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**From:** Fitchie, Andrew  
**Sent:** 15 February 2009 22:55  
**To:** 'stewart.mcGarrity@tie.ltd.uk'  
**Cc:** 'steven.bell@tie.ltd.uk'  
**Subject:** Re: Options Analysis - PRIVATE & CONFIDENTIAL and LEGALLY PRIVILEGED FOISA EXEMPT

Stewart

Thanks for this.

On the legal points:

1. The fact that BSC seems neither to have concluded the key subcontracts nor to have provided tie with collateral warranties makes a tie step in (or for that matter Siemens replacing BB as main civils contractor) more difficult. On the procurement angle, we would need to consider trying to establishing exemptions for tie on the grounds of necessity and efficiency if tie step in were the selected move. This step-in entails a potentially difficult interface where construction integration risk previously transferred to the Consortium would be taken back by tie.

Option D

Agreeing to BB's cost and programme proposal as communicated to tie last Monday would be tantamount to re-writing the Infraco Contract and I consider (1) there would be a procurement risk that the Bombardier Laing O' Rourke consortium might come looking for their bid costs (2) public knowledge of the price increase demanded could result in third party complaint to the EU procurement Directorate.

Sadly, there seems to be very little practical evidence that BB will show a "can do" attitude or good faith even if their current requirement is acceded to. The negative behaviour pattern is identical to the pattern pre contract award.

2. There is a stark decision between (a) confronting BB at this point using all commercial and legal means (which may trigger a dispute) and , in my view, this includes the calling all of the performance securities (bonds and PCGs) to extract clarity on the real BB agenda and to force Siemens AG to consider their position - and then negotiating a solution (b) continuing to try to use the contract to address problems which will mean DRP.

Although the parties must carry on their obligations during DRP, it would have the inevitable negative effect on project progress.

3. We need to be conscious that Siemens are an extremely risk averse organisation- so that their assuming the mantle of BB as civils leader voluntarily would come at an appreciable price.

4. If they were to be asked to consider doing this (ie taking on civils lead) on a negotiated basis, my view is that tie would need to attempt this discourse against a backdrop where Siemens would know there was at the very real risk that they would be obliged to accept this any way by operation of the Infraco Contract- ie tie acting contractually to terminate BSC and Siemens/CAF needing to rescue this situation through the presentation to tie of a formal contractual remediation plan within 30 business days, in which the first remedial action as a precondition to tie carrying on with the Infraco (as we know it) would be BB leaving the Consortium.

5. I agree that there needs to be analysis of likely market for the job replacing BB. Since May 08 there have been infrastructure projects which absorbed capacity but not enough, I would say, to dampen enthusiasm altogether of a profile project such as the EDi tram, particularly because of the Forth Crossing and the advantage that success on the tram would bring..

6. The grant funding conditions, you are correct, provide TS with a range of controls over funding to CEC that are virtually sole discretion decisions to alter, curtail, suspend and claw back funding.

These rights, as you point out, contain also rights to approve termination of Major Tram Contracts. If such action becomes a likely part of tie's strategy, Ministers (through TS) will need to be kept informed by CEC.

Kind regards

Andrew Fitchie

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**From:** Stewart McGarrity  
**To:** Steven Bell ; Frank McFadden ; Dennis Murray ; Steven Bell ; Jim McEwan ; Fitchie, Andrew  
**Cc:** Graeme Bissett (external contact) ; David Mackay ; Alastair Richards - TEL  
**Sent:** Fri Feb 13 11:13:43 2009  
**Subject:** Options Analysis - PRIVATE & CONFIDENTIAL  
PRIVATE & CONFIDENTIAL

Some comments or questions for cogitation from me on the options A-F legal and commercial analysis sheets. Excuse me if I'm stating the obvious with some of these.

In overall terms Options B/C are by far the most desirable – preserving the procurement structure we have, sorting out our problems with BB and likely to have the least impact on cost and programme (of the options which involve the departure of BB). **The financial and time analysis of the options being worked up will be very important indeed.** This leads to the question as to when the right time would be to facilitate an approach from/to Siemens and CAF with a view to taking it forward.

If the “new civils partner” were Siemens itself or BAM and they could take over the BB sub-contracts in whatever state they are in then it may cause the least further damage to the programme and therefore costs?

Do we need a legal assessment of whether option C (**tie** manage subcontractors) is deliverable under procurement law. I'm informed CEC are having a huge problem at the moment as the lead consortium member on the EICC extension has left and rather than step in and fulfil the project manager role with the negotiated subby arrangements themselves they are having to reprocur all the subcontractors first. The subcontractors have not been formally contracted yet – only letter of intent - so legally are these arrangements we can step into and manage in any case?

BB are asserting that a version of option D - whereby they stop the job for however long it takes to compete utilities and design then give us a new price and programme for construction – will offer the best outcome for CEC. I can't see how this is attractive at the moment in light of seeing no evidence that they are operationally capable to get the job done (Steven and Franks area rather than mine) or that we could expect and better commercial behaviour eg how do we prevent them just passing on their procurement failures (mispricing in their tender) to us, seeking to change the underlying risk allocations in the contract or just ending up back in commercial impasses in as year's time. It's not too late for all that to change. Management costs (prelims) between inception last May and actual start of construction restart of the job will likely be a big number and the consequential impact on the Siemens half of the supply chain may be considerable.

We must in review be able to say we protected the cash already handed over to Infraco. Setting aside CAF and SDS for this analysis we have paid BB and S a total of £55m comprising the famous upfront payments of £45m (£22.6m to each of them), £9m in prelims (£5.3m to BB and £3.9m to S) and £900k for works milestones (all paid to BB). I think there are other construction milestones which they have achieved but have not been competent to apply for. The bonds and liability caps applied to the parent companies cover this but in the unfortunate event default happens – should we call the bonds even if we think option B/C is a deliverable way forward?

The limited market response to the Infraco offer last time round is very significant when considering Option A. Has anything changed in the market which makes it more attractive or would it look even scarier with a failed consortium already?

On continuing the construction work – we certainly don't want to cause any further disruption to the BSC programme by our actions or precipitate a comms/PR nightmare by not proceeding on Princes St as planned. At the same time, the Board next Thursday (in particular CEC officers and Councillors) is certain to consider whether and how it is competent to continue if there is diminished confidence in the circumstances then prevailing regarding the

deliverability of the project within the funding available, what additional sources of funding might be examined to close any gap or whether there are scope curtailment options which retain the viability of the first phase of the project and which stakeholders might find palatable. Should we be convincing the Board that progression with the project until such time as the BB situation resolves one way or the other is on balance the right thing to do? There is also as much concern amongst stakeholders re completion date as there is with the costs and funding equation. By early next week the financial analysis of these options should be advanced enough to give further thought to these matters.

We are keeping Transport Scotland as well informed of progress on all fronts as we can. Just to reiterate one or two of the Grant offer conditions:

- The Council will perform its obligations under the Major Trams Contracts (which includes Infracore) as they fall due for performance and will not exercise any rights to terminate any of the same without first giving the Scottish Ministers 30 days notice
- The "Project" the Grant is for is defined as Phase 1a and maybe Ph1b if affordable – my interpretation is that not delivering Ph1a in its entirety is cause for the Grant to be withdrawn unless another scope and Grant therefore is agreed.
- The Scottish Ministers may refuse to make any or all payments of Instalments if they are not satisfied that the Council will use the Grant for the purpose specified

Stewart

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