From: Anthony Rush [anthony@[redacted]
Sent: 31 August 2010 11:52
To: 'Richard Jeffrey'
Cc: Fitchie, Andrew
Subject: RE: Meeting followup

Thanks.

Andrew, Brandon and I discussed the inference of Dervaird yesterday and the reply sent this morning to 6241 emerged from that. Brandon would not own our response but he doesn't demur from it.

Probably more critical to our powers to instruct is Clause 34.3 which is touched upon by Dervaird. Brandon has already asked Richard Keen to comment on that and I asked him to ask for a view on 80.20. (Andrew – can you make certain that the message got to Brandon on the importance of 80.20 please?)

The simple answer to Nick is, yes the contract terms are what I call capricious and you call ambiguous – that's one of the reasons we are promoting the Carlisle exit. Frankly to obtain a definitive meaning would require the test of the Courts – in my opinion the more Dervaird type decisions we get (based on narrow factual basis) the more difficult it will get for us. There simply isn't a "knock-out" for either party. I suspect that the consequences of termination are becoming less attractive as we get closer to the point where it becomes a possibility.

If Carlisle doesn't happen we will have to up our game on how we deal with ND's and DRP's unless we crystallize the RTN's and UWN's into termination.

Tony

From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 31 August 2010 10:59
To: Anthony Rush
Subject: RE: Meeting followup

It is part of the e-mail chain attached below

From: Anthony Rush [mailto:anthony@[redacted]
Sent: 31 August 2010 10:49
To: Richard Jeffrey
Subject: RE: Meeting followup

Thanks Richard – please forward the email you are responding to.

Tony

From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 31 August 2010 10:10
To: Anthony Rush
Subject: FW: Meeting followup

Tony, fyi

R

From: Richard Jeffrey
Sent: 30 August 2010 14:29

To: Steven Bell; 'Fitchie, Andrew'; Susan Clark
Subject: FW: Meeting followup

fyi

From: Richard Jeffrey
Sent: 30 August 2010 14:28
To: 'Nick Smith'
Cc: Alastair Maclean; Marshall Poulton; Dave Anderson; Donald McGougan; Alan Coyle - CEC; Ailie Wilson; Andy Conway - CEC; Carol Campbell
Subject: RE: Meeting followup

Nick, thanks for your note.

I will prepare a more full response to your note in due course, but a couple of points.

Given the resource pressures of running project Carlisle, project Notice and administering the contract we need to think about how we prioritise resources, and we may need to accept that, in order to meet the council deadlines we may have to forsake some details, deploy additional resource or accept a different timescale.

I am very concerned about your first paragraph. We have discussed before the need to be cautious with how we express our personal views, and we need to be doubly cautious about how we express them in writing. For the record I do not share your views and I do not think the facts support them.

Regards

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

Nick Smith
Principal Solicitor
Legal Services Division
City of Edinburgh Council
Level 3, Waverley Court
East Market Street
Edinburgh EH8 8BG

(t)[redacted]

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

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