

Ainslie,

You asked me to set out briefly the main points that we discussed this afternoon.

1. Position prior to 2 September 2011 Council meeting

1.1 As you know from your attendance at mediation, there are significant difficulties with the original Infraco contract. It is important to note that much of this contractual framework will remain in place with only the changes necessary to implement the agreed settlement with the consortium following mediation. This is an imperfect solution compared to a wholesale revision and rewriting of the original contract but is a necessary consequence of continuing with the existing consortium, recognising that to reprocur with another contractor would cause additional delays and risks in the form of system integration and so on.

1.2 In particular utility risk is being taken on the on street section and the price for that section is not fixed. All this is as per the heads of terms negotiated at and arising from mediation and needs to be measured against the existing contractual position, namely a variable price contract to Newhaven allowing significant scope for the contractor to maximise claims for additional time and cost.

1.3 Whilst the new arrangements for the on street section (if accepted) would be similar in risk terms to those that presently exist, they do:

1.3.1 reduce the scope of the on street section from Newhaven to St Andrew Square;

1.3.2 afford the Council the right to terminate the on street section upon payment of the cost of unpaid works carried out to date and sub-contractors' demobilisation costs; and

1.3.3 require the Infraco to continue with the works pending resolution of any dispute as to the cost of those works.

1.4 In addition, for the off street section of the works, we now have a significant degree of price certainty by means of a lump sum price subject to limited exclusions.

1.5. I am working on the assumption that you are up to speed on the main points as of a couple of weeks ago, but in case you are not I attach two notes which I believe set out the key legal risks:

1. 5.1 a list of key legal risks of the revised contractual arrangements which was a confidential appendix to the June Council meeting and which was made available to the elected members; and

1.5.2. a note dated 20 08 11 which was sent internally prior to the 2 September 2011 Council meeting setting out more detail in relation to some of these risks and principally the utility risk of the on street section.

2. Position after 2 September 2011 Council meeting

2.1 At the 2 September meeting the Council reversed the 25 August decision to go to Haymarket and reconfirmed the June decision to proceed to St Andrew Square. Council also approved the funding position set out in the August report.

2.2 Since the September Council meeting the position of the consortium appears to have hardened. Like you I suspect that this is due to the fact that the Council has twice reversed its

previous decision thereby causing an increase in cost and uncertainty for the consortium. The reasons for this are likely to include:

2.2.1 the fact that the broad size of our risk pot is no longer confidential; and

2.2.2 it is now known to the consortium that termination is not considered an affordable option by the Council.

2.3 I am attaching a note (dated 08 09 11) setting out what the main changes have been in the last week or so. The position set out is not agreed but narrates the best position that BBS are prepared to agree. We need to ascertain whether we are willing to accept those terms.

2.4 Whilst negotiations are still ongoing, the main issues I flagged to you are:

2.4.1 the consortium have calculated the on street contract price based on the current drawings and not the employer's requirements, because these have not yet been finalised. They will, however, be obliged to deliver the works in accordance with the updated ERs and to confirm that the drawings would deliver to the existing ERs as at 13 September 2011;

2.4.2 where BBS deliver drawings that comply with the ERs, CEC will take the risk of changes required by any approval body;

2.4.3 the ripcord (entitling CEC to terminate the on street section from Haymarket to St Andrew Square) is now to include subcontractor loss of profit - since our discussion, two of the three subcontractors have agreed to waive any such entitlement. We are yet to approach the remaining subcontractor (BAM);

2.4.4 in the event of a procurement challenge BBS want us to reimburse 100% of their subcontractor demobilisation costs as opposed to 50%;

2.4.5 BBS want to agree a sum for the delay that has been caused between the August and September Council meetings after contract signing - there will also be a delay of 6 weeks in the overall programme;

2.4.6 an issue in relation to BBS allowing CAFan IPR sub-licence has developed and we need a warranty that this is not a matter of any practical substance.

2.5 It may be the case that a discussion on these new points is required with the principals of the consortium and Sue or myself will contact you once the position is clearer this evening.

2.6 Clearly it will be important to mitigate these risks as a matter of practice. As you know, the Council has appointed TTPM to professionally manage the project going forward. In addition, the Council has met a number of utility providers to discuss a speedy response to utilities conflicts. I think it would be of enormous benefit if TS/SG were able to exert some additional influence over the utility providers, as you suggested today. Also, the Council would very much welcome TS' ongoing involvement whether that is by way of a supervisory team or a more integrated approach.

I hope this helps but if you would like any more detail please let me know.

Kind regards Alastair

Alastair D. Maclean  
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