
From: Alastair Maclean
Sent: 30 November 2010 15:20
To: Tom Aitchison; Donald McGougan; Jim Inch
Subject: FW: Trams - STRICTLY PRIVATE AND CONFIDENTIAL - LEGALLY PRIVILEGED AND PREPARED IN CONTEMPLATION OF LITIGATION

Sensitivity: Confidential

A large element of shooting the messenger here but let's avoid a war of words - the idea of last week's meeting was presumably just to let Richard know where we are.

The disagreement I think focuses solely around:

1. the RTN's being too vague to be relied upon (although I understand that McGrigors had similar concerns);
2. the need to enforce performance to the extent that has not already been done - ie asking for the design and programme and following that that through with the minimum of changes; and
3. whether or not CEC has sufficient confidence in tie (not Richard) to continue, especially in the light of the article in the Sunday Herald.

I appreciate that Richard is being overly sensitive to any constructive criticism but I do think that CEC needs to decide how it wishes to take matters forward in the light of a very robust opinion from one of the top QC's in the UK and one which seems eminently sensible to me. As you know I have real concerns about the legal advice received by tie and their delivery of the strategy to date but I am only flagging this to help inform decision making about the future. Presumably CEC wants to have ultimate say in relation to the strategy here but I may be wrong.

Happy to explain further but let me know if you need any more from me at this stage.

A

From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 30 November 2010 14:11
To: Alastair Maclean
Cc: Tom Aitchison; Donald McGougan; Jim Inch
Subject: RE: Trams - STRICTLY PRIVATE AND CONFIDENTIAL - LEGALLY PRIVILEGED AND PREPARED IN CONTEMPLATION OF LITIGATION
Sensitivity: Confidential

Alastair, thanks for your note.

I have subsequently had a productive discussion with Tom on Monday morning.

Much of what is covered in your note was also covered in my e-mail of 24th, so I do not propose to repeat myself, but I do have some comments.

Firstly let me emphasise that I agree on most of the points raised in your e-mail, they are consistent with the points raised in my e-mail of 24th.

However,

- I do not share your/Nicholas Dennys' view on credibility.
- I do not share your/Nicholas Dennys' view as the the state of mind of the Infraco
- I do not share your/Nicholas Dennys' view on the timing of mediation

I do not deny that your/Nicholas Denny's views are credible, but I beleive there is evidence to support an alternative credible view, which I prefer.

In terms of governance, I am concerned that lines are becoming ever more blurred, and your paragraph 2.4 highlights this. I am also concerned that, unless it is handled very carefully, the proposed meeting between CEC and BSC has the potential to blur matters yet further, although I do accept that the meeting was arranged with my agreement.

I will clearly need to discuss this at the next TPB and seek to establish the board's preferred way forward on 15th December, if not before, and in the meantime I look forward to CEC reaching a settled position on the issues raised in my letter of 22nd November.

Regards

Richard

From: Debbie Harkness [Debbie.Harkness@edinburgh.gov.uk] On Behalf Of Alastair Maclean [Alastair.Maclean@edinburgh.gov.uk]
Sent: 26 November 2010 09:48
To: Richard Jeffrey
Cc: Tom Aitchison; Donald McGougan; Jim Inch
Subject: Trams - STRICTLY PRIVATE AND CONFIDENTIAL - LEGALLY PRIVILEGED AND PREPARED IN CONTEMPLATION OF LITIGATION

STRICTLY PRIVATE AND CONFIDENTIAL
LEGALLY PRIVILEGED AND PREPARED IN CONTEMPLATION OF LITIGATION

Richard,

As requested, I set out below the advice which CEC received in London on Tuesday from Nicholas Dennys QC and which we discussed on Wednesday afternoon.

We also discussed what Nicholas Dennys QC felt was the most appropriate way forward in order to achieve an operational tram from Edinburgh Airport to at least St Andrew Square for the best price possible and as soon as possible.

You asked me to clarify what I thought CEC needed from tie in this regard and I have indicated that in this email, although I am aware that you, Bob McCafferty, Andy Conway and Nick Smith have since discussed this.

1. CEC's Q.C.'s comments

I was extremely impressed with the clarity of thought and robustness of Nicholas Dennys QC's advice. He appeared to have a very firm grasp of the issues and, on the information before him, he was unwavering in his advice.

That advice was split into six parts and his comments in summary were as follows:

1.1 Credibility issues

There is likely to be a concern as to tie's credibility in the eyes of the Infraco (and indeed of the stakeholders) due to:

- 1.1.1 the perceived shift in direction and the apparent lack of a coherent strategy for the way forward with the project;
- 1.1.2 vague/badly formulated RTNs; and

1.1.3 the proposed move to a further means of dispute resolution by way of mediation.

1.2 Termination

Whilst the possibility that tie does have grounds for termination cannot be ruled out at this stage and whilst that needs to be investigated further by McGrigors, there are significant concerns that:

1.2.1 the Princes Street RTN is back in tie's court and does not appear to have been responded to (NB: Whilst that appeared to be the case from the papers it was not known if that was in fact correct); and

1.2.2 the remaining RTNs are too vague and unspecific to enable termination (even if supported by the facts);

To put this more clearly, termination on the basis of the present RTNs would not be advisable. However on any view, given progress to date by the consortium on the delivery of the works, it would appear probable that if properly investigated and formulated, valid grounds of breach could be articulated effectively in due course.

1.3 Mediation

1.3.1 Mediation should be fully prepared for on the basis of complete factual information and with a known strategy, once CEC/tie is on a substantially surer footing.

1.3.2 That process will take months and whilst there is a political imperative it should be slowed down to enable a clearer, more incisive strategy to be put into effect.

1.3.3 Mediation at this stage is legally premature and may lead parties to a further entrenched position.

1.4 Meeting with Infraco

Whilst this was chosen to neutralise possible judicial review in relation to termination, it makes sense for the CEC meeting to proceed in order to elicit further information and to ascertain what Bilfinger Berger (Germany) in particular would like to discuss.

1.5 Infraco position

1.5.1 It is likely that Bilfinger Berger do not fear termination as presently proposed by tie and, indeed, CEC/tie could well be playing into their hands by terminating the contract.

1.5.2 Siemens are likely to take a shorter term view, wanting a return on their investment.

1.5.3 CAF are likely (notwithstanding joint and several liability) simply to be thinking of supplying the tram vehicles.

1.6 CEC's strategy

1.6.1 The working assumption was that CEC would like an operational tram from Edinburgh Airport to at least St Andrew Square for the best price possible and as soon as possible.

1.6.2 There are only two ways in which that can be achieved:

1.6.2.1 reduce the scope, rebase the contract and keep the existing contractor (“Option 1”);
and

1.6.2.2 terminate the contract and reprocur with a new contractor (“Option 2”).

1.6.3 In any event, the immediate strategy should be to force the Infraco to perform the contract and incur expense. If that does not yield a result by unlocking the present contractual deadlock and providing tie with a stronger position from which to negotiate a rebasing of the existing contract (Option 1) the contract would need to be terminated (Option 2). It is hoped that pursuit of enforced performance should assist in that event, by providing fresh and more compelling grounds for termination linked to the Infraco’s failure to progress the works.

1.6.4 The proposed approach is that:

1.6.4.1 to the extent not already done, tie ask the consortium for an update immediately on:

- a. the state of the design; and
- b. the current programme ie. when they will complete the works and other contract deliverables.

1.6.4.2 tie then require the consortium to continue with the works (and, in particular the Princes Street works). It goes without saying that contract changes proposed by tie should be kept to a minimum.

1.6.4.3 in parallel, McGrigors should continue with the existing investigation into the factual matrix but on the assumption that the existing RTNs served to date are too unspecific to provide an effective ground for termination.

1.6.4.4 if a decision is subsequently taken to terminate the contract this must be on the basis of firstly, a proper evaluation of the factual position and secondly, fresh RTNs - most likely linked to a failure to carry out the works referred to at 1.6.4.2 above.

1.7 Summary

In summary:

1.7.1 mediation in the immediate term is legally premature and inadvisable;

1.7.2 the proposed meeting with Infraco should proceed;

1.7.3 termination should not proceed on the basis of the existing RTNs (and it follows that tie’s proposed strategy of testing the RTNs through the dispute resolution procedure in the contract should not be pursued);

1.7.4 performance of the contract by Infraco should be enforced as set out above; and

1.7.5 the investigation into the factual position should be urgently finalised.

2. The way forward

2.1 You indicated that much of the above ties in with the legal advice you have recently received from McGrigors and Richard Keen Q.C.

2.2 We did, however, go on to discuss some differences:

2.2.1 The CEC view is that pursuing the dispute resolution procedure in relation to the RTNs is inadvisable and confuses the key message - that we wish the Infraco to perform the contract;

2.2.2 You indicated that tie have already instructed the Infraco to provide the design and programme and carry out the works as our Q.C. recommends. Clearly he has not seen this documentation as the information which has been provided by tie in the last few weeks relates to the current RTNs. If that has already been done I am delighted - it sounds like the proposed strategy is already in train. (I know that Bob McCafferty, Andy Conway and Nick Smith have since discussed this further with you in order to gain an understanding of where tie are in enforcing performance of the works on this basis.)

2.2.3 From a legal perspective, we do not agree as to when and how mediation should be pursued. If it is pursued in the immediate term it would start from a weak CEC/tie position and may entrench the parties. I believe it would be preferable to consider this option further once CEC have met with the consortium, and I shall email you separately in relation to this.

2.3 There are various other comments in your email, but I think we should concentrate on looking forward.

2.4 Clearly there is a danger of the governance arrangements becoming confused here and I can understand that you are concerned regarding that. In particular you are I think concerned about “man-marking” and that is a fair concern. There should be as little unnecessary duplication of effort here as possible to protect the public purse but clearly CEC needs to be in a position where it can fully understand the state of the project, take strategic decisions and as shareholder and financial guarantor approve or reject any request by tie to terminate the existing contract.

2.5 At present, tie are project managing the contract and CEC has been supervising that under the direction of Dave Anderson, the project sponsor, and Marshall Poulton, the Tram Monitoring Officer. Only recently has a new workstream and project team been set up in order to prepare for the December Council meeting and tie/TEL’s anticipated request under the operating agreement for approval to terminate the Infraco contract. As you know that team comprises Bob McCafferty, Andy Conway, Alan Coyle, Nick Smith and Carol Campbell, and they have been attending weekly meetings with you and your team in order to be updated on your progress on an interim basis. A supervisory group within CEC has been updated by the project team as to progress towards the December Council meeting and that comprises Tom Aitchison, Jim Inch, Donald McGougan, Dave Anderson and myself.

2.6 Clearly matters have moved on in the last week given that tie will no longer be seeking approval for termination of the contract, at least in December.

2.7 The aim of Wednesday’s meeting was simply to share CEC’s legal advice with you. It is of critical importance that there is effective two way communication between tie and CEC and I wanted to share this with you as soon as we possibly could.

2.8 I think that a broad strategy going forward was collectively agreed between CEC and tie as follows (although to some extent that is dependent on the outcome of the meeting between CEC and BSC):

- 2.8.1 McGrigors should continue to check the factual matrix to ascertain whether there are any breaches that amount to Infraco default, but will also look into the factual position that may or may not support the proposed strategy outlined at paragraph 1.6.3 above.
- 2.8.2 CEC should meet with BSC.
- 2.8.3 In the meantime, the message to be communicated should be that:
 - 2.8.3.1 it is in everyone's interests to resolve matters outside the courts;
 - 2.8.3.2 as a result, it is inappropriate to consider termination of the contract in December;
 - 2.8.3.3 consideration should be given to mediation as a means of resolving the dispute;
 - 2.8.3.4 tie will continue to enforce performance of the contract; and
 - 2.8.3.5 if it proves necessary, ultimately appropriate court action will need to be taken.

I hope this assists but if you need any further information in relation to our consultation with QC I will ask Nick Smith and/or Carol Campbell to make that available to you.

Kind regards,

Alastair

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