From:	Gill Lindsay
Sent:	05 July 2010 10:48
To:	Nick Smith; Alastair Maclean
Subject:	RE: 90.1.2

Nick, thanks for your mail for information.
I am not updated on matters leading up to this including the 90.1.2 letter or your diligence on this matter or liaison with the project/advice from the external lawyers to the project, (the legal reporting route taken for some time being to you and from you to Alastair). It is clear that, notwithstanding the detail, this is a crucial stage and we require to be very closely aligned to all the external lawyers to the project (and as matters have developed) and Counsel in the role of support and challenge and participate and be represented in all legal meetings as we determine appropriate, in relation to CEC's role and interests.

You may wish to consider noting and declaring CEC's interests in the instructions to Counsel for clarity and seeking advice on that basis if this is not in place and to consider if and to what extent the interests of Tie and CEC are not now aligned in terms of the project if this is now the case and to deal with this.
Gill

From: Nick Smith
Sent: 05 July 2010 08:24
To: Gill Lindsay
Subject: FW: 90.1.2

For your info.

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) 0131 [redacted]

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

From: Nick Smith
Sent: 02 July 2010 12:00
To: Dave Anderson; Donald McGougan
Cc: Alan Coyle; Marshall Poulton; Alastair Maclean
Subject: FW: 90.1.2

Gents

Please see Richard's email below. As you are aware I have a concern about this. Without wishing to go over old ground the DLA duty of care is virtually worthless as it (i) only applies where tie and CECs interests are totally aligned and that (ii) it assumes that all tie instructions are the same as CEC would instruct. This has always been the case.

Again, the matter comes down to trust. Essentially CEC may well be asked shortly to bless tie's assessment of its case for termination. It is fair to say that many of the legal issues
are riddled with uncertainty, we have no idea what Infraco's case is likely to be and, most

importantly, we simply have to trust that tie have got their facts right on the commercial and factual issues.

Not to put too fine a point on it, but you may recall that we were informed that tie had decided to serve their definitive 80.13 instruction some weeks ago, only to have Infraco correctly assert that tie were in the wrong and the instruction was invalid. tie had to retreat and reassess.

It cannot be understated how big an issue serving the 90.1.2 notice could be. In summary:

- Under the agreement, once a 90.1.2 letter is served effectively it is up to tie as to whether to accept any rectification plan. There is no requirement to act reasonably and in practice tie could simply reject the plan out of hand.
- The key issue is whether there has been (i) a breach of the contract by Infraco which materially and adversely affects the carrying out and completion of the Infraco works or (ii) whether Infraco has without cause failed to comply with a tie instruction to proceed with the works. If either of these can be proved then effectively Infraco default is established and tie are within their rights to terminate.
- If tie is unable to clearly establish that there has been such default then tie will be treated as having repudiated the contract.
- Infraco will no doubt refer any 90.1.2 letter to DRP. Arguably they can but this is not entirely clear.
- We are of the view that the 90.1.2 letter can be served now without triggering a repudiation of the contract and a decision taken at a later date (ie by Council) as to whether to actually terminate. Counsel is being asked to opine on the repudiation point. However, serving the letter and then failing to terminate *may* bring about issues of personal bar etc potentially resulting in a loss of tie's rights to terminate in respect of the breaches set out in the notice. The waters could be very murky here if eg Infraco remedied some matters and we tacitly accepted it. tie has 10 business days to decide whether to accept the plan or not.
- Commercially, Infraco may simply not produce a remediation plan as it may indicate that they agree they are in some form of contractual non-compliance. Indeed, in our view simply serving the notice will likely move the project inexorably towards the courts as Infraco's lawyers will know that effectively they have no option to remedy as tie can simply reject the plan out of hand.
- On a termination, there are only really two possible scenarios - (i) termination where Infraco are in default; or (ii) termination where Infraco default cannot be shown and therefore tie have effectively repudiated the contract. In both scenarios the issues currently in dispute (eg BDDI/IFC) would still need to be thrashed out to come to agreed compensation figures.
- Given the potential consequences for Infraco if they are in default, the courts are likely to require the seriousness of the Infraco breaches to be quite extreme in order to justify termination.
- One of the issues may be that certain of the key provisions of the contract are so difficult to interpret that the obligations on Infraco are unclear and it follows that it is difficult to say with any certainty whether they are in breach of those obligations. We therefore have to find (i) clear and undisputed contractual obligations which they have failed to comply with and which materially and adversely affect the contract etc; or (ii) hold our nerve, allege that the obligation in question is indeed clear and that they are in breach (assuming Counsel's opinion supports that view) ; or (iii) await an adjudication on the relevant issue(s) (eg 80.13) and assuming we win then serve the 90.1.2 and terminate in the hope that the courts will back the adjudicator.

I am sure that Counsel will expand on these matters, but I think we need to be very clear where I think we are at the moment. Given the importance of the matters which are being discussed and the critical stage we have reached, I believe it is important to hear from Counsel his views

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for ourselves rather than third hand. I also think it would be useful for Carol to attend as (i) she will be assisting on the project and (ii) used to be a commercial litigator before becoming a corporate lawyer. Her fresh viewpoint has already been helpful.

We can perhaps raise the issue on Tuesday.

Kind regards

Nick

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Kind regards

Nick

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From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 02 July 2010 08:08
To: Nick Smith
Subject: RE: 90.1.2

Nick, I think we need to be really careful that you do not start trying to do tie's job. DLA have a duty of care to CEC and surely a report back from them should suffice. In any event I want to limit numbers. I will discuss with andrew, but suggest at the very most there is space for only one of you.

Regards

R

From: Nick Smith [Nick.Smith@edinburgh.gov.uk]
Sent: 30 June 2010 15:53
To: Richard Jeffrey
Subject: 90.1.2

Richard

I have yet to review the 90.1.2 letter in detail, but just to let you know that Carol and I would like to attend the consultation. can you let me have the details please?

Kind regards

Nick

Nick Smith
Principal Solicitor
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