

Ysella Jago

From: Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]
Sent: 13 December 2007 19:43
To: Gill Lindsay
Subject: Re: CEC Resolution
Follow Up Flag: Follow up
Flag Status: Completed

Gill - considering. Thoughts follow. Productive meeting with CEC Guarantee issues this pm with Colin and Rebecca.

Kind regards
Andrew Fitchie
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----- Original Message -----

From: Gill Lindsay <Gill.Lindsay@edinburgh.gov.uk>
To: Fitchie, Andrew; Graeme Bissett <graeme.bissett@[REDACTED]>
Cc: Willie Gallagher <Willie.Gallagher@tie.ltd.uk>; Andrew Holmes <Andrew.Holmes@edinburgh.gov.uk>; david_mackay@[REDACTED] <david_mackay@[REDACTED]>; Colin MacKenzie <Colin.MacKenzie@edinburgh.gov.uk>; Moffat, Hazel
Sent: Thu Dec 13 13:04:17 2007
Subject: RE: CEC Resolution

Thanks for the note Andrew. I appreciate this is the way which is considered best for certainty for BBS. This could be adopted if we were at a different stage when we were going to Council but we are not at that stage. In terms of audit and governance here the Council must retain a way of satisfying itself before acting. Ideally we would be at Council were everything closed and using Tie governance may have suited in that case. The only way the Council can take this decision is by Council decision or Council delegation. We will not be at the stage of decision in December, particularly as we try to close the risks as agreed. I still consider specific delegation is competent and is in fact the way the Council can properly deal with audit issues.

Do you have advice that this is precluded and if so on what basis.

Another thought is to consider the resolution in December Report as being a decision but a suspensive one which needs the officers to purify.

Suggest we continue to push to resolve this and all other de risking of issues and take a view later in the week on whether we need to consider another plan. Another thought is that the whole matter would likely be reported back to Council or Tram sub Committee in February and we could use this to sweep up any concerns.

Gill

-----Original Message-----

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 13 December 2007 11:14
To: Gill Lindsay; Graeme Bissett
Cc: Willie Gallagher; Andrew Holmes; david_mackay@[REDACTED] Colin MacKenzie; Moffat, Hazel
Subject: RE: CEC Resolution

Gill

Thank you for this. Apologies that my thoughts were delivered very late last night. Long day.

14/12/2007

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I have spoken at some length now with my partner, Hazel Moffat, who is our public law specialist. In summary:

1. Appreciate that CEC may have a preference as to whom authority to conclude the contract suite is delegated because of the status of the project.
2. DLA Piper's advice to CEC is in essence that the CEC delegation here is one which would be taking place under specific private legislation - Section 69(2) of the Tram Acts to be precise. We are not therefore within the normal statutory delegation arena in which the Council operates in order to function using its local government powers. CEC wants tie to enter into contracts to deliver the tram scheme and the powers deployed to authorise this are the Tram Act powers, in CEC's capacity as statutory Authorised Undertaker.

Our concern is that a sub-delegation from Council officers to tie Limited to enter into the contracts might be challenged and there is jurisprudence on this, even within the normal delegation of local government power.

3. Our recommendation is therefore in line with my e-mail last night, that the issue of tie reporting back before contract close is dealt with through the project governance mechanics: under a specific tie Board resolution and the TPB. The resolutions themselves are a delegation under Section 69 (2) of the Tram Acts. to tie Limited, as preciously drafted in outline. We believe that this is the right approach for CEC and its use of powers, leaving aside the issue of what BBS legal team may advise (which we consider the above will satisfy, provided it links to the operating agreement.

If you would wish this, I can arrange for Hazel to call. Please let me know if this will assist.

Kind regards

-----Original Message-----

From: Gill Lindsay [mailto:Gill.Lindsay@edinburgh.gov.uk]
 Sent: 13 December 2007 09:26
 To: Fitchie, Andrew; Gill Lindsay; Graeme Bissett
 Cc: Willie Gallagher; Andrew Holmes; david_mackay [REDACTED]
 Subject: RE: CEC Resolution

Andrew I see the need to be able to fully satisfy BBS but the issue is that the Council are not yet at the stage of the preferred option. At present subject to having enough in place for Monday as we agreed yesterday there would be the specific delegations as we discussed here on Tuesday and at our meeting yesterday. Even though there is a statutory issue here that should not preclude the Council proceeding this way and I do not see it as causing a difficulty. Let me know when you get your opn.

Gill

-----Original Message-----

From: "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>
 To: "Gill Lindsay" <Gill.Lindsay@edinburgh.gov.uk>; "Graeme Bissett" <graeme.bissett@edinburgh.gov.uk>
 Cc: "Willie Gallagher" <Willie.Gallagher@tie.ltd.uk>; "Andrew Holmes" <Andrew.Holmes@edinburgh.gov.uk>; "david_mackay" <david_mackay@edinburgh.gov.uk>
 Sent: 12/12/07 23:51
 Subject: CEC Resolution

14/12/2007

Gill, Andrew
David
Graeme
Willie

Why I am focused on the notion of a Resolution which delegates the Council powers other than direct to tie Limited :

* If delegation is , say to Gill, Andrew and Donald, to receive tie's best counsel and declare themselves satisfied, can they, as Council officers, in fact legally pass on the statutory delegation of CEC in its capacity as AU for the Tram Acts -which is what we need to happen. I am getting expert input on this tomorrow morning.

* If delegation was direct to tie, but had to be perfected by tie satisfying Gill, Andrew and Donald in a transparent and pre-arranged way, does this operate without legal blemish? What would happen, for example, if one of the referees disagreed with tie's approach?

Both the above are likely to be open to probing by BBS in an unhelpful way.

I think the answer is a clean delegation to tie by Resolutions as we envisaged, but the tie Board determines now by extraordinary resolution that it must have the endorsement of the TEL Board and TPB, before authorising Willie to sign up. This gives CEC Officers definitive influence over how tie satisfies CEC and so far as :

The outside world is concerned tie is moving ahead, fully authorised

BBS is concerned they are told that Willie has hoops to go through that they must assist on and at their peril if they do not.

Thoughts welcome.

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14/12/2007

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