

From: Kenneth.Hogg@scotland.gsi.gov.uk
Sent: 17 December 2007 09:52
To: Graeme Bissett (external contact)
Cc: Willie Gallagher
Subject: RE: O/A - updated version

Graeme – just on the Remco point – if the compromise is that CEC approve the remuneration policy and leave tie to apply it that may be acceptable, but the current drafting also has CEC approving the application of it too. And approval of the policy in the first place also carries with it some risk – eg CEC could make it a matter of policy that no bonus paid exceeded 5% of salary and then leave it up to tie to apply that. It all depends on what you consider to be policy.

The inclusion of this issue at all in the draft makes me a) nervous and b) suspicious about why CEC inserted it. They wouldn't have put it there if they didn't have something in mind, and my concern is that that something wouldn't have been 'harmless' general oversight of general remuneration policy.

Kenneth

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

From: Graeme Bissett [mailto:graeme.bissett@
Sent: 17 December 2007 00:03
To: 'Willie Gallagher'; Hogg KJ (Kenneth)
Subject: RE: O/A - updated version

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Comments below – Rem Comm issue in particular needs dealt with first thing tomorrow Monday.

2.14 is wording from our insurance manager, having had input from Heath Lambert, which taken together with the language now in 2.12 gives the Council the maximum “co-insured” status possible. The issue is to do with the need for the Council to have an insurable interest in the individual policies, which is the only basis on which they can be covered.

2.24, 3.4 and more generally – totally agree with the concern, we must have one governance model. I think CEC accept this now and the TMO is formally stated to be the Director CDD who is also formally stated to be a member of the TPB. The liaison role I see as an administrative understudy, potentially useful if the person is any good and not a threat.

2.25 – In addition to my comments in the original mail, I understand the desire to have appropriate freedom, but we need to bear in mind that under plc governance standards, the published Remuneration Report is subject to specific shareholder approval these days ; having the policy only (not its application) approved by our shareholder would not be seen as onerous against that background. This is a subject that will generate disproportionate external interest if it is handled other than through the draft to be published tomorrow, so we need to come to a clear view first

thing tomorrow on how the Board want this played. There is much less chance that CEC will slacken off if they have to report such a change specifically at a later date.

3.2 – it is all the financial obligations on certain aspects of the project ; the guarantee applies only to Infraco.

3.9 – awaiting confirmation, but Donald is happy.]

6.1 – yes, but of we are at that stage, the operating agreement will be incidental to the real issues.

11.1 – reinforces the real legal nature of the arrangement as contractual not agency or partnership ; doesn't help the Single Economic Entity argument but the wording is still subject to finalization.

Regards
Graeme

Graeme Bissett
m : [REDACTED]

From: Willie Gallagher [mailto:Willie.Gallagher@tie.ltd.uk]
Sent: 16 December 2007 20:10
To: Kenneth.Hogg@scotland.gsi.gov.uk
Cc: Graeme Bissett (external contact)
Subject: RE: O/A - updated version

Kenneth,

I have forwarded your comments to Graeme, I will forward to Brian in the morning. I agree wholeheartly with the 2.25 Remco comments, I am trying to get this further watered down to us having to inform TMO of our remuneration policy..full stop.

Talk Tuesday,

Willie

From: Kenneth.Hogg@scotland.gsi.gov.uk [mailto:Kenneth.Hogg@scotland.gsi.gov.uk]
Sent: 16 December 2007 18:47
To: Willie Gallagher
Subject: Fw: O/A - updated version

Thanks for sending me this. I have now had an opportunity to review. Please forward my comments below to whomever you think appropriate. Graeme and Brian (re- RemCom)?

Not sure what para 2.14 means but I'm happy if Graeme is.

Para 2.24 still gives me cause for concern. Unless the TMO is a member of the TPB and acts through that role - I think this is a recipe for confusion, delay and risk of inadvertently acting ultra vires. I agree with Graeme's concerns set out below. In the heat of construction, speed of process will be essential and this introduces scope for delay. But it also sets up CEC as a separate entity rather than as an integral part of the one enterprise. I also think the second sentence of 2.24 confuses, rather than helps. I would want significant reassurance on 2.24 before agreeing to it.

2.25 - RemCo issue. I remain concerned about this. (I'd be interested in Brian's views, but wearing my audit committee hat I'm also concerned.). It seems to me that part of the reason for creating tie in the first place was to create an entity which could do things more easily than CEC could. Prime among these are recruiting and retaining staff, with remuneration issues paramount. Given the level of bonuses that tie pays out (25 to 50%) compared to CEC bonus levels (in some cases probably zero) I would put money on the TMO being concerned about this at some point and objecting. But as long as tie is operating within the financial parameters agreed with the Council it should be a matter of tie's judgement - not CEC's - how it remunerates its staff. After all it's tie's responsibility to get the job done and it's tie (not CEC) which has to get and keep the right people for the job. In addition, I think that para 2.17 (tie shall apply the principles of good corporate governance) conflicts with this. Good corporate governance requires the existence of a RemCo. Good corporate governance would not suggest that CEC in effect sets tie bonus arrangements - that would undermine tie's ability to get the job done.

3.2 - I didn't understand why CEC was guaranteeing only "certain" aspects of tie's financial obligations, but maybe there is a legal reason for this? Why not all aspects?

3.4 - I'm even more unhappy about the TMO issue given what 3.4 says about another CEC individual having day-to-day liaison responsibilities. Does this mean yet another link in the CEC approvals chain? Does it imply a distance of the TMO from the project?

3.9 - dealt with in another email, but just to confirm that this is important and I'd want to see the square brackets removed from this section.

6.1 - just wondered about the ability of either party to terminate the agreement with only 14 days notice. I suppose it's necessary to protect both parties?

11.1 - also wondered what this meant. Is it meant to remove any doubt that CEC and tie are a single economic entity?

I appreciate that this draft is a significant improvement from the last. I do think we need to see some key further changes though - as set out above.

Happy to discuss any of this further. I'll be joining the conference call on Tuesday.

Kenneth

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Hogg KJ (Kenneth)
To: 'kenneth@[REDACTED]' <kenneth@[REDACTED]>
Sent: Sat Dec 15 23:23:54 2007
Subject: Fw: O/A - updated version

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Willie Gallagher <Willie.Gallagher@tie.ltd.uk>
To: Hogg KJ (Kenneth)
Sent: Sat Dec 15 10:05:24 2007
Subject: FW: O/A - updated version

** <<Operating Agreement v16 131207 vGB.doc>>

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For info.

From: Graeme Bissett [mailto:graeme.bissett@██████████]
Sent: 14 December 2007 11:57
To: david_mackay@██████████; 'Neil Renilson (TEL)'; Willie Gallagher
Cc: Susan Clark; Tracey Kinloch; 'Fitchie, Andrew'; Stewart McGarrity
Subject: O/A - updated version

I've now got the new version. Rather than a track change copy, I've attached a clean copy and the two track changes on the attached are the ones I now want to be installed. The main issues of a commercial nature are discussed below.

Andrew – can you re-read and give me any final points. The consistency with the Report resolutions which empower tie are still WIP, hence the clause at 3.1 is still WIP. This is the most important outstanding matter.

Tram monitoring Officer and dual governance risk

My previous note referred to CEC's desire to have a Tram Monitoring Officer (TMO) separate from the project and the holding solution is reflected in 3.5. I believe getting this right is vital if the project is to operate efficiently during construction, when time absolutely will be money. To emphasise the importance of having one person / structure and not two, the following is a summary of the issues in which the TMO has an interest, based on the attached draft agreement. We can expect similar points to appear in the TEL agreement.

- 2.2 Duty of care terms in third party contracts
- 2.12 tie insurance cover availability
- 2.13 Third party insurance cover availability
- 2.14 Annual summary of insurance cover
- 2.18 Regular receipt of all Board papers
- 2.21 Regular liaison – 4-weekly meetings
- 2.22 Notification of impending project delay
- 2.23 Notification of action needed by CEC to ensure project continuity
- 2.24 Settlement of claims
- 2.25 Submission to and approval of remuneration policy
- 2.28 Novation / transfer of contractual rights
- 2.29 Non-compliance with contractual terms
- 2.30 Quarterly approval of communications protocol
- 8.1 Changes to the operating agreement

This is an extensive list, but with the exception of the Rem Comm policy and Operating Agreement changes, the other dozen are integral to the project itself and would be handled by the TPB. If the TMO is not already on the TPB, we will have the nonsensical situation of another Council official (probably junior to those on the TPB) being reported to separately from the TPB structure, then having to seek input from the people on the TPB who have already dealt with the issue. So the TMO must be on the TPB. I would be happy if the two real company items (Rem Comm policy and changes to the Agreement) were specified as needing separate Director of Finance approval, with all others handled within the TPB governance. See next steps below.

Highlights in attached draft agreement

The following have been amended significantly or added (highlighted in yellow) :

- * The paragraph on integration objectives has been transferred to the body of the document at 3.10 and beefed up with advice from AF

- * An over-arching responsibility has been inserted at 1.5 such that the approvals required of the Council or the Tram Monitoring Officer must be executed without delay

- * The insurance clauses 2.12 – 2.14 have been finalised with input from Tracey Kinloch and Heath Lambert, particularly with respect to the Council's interests in the policies. Tracey – can you review and confirm ok.

- * A requirement to report insurance cover annually has been installed at 2.15 (hassle, but we'd do this anyway for the TPB under good practice)

- * 2.25 is the Rem comm issue. I am aware of your disquiet but am sceptical as to whether we will get this removed. The clause is focussed simply on a statement of remuneration policy (which the rem comm should do anyway) and linkage of incent payments to project milestones (which is uncontentious). There is a requirement that this is approved by the TMO and new words have been added saying that no bonus can be paid until the policy statement is approved by the TMO (which must be done without delay and the timing of this is a year in advance of annual bonus payment). What goes into the statement is not mandated and we can debate the content when the first such arrangement needs implemented. Clearly the statement must be meaningful but I think you retain full flexibility. Anyway, its your call – let me know your thoughts.

- * Old 3.3 – the clause controlling the payment of money to tie should now be removed.

- * They are thinking about the protection clause at 3.9 but Donald is happy with it. See following note on personal liability.

- * Schedule 1 list of services to be delivered has been approved by Susan and represents a list of things we will do anyway. Susan – can you review and confirm ok.

Relationship to existing tie Operating Agreement

DLA have reviewed this new agreement in comparison to the existing tie Operating Agreement. Veterans of this campaign may recall that we are in a position of adding the new agreement to the old, rather than preparing a single new agreement. It would be important to avoid any material conflicts or inconsistencies and it would appear that there are none of these, although there are a number of awkward overlaps and minor possible areas of conflict. The new agreement specifies that in matters Tram, the new agreement supercedes the existing one.

In the event that there was a real issue between the two agreements, bearing in mind that the parties are in the same family, it would be safe to assume that a sensible conclusion could be quickly reached. Accordingly, no amendments are needed in either document at this stage.

In finalising the new agreement in January, we can make whatever minor amendments are needed to the existing agreement.

Next steps

We need to finalise comments on this draft, especially the wording of the tie empowerment clause 3.1.

The draft agreement is likely to be attached to the Council Report issued on Monday which will seek Council approval to its terms. This needs to be couched such that further amendments can be accommodated without requiring full council approval.

The document is in holding condition, notably with respect to the status of the TMO and will not change materially this side of 20/12. As a document, it's a bit of a camel but is both acceptable and explainable in all respects should Elected Members or external parties raise any queries. It will be too late for the Council Report issue, but the tie Board will have a chance to approve on Tuesday 18th.

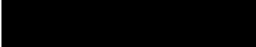
The most important next step is to produce a TEL operating agreement and the full TPB / TEL governance arrangements and delegations. I will tackle this next week, rather than await a draft from the Council. This should give us the initiative and my objective would be to have drafts and all related matters agreed by recipients of this email, then sent to the Council as an advanced draft by 21/12. I would recommend we arrange to sit down with the senior CEC officials (including Gill Lindsay) early in the New Year to review the documents, agree the principles and deal with any issues. That way the internal lawyers should act subsequently based on instruction and not the other way around.

Let me know your thoughts.

Regards

Graeme

Graeme Bissett

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