
From: Richard Jeffrey
Sent: 30 August 2010 14:31
To: Fitchie, Andrew
Subject: RE: Meeting followup

Thanks Andrew.

I think we may need to arrange a session for you and me to sit down with CEC legal to answer any questions they may have. Could you please advise on availability. I have a regular weekly meeting with CEC Tuesday lunchtime.

Regards

Richard

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 30 August 2010 14:24
To: Richard Jeffrey; Steven Bell; Stewart McGarrity; Susan Clark
Subject: Re: Meeting followup

Legally privileged and FOISA exempt

Richard

All noted. Happy to engage with Nick on this if there is exploitation to be gained.

We will prepare a response to para 1.
Schedule Part 4 was imposed on the Contract and has been used by BSC to by-pass Clause 80.20 - but let me make sure a squeeze of the sponge is not possible here.

I am through in Glasgow this pm on RTNs.

Kind regards
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From: Richard Jeffrey <Richard.Jeffrey@tie.ltd.uk>
To: Fitchie, Andrew; Steven Bell <Steven.Bell@tie.ltd.uk>; Stewart McGarrity <Stewart.McGarrity@tie.ltd.uk>; Susan Clark <Susan.Clark@tie.ltd.uk>
Sent: Mon Aug 30 13:41:45 2010
Subject: FW: Meeting followup

Please see below.

Can we discuss please.

I have explained to Dave Anderson that I consider this e-mail unhelpful and symptomatic of the CEC input lacking focus. I am seeing Dave to discuss this on Wednesday.

Nevertheless we need to respond to this letter. I will co-ordinate a response.

Can Andrew please draft a response to paragraph 1.

I agree with Paragraph 2

Paragraph 3 is asking for costs, which is combination of legal and QS input. I suggest we aim to provide estimates (in the form of a range) for the following scenarios

- Project Carlisle (this we have done as part of the presentation to CEC)
- Cost of termination (best and worst case, i.e. best case is Infraco Default, worst case is we are unable to prove Infraco Default and tie are deemed to have wrongfully terminated)
- Cost of project cancellation following termination (and in the event of Infraco Default being proven what can be recovered from Infraco)
- Cost of project completion following termination (and in the event of Infraco Default being proven what can be recovered from Infraco)
- The final option of carrying on without Carlisle or Termination seems to me to be simply a delaying tactic if no-one actually believes it will deliver a completed tram, so nothing new other than the fact that we will have progressed a little more and spent a little more.

Para 4 is covered above

Para 5 is a question for Andrew, but it can wait

Para 6 can also wait, but I assume we will get counsel opinion before we actually terminate.

Any views?

Richard

From: Nick Smith [mailto:Nick.Smith@edinburgh.gov.uk]

Sent: 27 August 2010 17:02

To: Richard Jeffrey

Cc: Alastair Maclean; Marshall Poulton; Dave Anderson; Donald McGougan; Alan Coyle - CEC; Ailie Wilson; Andy Conway - CEC; Carol Campbell

Subject: Meeting followup

Richard

Further to the meeting yesterday I thought I would set out my views on what CEC currently requires to inform the on-going decision making process. Please note that it is sent subject to Dave and Donald's comments as neither have had a chance to review these points as yet. However, some of the requests are simply a reiteration of Donald's email to you on 18 August .

1. A legal view on the use of 80.20. I understand that tie is of the view that this has been looked at before and it is a no-go option. If this is the case then it appears from a practical perspective Infraco can hold tie to ransom as effectively there is no way to get them to progress works unless (i) an estimate is agreed (80.13); or (ii) the matter is in DRP (80.15). We would still like to see the analysis of the effect of 80.20 to finally close it out as an option. The issue of the effectiveness of clauses 34.1/34.3 also needs to be bottomed out. I appreciate that the TPB's view is that "as is" is not an option, but I think we still need to explore this avenue to inform the other options and perhaps even weaken Infraco's negotiating position.
2. My current thinking is that there are broadly four outcomes (i) continue with the existing contract; (ii) terminate and win ; (iii) terminate and lose; and (iv) Carlisle. A decision as to what to do after termination (ie continue, postpone or cancel) will require to be taken at the appropriate stage but we will know which is the viable option here before a final view is taken on termination.
3. Can tie please provide estimates of (i) the worst case cost scenario for terminate and lose under the Infraco contract assuming tie *lost* all the DRP/disputed issues (eg BDDI); (ii)

the worst case cost scenario for terminate and lose under the Infraco contract assuming tie won all the DRP/disputed issues (eg BDDI); (iii) separately, a total of all other non-Infraco contract costs (so that when added to (i) or (ii) it would give a total cost estimate for termination); (iv) the estimated cost of a re-procure for the remaining works from Airport to St Andrew Square and separately from St Andrew Square to Newhaven; (v) the estimated total cost of termination for Infraco default with Infraco paying for the differential in completion costs (interestingly this would presumably include Airport to Newhaven for the final settled cost of the current contract rather than just to St Andrew Sq); and (vi) the proposed cost of Carlisle.

4. I appreciate (v) is very difficult as it depends on the total cost (which we don't know yet) and on whether you assume tie win or lose the contract interpretation questions - ie if tie lose the arguments re BDDI etc then tie is due to pay more and consequently the difference between the cost of Infraco doing the work and a third party doing the work is less.
5. A legal view is required on whether termination notices should be served piecemeal or all at once (the difference here being timescale for termination). I suspect this may be more of a tactical issue than a legal one but we should get a view so a decision can be taken.
6. Richard Keen's view on the case for Infraco default based on the evidence tie has amassed when set against the contract terms. ie what does he think are the chances of success? Fully appreciate this is reliant upon receipt of info from Infraco in response to the notices.

Stewart has previously provided figures for some variation of 3(iii) above. The latest was on 10 June at £415m, but this was for a termination and cancellation and also included a lot of cost which would not be required under a re-procure and continue option and also factored in £40m for litigation risk. I'm also not sure whether this included the sums paid to Infraco or whether this would reduce further due to actual value of work done. However, on a quick analysis, at a rough base figure of £350m, could we not simply add the estimated cost of a re-procure (for either part or whole route) and arrive at a total estimated project cost? From memory the whole Infraco part of the contract was £243m so adding those together would give you £593 for the whole scope. A re-procure would hopefully cost less in this market. This would also be a worst case scenario as our position would always be that Infraco are in default. I am probably massively oversimplifying here.

Identifying the worst case scenarios cost wise will allow us to eliminate the litigation risk issue as it can only ever then be an upside for the project costs. The difficulty of course comes when weighing up both cost and other influencing factors such as PR, political view, funding options and risk profile generally, but in my view the above information would at least allow us to narrow the options.

I am currently working on some form of matrix setting out the estimated costs and headline issues so that we can hopefully give tie an early steer to tie as to which options are still in the running and thereby allow tie to focus its resource most effectively as requested. I'll send this over once it is more developed. However, skeleton attached for info.

I also appreciate that the result of the strength of the legal position may not be known by October Council as we may not have the responses to the breach notices. However, a view on the estimates/issues for Carlisle versus a best and worst case for termination would at least inform the current thinking.

In addition, I appreciate that for certain of the estimates CEC will necessarily have to trust tie's judgement on the issues - eg tie will have to take a view on how best to re-procure and that methodology will likely affect the cost estimate. So long as we understand the working assumptions we can discuss them at that point.

Hopefully the above is clear but please let me know if not. Happy to discuss.

Kind regards

Nick

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Please note that I am not in the office on a Monday

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