

Date: 12 June 2013
Our ref: 31546.00001
Your ref:
DDI:
e-mail: Marc.Hanson@blplaw.com

Berwin Leighton Paisner LLP
Adelaide House
London Bridge
London EC4R 9HA
Tel: +44 (0)20 3400 1000
Fax: +44 (0)20 3400 1111
DX92 London
www.blplaw.com

By Email and post

Colin Smith FRICS MAPM
Edinburgh Trams
Senior Responsible Officer
on behalf of
The City of Edinburgh Council
Waverley Court, Level 2:7
4 East Market Street
Edinburgh EH8 8BG

Dear Colin,

Professional Services Agreement between Turner & Townsend and The City of Edinburgh Council – Edinburgh Tram Network

You have asked us to consider the services provided by Turner & Townsend ("T&T") to the City of Edinburgh Council ("CEC") pursuant to a Professional Services Agreement dated 20 October 2011 (the "Agreement").

In particular, you have asked us to advise on the effect of the following potential breaches of the Agreement by T&T;

- 1 the non and late reporting of the cost benefit and liability for the 22 week cost engineering exercise;
- 2 omission of track length at York Place, now being built out of sequence;
- 3 late valuation processing;
- 4 non-reporting of defective track rubber chamber junctions in three locations 150m;
- 5 non-reporting of material reused from Princes Street; and
- 6 non-reporting on the immunisation sum of £2 million. (NB this sum was brought to T&T's attention by CEC Finance Department and Bilfinger Berger).

T&T's obligations under the Agreement

T&T has extensive project management obligations which are set out in the body of the Agreement, and in Schedules 2-2 (Client's Requirement) and 2-3 (The Services and the Fee Schedule) of the Agreement. The relevant provisions are summarised below.

By clause 3.1 of the Agreement, T&T are to ensure that *"all documents which are prepared by it including any feasibility study, design or reports, drawings... shall have been prepared to the Contract*

To:
Date: 12 June 2013
Page: 2

Standard. Furthermore, CEC shall be "entitled to rely on all documents submitted by the Service Provider... in connection with the Project to which they relate."

Clause 8 of the Agreement provides that T&T shall provide the Ordered Services to the Contract Standard. By clause 9.1, this means that it will perform the Ordered Services using all reasonable skill care and diligence.

Pursuant to clause 25 of the Agreement, T&T shall "have due regard in the performance of the Ordered Services to the Client's budget requirements for the Project. The Service Provider shall take no action which may result in that limit being exceeded without first obtaining the Client's written approval for that expenditure. Further if the Service Provider becomes aware of any circumstances which may cause those budget requirements to be exceeded, the Service Provider shall inform the Client without delay."

Schedule 2-2 (Client's Requirement) states that T&T is obliged to provide "project management services in respect of the procurement and delivery through to completion of the contracts relating to the Edinburgh Trams Network Project, and all related and incidental project management services required by the client in connection with the same."

Schedule 2-3 Part 3 of the Schedule sets out the scope of T&T's services, which include, inter alia:

- 3 *Provide accurate and current information to Tram Project Board, Transport Edinburgh Limited and the Council for appropriate decision making and approvals.*
- 4 *Provide efficient and effective project management services for the Project including cost, financial programme, risk, contract and change management.*
- 6 *Provide and demonstrate to the Council that all levels of project management cost control, Health and Safety Monitoring and ROGS compliance is delivered to match and meet the employer's requirements as set out in the Settlement Agreement.*
- 7 *Ensure a continued focus on value engineering and deliver any agreed initiatives.*
- 10 *Manage the project delivery with a view to ensuring that all contracting parties meet their obligations (including protocols, traffic management, contract conditions, employers' requirements, site supervision, testing etc).*

Schedule 2-3, Part 3 lists the broad agreements to be managed which include the Infraco Contract and the Settlement Agreement.

Schedule 2-3, Part 3 (Services – Transition Plan) Section 1 states that responsibility is transferred from the tie Representative under the Infraco Agreement to T&T as Service Provider on 19 September 2011.

The obligations of tie's representative under the Infraco Agreement are therefore incorporated by reference into the Infraco Agreement.

These include the obligations to exercise the "functions and powers of tie under the Infraco Agreement..." and to "be responsible for the day to day monitoring of the Infraco Works to be performed by the Infraco..." (Infraco Agreement, Clause 25.1).

To:
Date: 12 June 2013
Page: 3

Pursuant to clause 40.1 of the Infraco Agreement, "*...if during the carrying out of the Infraco Works... tie becomes aware of any error or omission in the carrying out of the Infraco Works... tie shall notify the Infraco who shall, at its own expense and in liaison with tie, rectify any error or omission or breach...".*

T&T's failures in relation to provision of the Ordered Services

Items 1 and 6, non and late reporting of the 22 week cost engineering arrangement and the immunisation sum, appear to be failures to comply with Clause 3.1 of the Agreement and Schedule 2-3, Part 3, clauses 3, 4 and 7.

In relation to item 2, omission of track length at York Place which is now being built out of sequence, this appears to be a breach of T&T's general project management obligation set out in Schedule 2-2 and its obligation to exercise the functions of tie Representative under the Infraco Agreement, and to be responsible for the day to day monitoring of the Infraco Works to be performed by the Infraco (Infraco Agreement, Clause 25.1.1).

In relation to item 3, late valuation processing, you have informed us that T&T's late processing of Infraco's payment applications has led to difficulties in complying with CEC's contractual obligations to approve Infraco's payment applications by the date required in the Infraco Agreement. This would appear to constitute a failure to meet T&T's general project management obligation set out in Schedule 2-2 and its obligation to ensure that all contracting parties meet their obligations (Schedule 2-3, Part 3, Clause 10.)

In relation to items 4 and 5, T&T's non-reporting of defective track rubber and material reuse from Princes Street by Infraco, this appears to constitute a failure by T&T to meet its general project management obligation set out in Schedule 2-2 and to carry out the functions of tie Representative under the Infraco Agreement, and to be responsible for day-to-day monitoring of the Infraco Works, (Infraco Agreement, clause 25.1.1) and to notify Infraco of an error in its works which requires to be rectified (Infraco Agreement, clause 40.1).

In order to demonstrate that such failures constitute breaches of T&T's obligations under the Agreement, CEC must demonstrate that T&T failed to carry out the Ordered Services to the Contract Standard, i.e. with all the reasonable skill care and diligence of a consultant carrying out work of this nature.

If CEC wished to pursue T&T for breach of the Agreement, the next step would be to instruct a project manager to act as an expert witness and to report on whether T&T fell below the required standard.

CEC losses arising from such breaches

Having established a breach of T&T's obligations under the Agreement, there is a further requirement for CEC to demonstrate that it has suffered losses arising out of T&T's breaches. We set out below what we understand to be the position in relation to any losses.

To:
Date: 12 June 2013
Page: 4

T&T ultimately reported to CEC on both the 22 week cost engineering and the immunisation sum, and in any event CEC was at all times aware of these sums. Therefore it is unlikely that CEC has suffered any losses arising out of these two failures to report. Please let us know if you become aware of any such losses.

In relation to the omission of track length at York Place, it should be noted that pursuant to the Infraco Agreement, Infraco bears any liability for costs and time relating to this matter.

We understand that T&T's late processing of valuations has not caused CEC any losses to date. Should any losses arise in future, these are likely to be limited to the additional interest which may become payable to Infraco as a result of CEC missing payment valuation deadlines. Nevertheless, we appreciate that T&T's late processing is frustrating and CEC may wish to remind T&T of its obligations pursuant to the terms of the Agreement.

In relation to defective track rubber and reuse of materials from Princes Street, we understand that, although the remedial works are expected to take approximately 4 weeks, there is likely to be no effect on the contact programme. However, we consider that any liability that does arise in terms of cost and time is likely to lie with Infraco in any event.

In conclusion, we are not aware of any losses which have flowed from these breaches. It is likely that the most serious failures, for example in relation to defective track rubber and omission of track length, may result in a liability of Infraco under the Infraco Agreement, and therefore CEC should look to Infraco to recover any losses in the first instance.

Limitation

Although our current advice is that the Council should not take any formal action against T&T at this stage, you have asked us to advise on the limitation period which applies for bringing any such claims.

It should be noted that the law of Scotland applies to this Agreement and that we are not qualified to advise on Scottish law. Scottish legal advice should be taken in relation to the limitation period that applies to any dispute with T&T.

Recommendations

Given that CEC has suffered no losses to date, we do not recommend that CEC take any formal steps at this time.

T&T's detailed knowledge of the circumstances surrounding the project is likely to be of value in agreeing the final accounts of Infraco and the subcontractors. Notifying T&T at this stage that CEC may have a claim against it is likely to jeopardise the working relationship between T&T and CEC.

Our recommended course of action is that CEC should continue to keep a record of any such breaches as well as of any losses flowing from such breaches.

To:
Date: 12 June 2013
Page: 5

Once final accounts have been agreed with Infracore and the subcontractors, you should consider raising with T&T your view that certain of its services have not been performed properly, for the reasons set out above. At that stage, CEC should present T&T with a note of its alleged failures to provide the Ordered Services, with a view to seeking a reduction in T&T's fees.

We look forward to discussing this advice further with you, during our next fortnightly call. Please let us know if you require anything further before then, for example a draft letter to T&T.

Yours sincerely


Berwin Leighton Paisner

cc: Alastair Maclean
Carol Campbell

ffor\30518604.3