

CONFIDENTIAL

High Level Summary of meeting between Colin Mackenzie, Nick Smith and Andrew Fitchie of DLA Piper on 2 July 2009

Please note that this summary is only to give an overview of what was a very wide ranging update meeting. DLAP were keen to keep CEC Legal Services fully up to date as matters progress. We were advised that the position is constantly changing, so some of the concerns below may not in fact come to fruition in the short term. They are however, real concerns which senior CEC officers should be aware of.

- Richard Jeffrey has recently sought to engage tie with BSC on an informal mediation basis to see if any of the outstanding issues could be resolved, or at least more understood.
- This process has been initiated outwith the formal mediation process under the contracts.
- Whilst understanding has increased on both sides, it is anticipated that little further real progress has been made by today (it was supposed to conclude yesterday but has been continued until this morning). Confirmation of progress will be known to tie by later on 2 July. Realistically it appears that progress will require tie to give further ground.
- In short, if this little progress is achieved, then PMP and informal mediation will indicate that BSC, or at least BB, are intractable in their position and little further progress is likely on a goodwill basis.
- Assuming that the informal mediation is unsuccessful, DLAP's advice is that tie should try to get BSC to agree to put the remaining outstanding issues into formal dispute, hopefully agreeing to go direct to adjudication as there is little point in further formal mediation. Whether BSC agree to this will be a test of goodwill.
- Realistically, it is difficult to see how such a relationship can continue in this vein. Indications are that PMP and informal mediation have shown little or no progress. From an outside perspective the relationship looks fundamentally broken in certain respects. Further agreements on individual issues, with further payments/promises by tie to meet BSC in the middle are all very well, but to use an analogy ransom payments with no delivery of the goods usually just encourage further demands. DLAP have indicated that they have seen little sign that BSC are delivering on their promises in this regard. Indeed Andrew indicated that if BSC are unwilling to comply with the main contract, is there a real chance they will comply with subsequent side agreements?
- Assuming that matters move to adjudication, it is a commercial reality that the parties will become more entrenched. Whilst tie can request BSC to continue to work on a demonstrable cost basis, realistically BSC will work to rule and find reasons not to deliver. Whilst this can be monitored, it is likely not preventable.
- Ultimately there is the possibility that BB could "leave" the consortium, whether by being forced out by the other members or by being ejected. The possibility of this happening has not been analysed in detail by DLAP as yet and breach will be very difficult to prove. There are likely to be significant cost, time and procurement implications of this option.
- DLAP also have indicated that there is also a slight concern that further cost increases and side agreements could also have procurement implications in that

theoretically the process could be challenged in the basis that the accepted “fixed price” has increased significantly to the extent of a material change.

- The immediate concern is that the likelihood of (i) finally solving the issues; (ii) getting an agreed timetable; and (iii) estimating cost are somewhat up in the air at present. This clearly give Council officers a significant difficulty in what can be reported to Council in August and the knock-on effect this has.
- We indicated to DLAP that one of the advantages that BSC has over tie/Council is that promises have been made in relation to completing parts of the project, eg Princes Street by a certain date. Further delay will likely cause BSC no real issues (as they will have arguments as to why the damages clauses don't apply), whereas there is a need for tie/Council to get on with the work from a public perception perspective. This puts the Council somewhat over a barrel commercially in that there is more of an incentive to concede points. However the funding envelope is then threatened further.
- It is likely that there is fault on both sides with regard to the causes of delay etc to date. However, getting a final answer on all issues will be very difficult and costly, and ultimately may not resolve the nature of the flaws in the relationship which have led to the present position.
- One option which DLAP indicated was that an external consultant, eg Cyril Sweet could be engaged to take a fresh look at the overall position from the Council's perspective. Whilst this would not necessarily solve the underlying problems and would involve further time and expense, it would at least given the Council a better view of the options.
- In conclusion, it is likely that there will shortly come a crunch point where serious decisions with regard to the future and nature of the relationship will need to be taken which may have significant consequences for the overall cost and timetable of the project.

Counsel's Opinion

- Whilst not strictly part of the meeting noted above, it is worth noting that an Opinion has now been received by tie. This Opinion is fairly balanced and examines tie's position at a very high level subsequent to a detailed consultation. It is fair to say that many of the issues are commercially driven and rely on a “usual for that market” analysis. There is no “legal” wrong or right here on most of the issues but what is certain is that there is no guarantee that we tie would win all their arguments. Nevertheless this does not solve the underlying commercial realities at play here.

Nick Smith
2 July 2009