of the matters it wishes to discuss at the meeting to allow CEC to undertake a degree of preparation or indeed to cancel the meeting if it becomes uncomfortable with what is being proposed.
3. In addition CEC should also make clear in advance of the meeting that the contracting party in relation to the Infraco contract is Tie and that nothing said by CEC at the meeting should be taken as in any way binding either CEC or Tie.
4. In the course of the meeting the attendees on behalf of CEC should be very careful not to undertake to do anything to assess claims or to commit to further meetings. We need to avoid the situation where CEC is manoeuvred into the position where it is somehow adjudicating on the competing claims between Tie and Infraco.
5. If CEC is being pressed to confirm that it undertakes to review matters, commit to further meetings etc, the attendees should simply point out that the contractual position is very complicated and that before committing to any particular course of action CEC will need to consider matters and take advice.
6. If possible one of the attendees should be tasked with taking a very careful note of the meeting so that we have a clear record of what was said and by whom. A note of the meeting should be prepared immediately after it has taken place for CEC's internal records.
7. I would recommend that the attendees allocate roles between themselves in advance of the meeting and stick to them in the meeting. I.e. one person is the note taker and will be listening rather than taking an active part in proceedings, one person will take the lead in any discussion and the last person is responsible for stepping in and steering the conversation away from any difficult areas or managing any pressure brought to bear by Infraco for CEC to commit to a particular course of action.
8. It should be made clear that nothing at the meeting should be taken in any way as a suggestion that the discretion of CEC will be fettered in any way.

I hope that this is of some assistance but if there are questions arising from this please do not hesitate to contact me.

Kind regards

David
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For and on behalf of Shepherd and Wedderburn LLP

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