
From: Nick Smith
Sent: 10 December 2009 17:17
To: Alastair Maclean
Subject: FW: Supplementals Justification

Alastair

I don't know what your intentions re involvement in trams are. However, email below simply for visibility at this point. I can elaborate on the history at your convenience.

Kind regards

Nick

Nick Smith
Senior Solicitor

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

From: Nick Smith
Sent: 10 December 2009 10:27
To: Jim Inch; Dave Anderson; Donald McGougan
Cc: Andy Conway; Alan Coyle
Subject: Supplementals Justification

Jim/Dave/Donald

I have been giving the supplemental agreements matter some further thought. From my limited understanding, and from a brief discussion with Stewart at tie and Andrew Fitchie at DLA, the need for supplementals is driven by the commercial stance of BSC, in that they are simply refusing to start work until they get further agreement and money. I understand that the Princes Street supplemental was signed just to get work started. You may recall that CEC were only consulted on this at the last minute when effectively it was a done deal.

The fundamental issue which I have here is that we have an existing contract with BSC. To the extent that BSC fail to comply with the original contract, there must be an appropriate mechanism within it to force them to continue the works as per the original agreement BSC bid and priced for the provision of a tram system compliant with the Employer's Requirements. It therefore appears to me to be wrong that BSC is able to effectively unilaterally decide not to comply with the contract. To my mind this is a very different scenario to DRP issues, where effectively there is a difference in opinion as to interpretation of specific parts of the contract or over valuation mechanisms. It has been explained that BSC may opt to play games with the existing terms in that they will submit inflated estimates and push for delays, but one would be disappointed if tie are contractually in the right and yet are still forced to agree further payments just to get what was originally agreed.

I therefore recommend that we urgently obtain from DLA and tie an analysis, or indeed get an independent view, of exactly what our redress is under the contract as it presently stands if BSC simply refuse to start on-street works and what our chances of success would be in forcing compliance with the existing contract. This would at least ensure that we are fully informed at the point of having to sign the supplementals.

The issue here is that once the detail of the supplementals becomes public, the very obvious question which will be asked by Members (and indeed Audit Scotland) is why we are giving BSC more money for effectively doing the same job they were originally contracted for. Is it that the contract is simply defective or is it that there have been significant design changes against what was priced.

I have no desire to set hares running here and fully understand that simple commerciality may mean that it is better to pay up now than fight it through DRP or the courts with a risk of loss and non-delivery of tram for a further period (which would be reputationally unacceptable). However, I do believe that we need a formal communication as to the reasons the existing contract do not work so that we are better able to inform Members when the time comes as to why the supplementals are needed in the first place. We should also consider that if BSC have failed to comply with the existing contractual terms, will they suddenly comply with a newly negotiated agreement? Princes Street has been a useful pathfinder, but it has been questioned as to whether tie have actually obtained anything different to that which was originally anticipated under the original contract.

I have also discussed with Alan and Andy, who were able to shed no further light the issue and agreed that it should be brought to your attention to seek direction as to how best to proceed.

Kind regards

Nick

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