

Mandy Wilson

From: Fitchie, Andrew [Andrew.Fitchie@dlapiper.com]
Sent: 13 April 2009 17:42
To: Gill Lindsay
Subject: Re: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP

Legally privileged and FOISA exempt

Gill

Hope you had a restful break.

Thank you very much for sharing the paper on DRP. I was not able to get to this on Thursday pm.

I think it provides a reasonably balanced overview, at this point. As a general report about tie's views, intentions and current positions, it should serve its purpose as I understood this from you.

I consider it might be preferable to have a more refined statement on actual DRP topics (probably from us) and tie's strategy on the use of DRP by the time a formal report from officers is made ready for the end of the month.

My comments are therefore intended to improve but not to mask the fact that this is an internal summary paper of officers' impressions at a "snap shot" in time..

Confidentiality and FOISA

As overriding and very important question, I would ask what the CEC's planned confidentiality and FOISA status of this paper will be, since there are sections in the paper which are clearly commercially sensitive: eg (A) the reporting of tie's views on the "tipping point"; (B) an analysis of merits of several contractual arguments and best/case worst case on DRP (C) the fact that tie might have/seek authority to trade extended completion dates against additional cost. (D) the list of 16 potential DRPs which tie may tackle surgically to keep BSC from blurring matters into global assertions about delay and cost.

These matters would all be very useful pieces of information indeed for BSC to know about and to exploit in potentially pre-emptive and damaging ways for tie and CEC.

I would recommend that a means of protecting this information is thought through carefully and put in place before the paper is released. For example, can the paper be given as a CEC Legal assessment? In this case, it could enjoy and be stated to enjoy legal privilege on the basis that it is specific legal advice on DRP and litigious matters - provided its distribution is restricted.

Specific Comments

Apologies if references are a bit pedantic but no section nos etc to use.

Page one

DRP 1: As at Thursday last week, tie had already or certainly will very shortly seek appointment of a mediator in order to move this dispute to a resolution.

Engagement

Para two line three: "adjudication", not "arbitration". The DRP does not contain arbitration.

Page two:

Say "Contract signature", as opposed to "Financial Close"- there was no external financing, so no finance to close..

End of point 1: The issue on normal design development is that (i) the agreed language of the contract does limit, by description, the detail of normal design development but (ii) it is a matter of technical opinion and

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engineering practice what is 'normal' as opposed to unanticipated or unforeseeable (iii) however the design has evolved, BSC is responsible for managing that process and passing all revisions through the proper contractual design review process.

Point 2: the exercise of analysing delay responsibility will have to be painstakingly completed in order for there to be a rational basis for settling allocation of costs. It has always been in BSC's interests to approach this on a "global" basis, since this offers the most effective means of obscuring their own defaults and failings behind assertions about client- side failings

Point 3: Suggest "BSC's methodology is also, on any objective view, wholly inconsistent with what is in the contract and it changed in late '08 to a more opportunistic and incorrect approach." Not quite sure what the last sentence in this point drives at.

Point 5: this might be better expressed as : "..... operation of the change mechanic in the contract and BSC's approach that indifferent quality/ non provision of competent estimates is excused by the number of changes which has occurred.

Penultimate para: "IFC"- perhaps explain that these are the drawings versions which are actually used to build from.

Conclusion

At Line two- perhaps: ".....manipulation by commercial and technical interpretation to an extent by BSC.."

..... Scope for argument around the facts and components of the set of contractualised assumptions that were negotiated and included by the parties in order to prevail upon BSC to agree to delineate a settled scope of work which corresponded to their tender price."

Last para: would prefer: "DLAP will continue to give tie/CEC advice on DRP strategy (including the use of the contract provisions to avoid/mitigate cost) and outcomes and any other claims or claims likelihood from BSC and how BSC are or are not using the Contract". But we will not be competent to advise on the technical and commercial aspects of the Project (eg a tie/CEC or third party necessitated variation which might occasion delay).

Hope this is comprehensive and useful. Please call tomorrow am if any point needs discussing.

Kind regards

Andrew Fitchie
Partner
DLA Piper Scotland LLP
T: +44 [REDACTED]
M: +44 [REDACTED]
F: +44 [REDACTED]

From: Gill Lindsay
To: Fitchie, Andrew
Sent: Thu Apr 09 15:05:45 2009
Subject: RE: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP

Great, thank you.
Gill

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 09 April 2009 15:02
To: Gill Lindsay
Subject: RE: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP

Gill

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Will study and revert by Tuesday early am latest.

A

Andrew Fitchie
Partner, Finance & Projects
DLA Piper Scotland LLP

T: +44 [REDACTED]
M: +44 [REDACTED]
F: +44 [REDACTED]

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From: Gill Lindsay [mailto:Gill.Lindsay@edinburgh.gov.uk]
Sent: 09 April 2009 14:56
To: Fitchie, Andrew
Subject: FW: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP
Importance: High

Andrew
I would be obliged if you would consider and advise.

Many thanks
Gill

From: Colin MacKenzie
Sent: 09 April 2009 14:47
To: Nick Smith
Cc: Gill Lindsay
Subject: FW: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP
Importance: High

Nick,

For information, following a request from Marshall.

Regards,

Colin MacKenzie
for Council Solicitor

From: Colin MacKenzie
Sent: 09 April 2009 14:45
To: Steven Bell; Stewart McGarrity; 'Graeme Bissett'
Cc: Marshall Poulton; Alan Coyle
Subject: FW: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP
Importance: High

Steven and Colleagues,

I have just spoken with Marshall, following upon his meeting with you, Steven, Stewart and Alan Coyle.

Please find attached a Note of a meeting from last Friday with the attendees as described in the first paragraph. This will form one part of the report by Marshall as TMO to Tom Aitchison. Marshall is aiming to conclude his report and submit it to Tom Aitchison by close of play on 14th April. If you have any comments on the attached please let me know by mid-morning on 14th April.

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Regards,

Colin MacKenzie
for Council Solicitor

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