tie Operating Agreement – Outstanding Issues

CONFIDENTIAL TO CEC

The following are responses to the issues raised by Graeme Bissett in his email dated 3 December, some of which we understand were discussed with Andrew Holmes on 5 December.

1. This issue relates to wording re delegated authority to tie re the Infraco/Tramco contracts and the giving of a Council guarantee. We agreed that the wording needs added so long as it mirrors exactly the Council report wording. Wording has been added at clause 3.1.
2. We are not sure why the Council would need to delegate authority to give the guarantee. It is the Council giving it – ie nothing is being delegated to tie in this regard. We have added some wording at 3.2, but are not convinced it is actually necessary.
3. Not agreed. This is the contention that one operating agreement should cover everything tie presently does. We have a particular concern as we had always envisaged that this would be a stand-alone tram agreement, with the existing overarching general agreement being separate. As discussed on 26 Nov at LAG, it was agreed that it would be better to update the other operating agreement post-financial close. Indeed WG suggested this and this was agreed. Our concern is that if the agreement tries to cover too many projects then each project has to be analysed and fully accounted for. In our view it makes little sense to have a single agreement to cover every possibility, especially given the timescales now available. So long as there are no inconsistencies, it is far cleaner to deal with matters separately by project. This was clearly the intention as the Council was advised on 23 August that there would be a "dedicated Tram Operating Agreement" in addition to the existing general agreement. We are, however, happy to have an acknowledgement that tie are undertaking other projects as approved by the Council (new Clause 3.9).
4. We are not sure of the concern being raised here. Where the agreement states that signoff is required from the Tram Monitoring Officer to ensure the Council has approved the action, it is up to the TMO to decide what internal CEC approval is necessary. tie can rely on TMO's instructions in good faith in the absence of other knowledge, so there should not be a concern from their perspective. TPB have no formal remit here – it is Council signoff that is required. So long as the TMO is aware of what he has delegated authority for and what he needs formal T.I.E or sub committee approval for, then there should be no issues.
5. See 4
6. Removing the schedule and putting the services in the main body is agreed in principle, but we are still awaiting confirmation from CDD that all relevant responsibilities/services are in fact covered by this overarching responsibility to comply with the FBC, the ERs and the Scope of Works. Finance have confirmed that the reporting elements which they require are already sufficiently covered.
7. Change to Clause 2.1 - Not agreed – this agreement is project specific so present drafting should remain – see 3 above.
8. Clause 2.3 - Addition of "best endeavours" qualification is probably acceptable as long as AH/DM agree. In summary there is a sliding scale - absolute obligation (what we started with), best endeavours (ie explore all reasonable avenues), reasonable endeavours (ie follow at least one reasonable course, but tie can take account of commercial detriment) and finally no obligation at all. Our advice would always be to seek absolute obligations where possible, but in a commercial situation it is difficult to achieve such comfort levels. Therefore, assuming it is acceptable to the Council, best endeavours will be the highest that can reasonably be achieved. Given the likely lack of indemnity (see 23 below), it may be a moot point in any event.
9. Clause 2.5 - Addition of "best endeavours" qualification is probably acceptable as long as AH/DM agree.
10. Clause 2.6 - Addition of "best endeavours" qualification is probably acceptable as long as AH/DM agree.

11. Clause 2.9 - Addition of "best endeavours" qualification is probably acceptable as long as AH/DM agree.
12. We have added (and adapted slightly) the wording re insurance suggested by tie to the agreement (Clauses 2.12 and 2.13). In short, it seeks to claw back the insurance requirement to that which is commercially available at reasonable rates. Given this is a bespoke project, are we happy to accept this? ie it may be entirely expected that insurance will cost more than normal and tie should perhaps already have accounted for this. There is already an obligation to obtain necessary insurances to do with its business in the original contract without the present caveats. However, overall the requirements seem reasonable.
13. Clause 2.23 - AH/DM to comment re this obligation re employment over £75k – our view is that this new proposal dilutes the obligation too far as it leaves tie to justify its actions after the fact, but with no effective remedy should CEC not agree. Better for CEC to have prior veto.
14. Clause 2.24 – AH/DM to comment – again our view is that removal dilutes the control too far. This clause was perhaps the only remaining measure of control which CEC had to encourage effective performance. It was originally quite powerful (approval of all bonuses), then became less strong (approval of the broad bonus terms) and is now simply obliging tie to ensure bonus are linked to milestones, but presumably with tie deciding what those milestones are. Any element of control will be lost if this is accepted. In our view the control should be reinstated.
15. Agreed re Clause 2.28 - wording suggested by CEC to be reinstated.
16. Clause 2.29 - This is linked to the issues of governance. CDD to determine which matters are to be referred to TPB and which direct to CEC. GB appeared to indicate that in practice all matters would be twin-tracked (ie given to TPB and CEC officials at the same time).
17. Clause 2.30 - This proposed removal gives us particular concern. We would have thought that tie should be willing and able to confirm that (i) they have acted in the Council's best interests to date; and (ii) have complied with the terms of the existing operating agreement. If they are not able to do this should the Council not be seriously concerned about ties actions to date and its and ability to carry out the project under a new agreement with similar terms? Whilst we understand tie's concerns about having to review all tie's actions to date, surely directors know what tie have been doing. We appreciate the request is quite onerous, but it would at least give CEC a level of comfort on tie's previous actions, especially as CEC is being asked to sign-off on negotiations which the Council has had no part in.
18. Clause 2.31 - This approach seems sensible, but CEC will need to ensure that the protocol matches up with their obligations under the Funding Agreement. It may actually be better to get TS to sign off on the agreed protocol to ensure they are happy but TS will no doubt resist this.
19. Clause 2.32 - CDD to confirm the position re ongoing OGC review.
20. "Reasonable" reinstated in Clause 3.3 – but we are still of the view that this is the Council's project and, accordingly, why should the Council have to be reasonable? Given tie have no assets, what is their concern? However, CEC is unlikely to be unreasonable in this regard in any event.
21. Board appointment position to be confirmed by CDD re Clause 3.4.
22. CDD to confirm whether TMO and liaison contact are the same (Clause 3.5).
23. Removal of the indemnity in Clause 5 – CEC will still have a breach of agreement claim and in light of no assets or PI cover the indemnity is likely of limited value in any event. However, the decision to remove it is a commercial one. Is the Council prepared to confirm that it will not sue individual directors too (as suggested by tie)? This would apply even if they were negligent.
24. Clause 8.1 - tie appear to have a concern here that CEC could assign their obligations to a party over whom they have no control. We have explained to Graeme Bissett that this may be the case but tie will have to live with this. Graeme agreed.
25. Clause 11.1 - In a normal agency situation, X negotiates for principal Y to enter into a contract with Z. In the present situation, tie is acting as principal contracting entity, albeit with a guarantee from CEC. We have adapted the clause in agreement with Graeme.

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As a general comment, it is fair to say that the last few weeks have seen a dramatic and systematic weakening of the Council's control and comfort in terms of this agreement. It had originally been intended that the Council could rely on tie's PI cover as a last resort. As we understand this is not an option available to the Council now, it means that CEC are in a much less protected position than if an independent third party manager had been appointed. However, whilst tie have no assets or PI cover to give CEC redress, they could at least be expected to give some comfort re bonuses, past actions and acting in the Council's interests. All tie's recent suggestions appear to seek to further weaken the Council's position (eg no control over hiring/bonuses, no indemnity and no warranty as to acting in CEC's interests) whilst strengthening that of tie (eg full delegated authority and seeking other projects to be included).

The Council report in August noted that the Operating Agreement with tie would be "robust". With the recent watering down of the Council's rights and apparent lack of insurance availability, the agreement is certainly not "robust" given that it provides no effective remedies. This may have to be accepted by the Council as being the position, but the members should perhaps be made fully aware of this risk.