
From: Dave Anderson
Sent: 04 August 2010 12:36
To: Richard Jeffrey
Cc: Donald McGougan; Tom Aitchison; Jane Turner
Subject: RE: Edinburgh trams - STRICTLY PRIVATE AND FOISA EXEMPT, PREPARED IN ANTICIPATION OF LITIGATION

Dear Richard,

Thank you for notifying me formally of your intention to pursue this strategy. Given the extensive efforts that have been expended, over the past 18 months, to get BSC to a position where there is a greater degree of certainty on the project timetable and likely cost outcome, and the consistent failure of the consortium to act in a manner that might be reasonably be expected of a properly engaged contractor I believe that the tactics now proposed are entirely appropriate.

I am content that the detailed legal advice that you have taken in relation to the issue of remediable breach notices provides a strong platform from which to pursue this particular course of action. In addition, subject to the advice of Lord Davaird, I believe that it will be appropriate to issue instruction in due course to the consortium to commence work on the key areas of the project that tie requires to be completed.

I have e mailed you separately about the work that I believe the Council is now duty bound to progress to prepare a contingency plan in the event of the need to progress formally to contract termination.

I sincerely hope that we shall be able to avoid such an outcome. However, this now rests upon clear evidence emerging of a willingness on the part of BSC to engage in a manner consistent with the spirit, intent and terms of their contract with tie.

Best regards. Dave

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From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 04 August 2010 11:48
To: Dave Anderson
Cc: Donald McGougan
Subject: Edinburgh trams - STRICTLY PRIVATE AND FOISA EXEMPT, PREPARED IN ANTICIPATION OF LITIGATION

STRICTLY PRIVATE AND AND FOISA EXEMPT, PREPARED IN ANTICIPATION OF LITIGATION

Dear Dave,

Project update and strategy going forwards

I write to you in your capacity as Senior Responsible Officer in the council. Given the extreme sensitivity of the subject matter I have not circulated this note to the board. I have discussed its contents with David Middleton at Transport Scotland this morning. The contents reflect our discussion yesterday.

We have now had chance to analyse the proposal received from BSC last Thursday night. I do believe that, like us, BSC feel that project Carlisle represents the best way forward, but I am unconvinced that they are prepared to approach this on anything other than their terms. The proposal ignores many of the criteria which were agreed with Ed Kitzman as the basis for their proposal and is more of a 'claim' than a serious proposal to reach a sensible settlement against a reduced scope. They have however indicated a strong willingness to negotiate.

Most importantly, I do not believe the proposal represents a fundamental change in approach by BSC. We can speculate that this may be driven by their inability to reconcile their corporate position of not wanting to accept any risk and yet at the same time address the real issues on this project.

On the ground, we have seen some pockets of good and improving progress, but overall progress remains unacceptable. We also get no hint that BSC have changed their approach on the important contractual matters.

I have also reflected on the negotiations and discussions that have taken place over the course of this project, the number of 'false dawns' the passage of time and the stakeholder/shareholder need for clarity.

Having further considered all the technical and financial issues and the legitimate extra costs for which we are liable we are still of the opinion that, subject to certain assumptions that I do not consider to be heroic (such as a reasonable contractor acting reasonably), it should be possible to complete Airport to Newhaven for £600m or thereabouts. However the current proposal and approach from BSC is not consistent with this by some considerable margin.

Having also considered BSC's continued failure to respond in any meaningful way to our allegations of breach of contract and our numerous requests for information, and the results of our consultation with Richard Keen QC, we have decided on a course of action as follows;

- We will immediately (this week) start to issue remediable termination notices (90.1.2) on a range of areas where we believe BSC are in breach of contract, where we have previously informed BSC of these breaches and where we have received no adequate response. This sets in motion a chain of events which may ultimately (but not unavoidably) lead to termination of the contract in the event that BSC do not remedy their breaches.
- We will also issue a first Underperformance Warning Notice under the contract (56.7) which offers a possible alternative route to termination should BSC not address the behaviour underlying their breaches of contract.
- In parallel the project Carlisle team will continue discussions with BSC to 'pressure test' their proposal.
- In parallel we will prepare a counter proposal based on our assessment of fair value and which we believe will be consistent with airport to Newhaven for circa £600m
- In parallel we will instigate a further investigation into the evolution of the design and the performance of SDS.

This 5 pronged approach is not risk free, but has been arrived at by answering several simple questions.

- Given all the factors, do we now wish to put in place the first steps which, in the event that BSC do not rectify their breaches may ultimately lead to termination?
 - If yes, which contractual route(s) offers the best prospect of success
 - If there is more than one option, are they mutually exclusive
- Have negotiations on Project Carlisle irrevocably broken down
 - If no, what is the best route(s) for continuing these negotiations
- In any event will we be better informed if we understand better how the design has evolved and what role SDS have played in all of this.

The risks with this approach are that BSC withdraw from any negotiations on Carlisle and/or reduce the rate of on-site progress, but on balance I believe this to be the best way forward. This has been discussed in detail and agreed with the Chairman, my team and my team of specialist advisors, and I believe it is consistent with direction I have been given by the board over a number of meetings.

Regards

Richard

Richard Jeffrey

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