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LITIGATION

Richard,

Following our meeting on 25 November and your subsequent voicemail and emails, this email sets out the views of CEC's independent QC, Nicholas Dennys, as discussed during our meeting. As we also discussed, I set out CEC's preferred strategy for the way forward, informed by our QC's view; and finally I provide more detail on what we would like tie to do in order to implement that strategy.

**1. CEC's Q.C.'s comments**

I reported our Q.C.'s views to you at our meeting and as we discussed they are as follows:

**1.1 Credibility issues**

There is a concern as to the lack of credibility in the eyes of the Infracore (and indeed of stakeholders) due to:

- 1.1.1 the perceived shift in direction and apparent lack of a coherent strategy for the way forward with the project;
- 1.1.2 vague/badly formulated RTNs; and
- 1.1.3 the move to a further means of dispute resolution by way of mediation.

**1.2 Termination**

Whilst the possibility that tie does have grounds for termination cannot be ruled out at this stage and whilst that needs to be investigated further by McGrigors, there are significant concerns that:

- 1.2.1 the Princes Street RTN is back in tie's court and does not appear to have been responded to (could you confirm whether this is the case?); and
- 1.2.2 the remaining RTNs are too vague and unspecific to enable termination (even if supported by the facts);

To put this more clearly, termination on the basis of the present RTNs is not advisable. However on any view, given progress to date by the consortium on the delivery of the works, it would appear probable that if properly investigated and formulated, valid grounds of breach could be articulated effectively in due course.

**1.3 Mediation**

- 1.3.1 Mediation should be fully prepared for on the basis of complete factual information and with a known strategy, once CEC/tie is on a substantially surer footing.
- 1.3.2 That process will take months and whilst there is a political imperative it should be slowed down to enable a clearer, more incisive strategy to be put into effect.
- 1.3.3 Mediation at this stage is legally premature and may lead parties to a further entrenched position.

#### 1.4 **Meeting with Infraco**

Whilst this was chosen to neutralise possible judicial review in relation to termination, it makes sense for the CEC meeting to proceed in order to elicit further information and to ascertain what Bilfinger Berger (Germany) in particular would like to discuss.

#### 1.5 **Infraco position**

- 1.5.1 It is likely that Bilfinger Berger do not fear termination as presently proposed by tie and, indeed, CEC/tie could well be playing into their hands by terminating the contract.
- 1.5.2 Siemens are likely to take a shorter term view, wanting a return on their investment.
- 1.5.3 CAF are likely (notwithstanding joint and several liability) simply to be thinking of supplying the tram vehicles.

#### 1.6 **CEC's strategy**

- 1.6.1 CEC would like an operational tram from Edinburgh Airport to at least St Andrew Square for the best price possible and as soon as possible.
- 1.6.2 There are only two ways in which that can be achieved:
  - 1.6.2.1 reduce the scope, rebase the contract and keep the existing contractor ("Option 1"); and
  - 1.6.2.2 terminate the contract and reprocur with a new contractor ("Option 2").
- 1.6.3 In any event, the immediate strategy should be to force the Infraco to perform the contract and incur expense. If that does not yield a result by unlocking the present contractual deadlock and providing tie with a stronger position from which to negotiate a rebasing of the existing contract (Option 1) the contract would need to be terminated (Option

2). It is hoped that pursuit of enforced performance should assist in that event, by providing fresh and more compelling grounds for termination linked to the Infraco's failure to progress the works.

1.6.4 The proposed approach is that:

1.6.4.1 tie ask the consortium for an update immediately on:

- a. the state of the design; and
- b. the current programme ie. when they will complete the works and other contract deliverables.

1.6.4.2 tie then require the consortium to continue with the works (and, in particular the Princes Street works). It goes without saying that contract changes proposed by tie should be kept to a minimum.

1.6.4.3 in parallel, McGrigors should continue with the existing investigation into the factual matrix but on the assumption that the existing RTNs served to date are too unspecific to provide an effective ground for termination.

1.6.4.4 if a decision is subsequently taken to terminate the contract this must be on the basis of firstly, a proper evaluation of the factual position and secondly, fresh RTNs - most likely linked to a failure to carry out the works referred to at 1.6.4.2 above.

1.6.5 In summary:

1.6.5.1 mediation in the immediate term is premature and inadvisable;

1.6.5.2 the meeting with Infraco should proceed;

1.6.5.3 termination should not proceed on the basis of the existing RTNs (and it follows that tie's proposed strategy of testing the RTNs through the dispute resolution procedure in the contract should not be pursued);

1.6.5.4 performance of the contract by Infraco should be enforced as set out above; and

1.6.5.5 the investigation into the factual position should be urgently finalised.

## 2. The way forward

2.1 You indicated that much of the above ties in with the legal advice you have recently received from McGrigors and Richard Keen Q.C. There are, however, some differences as follows:

- 2.1.1 We are of the view that pursuing DRPs in relation to the RTNs is inadvisable and confuses the key message - that we wish the Infraco to perform the contract;
- 2.1.2 You indicated that tie have already instructed the Infraco to provide the design and programme and have instructed performance as our Q.C. recommends. Clearly he has not seen this documentation as the information which has been provided by tie relates to the current RTNs. If that has already been done I am delighted - it sounds like our strategy is already in train. I have asked Bob McCafferty and Andy Conway to liaise with your team to gain an understanding of where tie are in enforcing performance of the works on this basis.
- 2.1.3 From a legal perspective, we do not agree that mediation should be pursued in the immediate term, given that it would start from a weak CEC/tie position and may entrench the parties. I believe it would be preferable to consider this option further once CEC have met with the consortium, and I have emailed you separately in relation to this.
- 2.3 There are various other comments in your email, but I think we should concentrate on looking forward. Clearly there is a danger of the governance arrangements becoming confused here and I can understand that you are concerned regarding that.
- 2.4 At present, tie are project managing the contract and CEC has been supervising that under the direction of Dave Anderson, the project sponsor, and Marshall Poulton, the Tram Monitoring Officer. Only very recently has a new workstream and project team been set up in order to prepare for the December Council meeting and tie/TEL's anticipated request under the operating agreement for approval to terminate the Infraco contract. As you know that team comprises Bob McCafferty, Andy Conway, Alan Coyle, Nick Smith and Carol Campbell, and they have been attending weekly meetings with you and your team in order to be updated on your progress on an interim basis. A supervisory group within CEC has been updated by the project team as to progress towards the December Council meeting and that comprises Tom Aitchison, Jim Inch, Donald McGougan, Dave Anderson and me. Clearly matters have moved on in the last week given that tie will no longer be seeking approval for termination of the contract, at least in December.
- 2.5 The aim of Wednesday's meeting was simply to share CEC's legal advice with you and to make you aware of CEC's preferred strategy. I think what we collectively agreed at that meeting was a broad strategy as set out below, but clearly that is to some extent dependent on the outcome of the meeting between BSC and CEC.
- 2.6 I believe we agreed the following:

- 2.6.1 McGrigors should continue to check the factual matrix to ascertain whether there are any breaches that amount to Infraco default, but will also look into the factual position that may or may not support our strategy outlined at paragraph 1.6.3 above.
- 2.6.2 CEC should meet with BSC.
- 2.6.3 In the meantime, we should communicate the message that:
  - 2.6.3.1 it is in everyone's interests to resolve matters outside the courts;
  - 2.6.3.2 as a result we believe it is inappropriate to consider termination of the contract in December;
  - 2.6.3.3 consideration should be given to mediation as a means of resolving the dispute;
  - 2.6.3.4 tie will continue to enforce performance of the contract; and
  - 2.6.3.5 if it proves necessary, the appropriate court action will be taken.

I hope this assists. I propose to stand down our external lawyers and my own team for the time being, until tie is in a position to seek CEC approval for any key decision on the future of the project. I would however appreciate if you could keep us updated at the regular weekly strategic options meetings.

Kind regards,

Alastair.