
From: Richard Jeffrey [Richard.Jeffrey@tie.ltd.uk]
Sent: 24 November 2010 19:34
To: Alastair Maclean; Tom Aitchison; Donald McGougan
Subject: this afternoon - STRICTLY PRIVATE AND CONFIDENTIAL

Dear all,

I thought I would capture my thoughts following this afternoon's meeting.

My apologies again to Alastair for the speed and nature of my departure, but I was already late for another meeting and our conversation was becoming unproductive.

So where are we?

1. I think we are all agreed that terminating the contract now is not the preferred way forward.
2. I think we are all agreed that continuing to robustly administer the contract is the best way forward for the foreseeable future, in parallel with/in preparation for some form of mediation
3. I think we are all agreed that a mutually agreed resolution of the contract is preferable to a contested termination of the contract.
4. I think we have agreed that at some point mediation is the best way to achieve a mutually agreed resolution
5. I think we disagree on when is the best time to initiate mediation, on balance I favour sooner rather than later for all sorts of reasons we discussed
6. We have not agreed answers to the issues raised in my letter to Alastair regarding the details of mediation, e.g. what we want out of mediation, etc
7. Alastair is of the view that BSC will think we are currently in a very weak position, primarily because of the drafting of the RTN's
8. We agreed that CEC should meet BSC to listen to their side of the story.
9. We did not discuss, but I need to be careful to keep my team, and board fully bought in to any strategy going forward, we (us 4) must be careful not to disempower and alienate them.
10. Alastair will forward me a copy of your views following the meeting with your QC
11. We need to agree a narrative on the above for the Council

On point 2 Alastair has clearly formed the view that up to now tie have not effectively administered the contract, and that administering it differently going forward will strengthen our position. Whilst I would be the first to admit that we may not have done everything as well as it could have been done, I do not share Alastair's view that a different approach to administering the contract will result in a different outcome. Firstly, I have seen no evidence that we have not effectively administered the contract (and there have been plenty of accusations that I have investigated), and secondly, I am not sure it changes the consequences for BSC of termination for BSC default.

For information we are currently compiling the factual matrix to support two allegations of breach by BSC, one being 'failure to manage the design', the other being 'failure to progress the works' this report should be complete by Christmas and should go some way to providing evidence around this point one way or the other.

However, accepting that Alastair holds this view, I would like to know what I can do to convince Alastair otherwise. It might also help if Alastair could give me specific examples of his concerns, and guidance on what he would need to see to alleviate those concerns. Please bear in mind that this has the potential to become very resource intensive and unproductive, both for my team and CEC's, and to divert resource onto this when such resource could otherwise be utilised on more forward looking activities. I am also concerned that this may create the feeling for my team here that they are having their homework marked, at a time when people are working incredibly hard and under enormous pressure. We discussed at the last remuneration committee of TEL the issue of retention of key staff, and I believe this is a real issue (see below on point 5 my comment on 'strategic endurance').

In the spirit of openness, we are in danger of man-marking here, and I think the real question is, if the council have lost confidence in tie, then exercise your prerogative and remove tie from the equation. I am not defensive about this, indeed I first suggested it in my e-mail to you several weeks ago, and it is a real option for CEC to consider, but please do not keep re-opening it. I expressed my views to you today on the potential implications of such a course of action.

There is an alternative which is for CEC legal to implant someone deep within the tie team, (as finance have done with Alan Coyle). I have suggested this on several occasions before. If this reduces the need for us to retrospectively explain everything we have done it would be a productive way forward, and would give us an extra pair of hands. We would need to ensure the individual was a good fit with the team in the way Alan is.

On point 5, I keep coming back to the fact that time is their friend, if this is a game of 'strategic endurance', they will be able to outlast us because of the media/political scrutiny we are under (see also my point 8 below). We have already initiated contact, not sure how/why we would back away now. I am not convinced our position would be any stronger in the future than it is now. I believe they have a desire to resolve matters now. Everyone's costs escalate as time progresses. The sooner we end this phase of the project, the sooner we can begin the next phase.

On point 6 I do not believe I can respond productively to BSC until we have reached a settled position on the issues raised in my letter.

On point 7, I believe that the validity of the RTNs does need to be checked, and is already being done with Richard Keen QC. His initial feedback on Monday is that he does not share those concerns, but we will get a written opinion on this. Whilst I accept that Alastair's view of BSC's state of mind is a credible possibility, I do not share it, and I believe that if Alastair was aware of all the contractual correspondence, the behaviours and the conversations he may also form a different view. I would be concerned if we were to base our strategy on this. I refer to the last paragraph of my comments on point 2 above as a possible way to resolve this.

On point 8 I would be very strongly of the view that CEC should be listening only, BSC will be very keen to start a dialogue directly with CEC, and we should ask ourselves why that is so. It is my firm view that they feel they will get a better answer leaving tie out of any negotiations. Of course this is your prerogative.

On point 9, Following discussions with my team and Richard Keen QC, it would be my recommendation to the Board (if I were required to make one today) that, in parallel with mediation, and continuing to administer the contract, we take the subject matter of one or more of the RTN's and put these through the internal dispute resolution process under the contract. We would expect the losing side to then appeal any adjudication to the courts outside the contract, a process which take many many months (or years). Of course, the adjudication, whilst non-binding, would significantly strengthen (or weaken) our negotiating position in any mediation depending on whether we win or lose, so it raises the stakes for both parties. I have not yet reached a settled position on this.

I do need to ensure that my board is informed of any issues which we may wish to elaborate on in any council paper, we cannot have something in a council paper that has not been seen by the board.

On point 11 I propose the following

"We do not believe that it would be in the best interest of the City to pursue the options of termination at the present time. There are a variety of reasons for this which includes the fact that it could tie up the City for years in costly litigation. From everyone's perspective a mutually agreed conclusion is obviously preferable. Above all we are firmly of the view that while the option of mediation is available to use, it would not to be in the spirit of mediation to proceed now to termination. However, the Board are continuing to administer the Contract as it stands and reserves the right at any point to proceed with the alternative options if deemed appropriate."

Happy to discuss, or meet again.

Regards

Richard

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