
From: Anthony Rush [rush_aj@██████████]
Sent: 21 September 2010 09:41
To: Fitchie, Andrew
Cc: Richard Jeffrey; Steven Bell; Susan Clark; J Blair Anderson; Jim Molyneux; david_mackay@██████████; Glover, Joanne
Subject: PRELIMINARY NOTES ON BSC'S RESPONSES TO RTN'S 1 TO 3

Andrew

Further to the meeting yesterday I have now had an opportunity to read through the BSC responses on RTN's – as is BSC's habit they manage to tangle fact with fiction, misrepresentation with representation, innuendo with assertion, exaggeration and misconceived proposals. The letters will take careful consideration before they are replied to so that we can disentangle the web they weave. I haven't yet disentangled them – I will try to later today.

Timetable wise we have to reply to Rectification Plans on 1 October 2010. My own timetable in this next two weeks is tight. We also have to have an eye on the Princes Street DRP timetable. Although I suggest this is a mediation candidate.

I have another matter today and tomorrow which will take my time. I am free then through to next Monday. Next Monday I have a trip arranged – available then on Tuesday afternoon and Wednesday. I have another matter on the Thursday and I am away with my wife for the weekend on the Friday. If I am to look over any reply from us – I would like to have first drafts by Friday of this week.

From what I see there are three levels of response:

1. Covering general issues.
2. Dealing with specific representations
3. Responding to the Rectification Plans

Covering General Issues

- i. BSC question whether the matters we raise are material and adverse. In my mind the meaning of adverse is clear – a “change for the worse”. I understand that defining material is somewhat more difficult and I am sure that you will have something to say on it. But in my mind in this case it means something which we could not have been reasonably expected to have happened affecting the decision making process.
- ii. BSC seem to appear to question the meaning of “breach of contract”. In my mind it means simply a failure to perform an obligation or duty. Many breaches don't reasonably entitle the injured party to repudiate the contract. But the failure to rectify the breach may and habitual behaviour committing minor breaches may.
- iii. BSC assert that Clause 56 doesn't apply – it being only for maintenance. We need to correct them on this – but we have to consider the timing of that because they may DRP our response.
- iv. BSC presume as to our attitude towards DRP – we should deny that
- v. All of this answers their proposition that they aren't in Default (a) and therefore that our RTN's are valid.
- vi. I am not inclined to respond to the assertion that we cannot terminate – other than to point out that termination is an option not a requirement and that we have had to issue RTN's because BSC were doing nothing about remedying the defaults.

Dealing with specific representations

10.6

- i. BSC on face value appear to attempt to seek to excuse themselves on the 10.16 obligation. We have written extensively on this recently and we need to revisit what we have asserted against what they now say.

Princes Street

- ii. BSC make extensive assertions on Princes Street which require response – their primary case appears to be de facto that they were working under **tie**'s instructions. This needs a cool response and denial. I am also minded to draw their attention to Clause 80.20. But we have to consider its use in regards to the PSSA. Our response on this has to be very carefully crafted and considered.
- iii. Essential to our response is to have a clear understanding of whether BSC obtained CEC/Roads Authority Approval for the work they carried out. I note that SDS is being put up-front as having the task of obtaining Consents for the Rectification Plan. It may be that we should cover this aspect as separate issue (letter).
- iv. We need to question whether Approval of a defective design absolves BSC from responsibility.
- v. BSC make a number of technical statements. For example – the HRA couldn't have high bitumen contents because they have achieved texture depth. Ironically I can "eye-ball" high bitumen content as easy as texture depth. But texture depth is also a result of compaction as well as stiffness – high texture depth and high bitumen contents could indicate low compaction which is the underlying fault BSC admit.
- vi. They offer no test results to support their assertions. I would expect texture depth, density and material composition tests to be carried out in statistically determined numbers.
- vii. They also appear to question the practicality of achieving the level tolerance at the rails.
- viii. There may be a need to have a "battle of the experts". It appears that BSC draw on the difficulty in compacting bituminous materials by hand – something experts would agree on. Is it therefore reasonable to say that they should have infilled between the rails with concrete – topped off with a bituminous wearing course?
- ix. They raise the question of whether tie should have extended the targeted "completion date" of 29 November 2009. We need to respond to this. How was it set, what was its significance etc?
- x. They assert that "*some work was installed on a temporary basis*". What was that work and why?
- xi. We also need to address the proposition that working in inclement weather and under traffic affected quality. What was the original Programme – have BSC programmed not to work in periods of inclement weather (a vain hope in Scotland)?
- xii. All of this should be used to address letter 6728 (page 5) "BSC's performance and failures to comply with obligations".
- xiii. We also need to address the "stray current" problem.

Responding to the Rectification Plans

Extranet and 10.16

- i. It seems to me that we can say the plan is unacceptable on the grounds that it does not give details of the extranet and a guarantee of the deliverables/information which can be accessed. Moreover 10.4 requires an "appropriate log-in security scheme" – the plan should have addressed this and not left it to be decided.
- ii. In my mind we should remind them of the provisions of Clause 90.5.

Princes Street

(Brief comments – I am running out of time having had a call from Andrew).

I am minded that the rectification plan isn't acceptable inter alia for the following reasons:

- It isn't finalised – it hasn't been approved by the Planning and Roads Authorities.
- It isn't based on adequate in-situ testing data.
- The idea of cutting out 300 mm strips adjacent to the rails weakens the integrity of the surfacing.
- No proposal for transition between new track and road (doesn't refer to DMRB)

I will take a more detailed look later today – but in the meantime I trust that the foregoing may give some food for thought.

Tony

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BoW Tel [REDACTED]
Mobile [REDACTED]
email [rush.aj@\[REDACTED\]](mailto:rush.aj@[REDACTED])