
From: Fitchie, Andrew
Sent: 10 December 2007 23:01
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Cc: 'Graeme Bissett'; 'Willie Gallagher'; 'Stewart McGarrity'; 'Willie Gallagher'; 'andrew.holmes@edinburgh.gov.uk'
Subject: Draft Tie Operating Agreement

Importance: High

Follow Up Flag: Follow up
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Nick

Thank you for staying on to discuss the draft. I have not been involved in all the discussions which you have had with Graeme but after our discussion, I have reflected again on **three very important items**:

1. The Resolution concerning NRSWA 1991. **tie's** ability to assert on full Council resolution that it has the capacity of the relevant transport authority is worth 7.5% or 18% of the value of on street utilities diversions - whether executed by MDFA or by Infraco. **It is therefore well worth while investing some effort into how this delegation can operate.** We owe this to the Project and it is, in some measure our hands to create this support. A separate short note follows for Alan.

2. Operating Agreement - Clause 2.22. You and I have settled some language which is a 'half way house', but you have explained to me that the proposed Clause reflects a full Council resolution which I had not appreciated. I would not recommend showing this clause to BBS who will immediately question **tie's** authority and make provision for cash carry until they can be sure of being paid.

I am still unclear what was intended by the word 'claim', but it is obvious that under an infrastructure contract of this size, with Milestones worth several millions of pounds, the contractor may be including an entirely legitimate 'claim' for e.g. prolongation cost due to unforeseeable ground conditions. My concern is that once such an application for payment is approved by **tie**, there will be no time for an internal approvals process through the Tram Monitoring Officer, tram subcommittee and full council resolution before payment by **tie** is due contractually. The effect of this provision is therefore to build in a risk that **tie** will incur a contractual interest penalty (2% over base) while CEC approve. Worst case if this sum were large enough the Infraco would have contractual termination grounds We discussed whether BBS could be instructed in the Infraco contract that their payment entitlement is subject this process. I have discussed this with **tie** commercial management and we conclude that this is not practical at this stage and would erode **tie's** authority as the Infraco's counterparty.

One way of interpreting this clause is that it deals with claims made as a result of tie being in breach, as opposed to requiring direct CEC approval to engineer the contract properly by evaluating payment applications under the certification, invoicing and payment terms. This would also square with the Change protocol controlled by TPB. Another approach would be to align this clause with spend profile of the project, so that the claims figures relate to amounts over and above predefined and known thresholds which are keyed to the project Milestones profile (**Stewart?**).

Clause 3.3 Again this is a provision likely to result in BBS questioning **tie's** authority. We cannot say that **tie** has "full legal authority" to enter into and manage the Infraco Contract if three lines further on CEC needs a test passed before agreeing to allocate funding. The release of funding for the Infraco Contract is stated to be dependent upon **tie** have performed its 'services' but this appears to me to be more to do with **tie** 's overhead and standing costs being paid, so that it can perform the project management duties - as opposed to the Infraco Contract being funded. Indeed I remember this clause from the old Op. Agt. Strongly recommend that we remove "*the Project*" from line four, if this provision is desired.

Suggest: "The Council shall make funding available to tie for the Project, in particular to meet the payment obligations under the Infraco Contract, such funding to be in accordance with the Final Business Case and the

specific controls provided for in the Funding Agreement and the Project governance arrangements stipulated at Clause 2.29."

Kind regards

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