
From: Colin MacKenzie
Sent: 09 April 2009 11:01
To: Marshall Poulton; Max Thomson; Andy Conway; Alan Coyle
Cc: Nick Smith
Subject: FW: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP
Attachments: Update re DRP (3).doc

Importance: High

Marshall and Colleagues,

Please find attached the Note put together by Nick and myself and sent to Gill for onward transmission to Andrew Fitchie. This version is in a format which can be read by external parties. We understand that Gill will be framing appropriate questions to put to Andrew.

Regards,

Colin MacKenzie
for Council Solicitor

From: Colin MacKenzie
Sent: 09 April 2009 10:47
To: Gill Lindsay
Cc: Nick Smith
Subject: FW: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP
Importance: High

Gill,

Following the meeting yesterday, and in accordance with the Action Note, we attach hereto an appropriate Note of meeting last week to be sent to Andrew Fitchie.

You may wish to pass this on to Andrew together with a list of the questions you consider appropriate.

Could you please copy us into his response.

Regards,

Colin MacKenzie
for Council Solicitor

From: Nick Smith
Sent: 07 April 2009 11:34
To: Colin MacKenzie
Subject: RE: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP

Great minds and all that.....

Kind regards

Nick

Nick Smith
Senior Solicitor

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From: Colin MacKenzie
Sent: 07 April 2009 11:27
To: Marshall Poulton; Max Thomson; Andy Conway; Alan Coyle; Nick Smith
Cc: Gill Lindsay
Subject: EDINBURGH TRAM: STRATEGIC OPTIONS AND DRP
Importance: High

Marshall and colleagues,

As you know, Nick and I were scheduled to meeting with Andrew Fitchie and Stewart McGarrity on Friday afternoon to seek further information on the Dispute Resolution Procedure in the overall context of your forthcoming report on the Strategic Options for the Chief Executive. The meeting went ahead and we were also joined by Dennis Murray from **tie**.

MEETING WITH TIE

General Observations

SMcG indicated he believed that BB were on board for the long term, having replaced all of their senior managers. The Project Management Panel (PMP) had only been in place for two weeks. He did not expect any softening in the commercial approach taken by BB thus far. What remains unclear at the moment is how empowered the new management team is; one will have to wait and see. SMcG expects BB to see out the contract, but will take every opportunity to maximise profit from the Tram Project.

Broad Categories of Disagreement with BB/BSC

(1) Responsibility for design management and evolution. **tie** contend that BSC took on responsibility at Financial Close for "normal design development". BSC maintain that any difference between design at December 2007 and Issue for Construction Drawings is to the account of **tie**.

Dennis accepts that the design was not complete at Financial Close, but completion of that does not fall outwith "normal design development". Accordingly this matter is to the account of BSC. He argues that the onus of proof lies with BSC to show why completion, however minor a task, lies outwith the definition.

Comment: an independent expert view may be required to settle this difference.

(2) Who is liable for the delay to date ? **tie** contend it is for BSC, or at worst, pay and share. BSC say that until they are given unfettered access to the works sites they will not lift a spade. Any examination of the respective positions will require a factual basis detailing what sites were available and when.

Comment: this matter will turn largely on the facts established.

(3) Preliminaries. Parties quite simply cannot agree and no compromise is envisaged. **tie** have already granted an extension of time amounting to 7 weeks (overheads and profit based). BSC value this head of claim at twice the contractual valuation maintained by **tie**.

Comment: this would appear to be a clear cut argument in favour of tie.

(4) Unforeseen ground conditions. **tie**/CEC have responsibility, especially on-street. This is a fairly common dispute in a civil engineering contract.

Comment: resolution of this disputed matter will probably turn on the test of "reasonableness".

(5) Failure to agree estimates (" Does Clause 80 apply ?"). This relates to the notified departures, 35 of which are **tie**'s. Most of the 300 + departures are unpriced.

Action by tie

SMcG has described to Alan Coyle a methodology dealing with "worst case" scenario. **tie** are to re-run the QRA on the above mentioned five areas of dispute.

SMcG described a "tipping point" in the contractual relationship, which may be reached around the end of June 2009. This would arrive once all BSC Sub-contractors are on board; MUDFA is finished; all designs have reached IFC status. After that point it is not really in BSC's interest to be difficult in the contract execution

tie will be seeking to reinforce the in-house view on these "big ticket" issues, possibly including a refreshed legal opinion (Queens Counsel), along with undertaking a strengthened technical analysis by the end of April. However, **tie** will require additional resources to manage these tasks.

SMcG advised that **tie** would be reviewing the entire project to check for exposure to risks from unforeseen ground conditions. This would not be available before the end of April.

In a nutshell, **tie** will produce a range of cost estimates (and risk allowance) over the next few weeks. In approximately 5 to 6 weeks they will have a reinforced position to report to the TMO/Council.

ACTION FROM IPG MEETING

I have considered the Action Note from the Tram IPG meeting of 25 March. Item 3 deals with the Dispute. It is significant to note that "trust must be built". Having met with **tie** and their solicitor, as well as receiving feedback from colleagues in City Development, it is clear to me that trust does indeed need to be built within two distinct relationships. Firstly, between the Council and **tie**; secondly, between **tie** and BSC.

It is very clear that the Council (particularly the TMO) was not in receipt of full disclosure from **tie** in the latter part of 2008 and early 2009. The Chief Executive should not have had to write formally to his counterpart in **tie** requiring the provision of crucial information post declaration of the Princes Street dispute. Whilst much of that is now history, nevertheless it does highlight that **tie** need to be much more transparent with the TMO, complying with the terms of the Operating Agreement. It may be necessary, from the Council's perspective, to review the Operating Agreement and make it even more onerous for the future governance and monitoring of the Tram Project. I realise that would be a matter for the A Team and elected members.

Trust should also be rebuilt between **tie** and the consortium, notably with BB. We are led to believe that BB have assembled a team of 12 Claims Experts at South Gyle and may also have retained the services of Hill International (Claims Specialists). Assuming that to be accurate, it signals that there is a tough road ahead in this contract for **tie**, as well as for the Council through its role as authorised undertaker and funder.

Whilst the Princes Street stand-off appears to be over, it remains to be seen how that agreement works in practice. A stronger legal presence regarding the dispute has been put in place at Citypoint. Overall this has been a positive experience, but it has to be said that the role of the Council in a contractual sense is very limited. It may be stating the obvious to say that the Council is not a party to the Infraco contract, but the consequences are that the Council has no real influence or voice even if it is the paying party behind **tie**. The contract terms were developed and concluded effectively without reference to the Council; no independent validation of the contract was undertaken to vouch for the Council's interest. As I have recently pointed out to the Chief Executive, Council officers do not know if the Infraco contract is sound and in all respects in the Council's best interests as client and funder. This contract may not be robust enough to deal with a claims oriented approach by BSC, which could then impact upon affordability for the Council.

The Council cannot change the terms of the contract. It would be a welcome change in the relationship if BB were to get on board with a claims avoidance approach. However, being more realistic it would appear that parties will inevitably have recourse to DRP. The Council is not permitted to get too close to that, although it can clearly support

tie in the background. The subject matter of the contentious points comes as no surprise. The B Team clearly stated what it believed to be risky areas for the project before a premature Financial Close; some of these matters are now heading towards DRP.

Given the timescale suggested above by **tie** for their further testing of costs etc., I wonder how much can be said in the report to Council scheduled for 30 April. Certainty may not become available until early May on a number of issues, whilst DRP will not have been concluded by closure of the Council report. Other matters coming forward on DRP will take even longer to work through to a conclusion. It should also be noted that this early in the contract it must be difficult to give Council reassurance that there will be no other big ticket issues with BSC. In balancing that statement, it should be noted that the greatest area of uncertainty is in unforeseen ground conditions. Most of the risks inherent there should be known sooner rather than later.

Looking towards the Council report on 30 April, it is a moot point as to the degree of confidence which can be given to members on delivery of the project within the funding envelope. This month looks premature. Another option, looking less palatable now, would have been to stand down BSC until such time as confidence emerged, rather than allowing **tie** to press on incurring expenditure when it was known that completion of the project was showing signs in early March of being unaffordable. The Council should not be the only stakeholder which concerns itself with affordability.

Kind regards,

Colin MacKenzie
for Council Solicitor