

1. Purpose

The purpose of this note is to report to the City of Edinburgh Council (“CEC”) monitoring officer concerns in relation to tie which yesterday were raised with Alastair Maclean (“ADM”), the Head of Legal and Administrative Services of CEC (and the associated implications) and to propose an initial course of action in the meantime.

2. Issue

- 2.1 Richard Jeffrey (“RJ”), the chief executive of tie yesterday indicated that he had concerns in relation to events at the time the tram contract with Infraco was entered into.
- 2.2 Those events require to be investigated but there is a suspicion that:
- 2.2.1 certain directors/employees of tie were incentivised to negotiate a concluded deal with Infraco at a certain “headline rate”;
 - 2.2.2 in order to achieve that headline rate and receive bonus payments other “softer” provisions were agreed;
 - 2.2.3 those other provisions may have been agreed with or without the collusion of Infraco;
 - 2.2.4 Andrew Fitchie (“AF”), partner of DLA who had been seconded to tie was paid a “thank you” payment or bonus after financial close into his personal bank account without the knowledge of DLA;
 - 2.2.5 the contract was defective in a number of respects which may or may not be as a result of such incentivisation or negligence;
 - 2.2.6 the closing report which was prepared by tie for CEC reporting and reliance purposes (CEC granted a financial guarantee of tie’s obligations to Infraco) was materially incorrect. That “misrepresentation” could be innocent, negligent or fraudulent.
- 2.3 RJ has engaged Anderson Strathern to advise him either in his personal capacity or as director in relation to:
- 2.3.1 his fiduciary duties to tie;
 - 2.3.2 potential obligations to report a fraud to the Serious Fraud Office or its successor (“SFO”) or in relation to proceeds of crime; and
 - 2.3.3 carrying out an investigation into the matter.
- 2.4 RJ may engage an audit firm to assist in the investigation.

- 2.5 Initial indications from AS at this stage are that he has no duty to report this matter to the SFO.
- 2.6 This issue has been disclosed by RJ to ADM and, prior to that, Donald McGougan (“DM”), the Director of Finance of CEC and a couple of others at tie on a confidential basis due to concerns of it leaking into the public domain.
- 2.7 RJ has raised with DLA the issue at 2.2.4 above. It is suspected that DLA will have put their PI insurers on notice and RJ has indicated that there is a feeling of the “shutters coming down” with DLA trying to distance themselves from AF. He also indicated that no-one (the implication being neither tie nor DLA) can make contact with AF.
- 2.8 The information was provided ostensibly due to a need to share a possibly serious problem with a few trusted colleagues but there may also have been a desire to report the matter (albeit informally) to tie’s 100% shareholder’s chief legal officer given the obligation of tie/TEL to act in CEC’s best interests under the operating agreement between tie/TEL and others.
- 2.9 ADM has discussed the latter with DM and has indicated that he provisionally felt that as matters at this stage were only unsubstantiated suspicions RJ should continue his investigations to ascertain in the next couple of weeks if those suspicions appear credible.

3. Concerns

- 3.1 There are a number of immediate concerns.
- 3.2 In no particular order of importance they relate to whether or not:
 - 3.2.1 there is a duty to report a potential fraud or at least not to be complicit in covering it up;
 - 3.2.2 there is an obligation of confidentiality;
 - 3.2.3 there is possible negligence by DLA;
 - 3.2.4 there is a public body has a duty to disclose such concerns;
 - 3.2.5 there is an effect on the ongoing audit investigation;
 - 3.2.6 there is an effect on how tie answers (if at all) freedom of information requests in relation to bonuses of directors, employees and consultants;
 - 3.2.7 CEC was complicit;
 - 3.2.8 the financial guarantee can be reduced;

- 3.2.9 tie should seek to recover payments of the bonuses or raise actions for possible breaches of fiduciary duties/misrepresentation/employment contracts or negligence;
 - 3.2.10 action should be taken to protect tie's property/rights including the removal of DLA and the mandating of all records; and
 - 3.2.11 there is an effect on the present dispute with Infraco.
- 3.3 There may well be others. PR and reputational issues should also be considered.
- 4. Recommended course of action**
- 4.1 Notwithstanding the confidential basis in which the information was provided the first course of action is to bring the matter to the attention of CEC's monitoring officer.
 - 4.2 [Insert next steps].

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