
From: Donald McGougan
Sent: 11 February 2010 11:38
To: Alan Coyle
Subject: FW: Strictly Confidential and FOISA Exempt

From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 11 February 2010 10:45
To: Dave Anderson; Donald McGougan; Marshall Poulton
Cc: david_mackay@tiscali.co.uk; Tom Aitchison; Graeme Bissett (external contact)
Subject: Strictly Confidential and FOISA Exempt

Frustration at BB Behaviour

I just wanted to follow up on the board yesterday and the sense of frustration that I know we are all feeling in not being able to get BB to behave in the spirit of the contract. You can imagine that this is equally frustrating for my team who come to work to get a tram built, not to spend countless hours on legal disputes, or dealing with ever more (understandably) impatient stakeholders.

Clearly if BB were clumsy enough to commit one single significant breach of contract that would give us grounds for termination (should that indeed be our desired outcome). In the absence of such a serious single obvious breach, (which given the pressure from Siemens and the experience of BB is unlikely) our best hope is to build a case of smaller breaches which can be compiled into an overall case. I know it is frustrating not to be 'hitting them with everything we've got' as soon as we have it, but there is a real danger that doing so would be nothing more than a series of minor irritations for BB, and would prejudice our ability to hit them later with a real knockout punch. I'm not sure if you like the analogy, but trying to stop a charging rhino by shooting it lots of times with an under-powered shotgun is not as effective a shooting it a couple of times with a well aimed high powered rifle.

We are compiling our best case against BB (McGrigors are pulling this together now), and this, complete with QC opinion, is currently planned to be ready for 5th March. This is going to be extremely tight but we are all committed to this. The top London QC's we had hoped to use are not available in this timescale, but we have secured the services of Richard Keen, Dean of the Faculty of Advocates (see link) http://www.axiomadvocates.com/members.php?article_id=61 This does not preclude us from using the top London QC in the future should it come to that.

Over the last few weeks we have been putting in place the necessary steps to 'tee-up' the principal arguments we feel we should be mounting, and I am happy to talk you through these at the next briefing. BB are certainly aware of our change of approach and should be sufficiently aware from recent correspondence of the areas where we intend to pursue them. The game here of course is to give them enough of a hint to unsettle them but not declare our hand to the point where they can mount an effective defence. Their approach relies heavily on their interpretation of schedule part 4 ("this was only ever a price for a three wheeled car") and their use (in our view abuse) of Clause 80 ("this contract allows us to hold you to ransom"), and denting their confidence in these two areas is clearly vital. (Siemens have confirmed to me that they think BB's approach on clause 80 is "suicidal, and an argument they can never win"). In addition, we need to bring into play all the other areas of the contract (especially clauses 6, 7, 60 and 73) which set out the whole of their obligations to us.

The advice from McGrigors is to put our strong emotional reaction and sense of frustration that they are 'not playing by the rules' to one side and focus on the impact that BB's behaviour is having, which is primarily the late delivery of the tram project due to their failure to progress the works with due expedition without just cause, and the lack of cost certainty created by their approach to the contract. As far as the contract is concerned our best sanction is to compel BB to complete the project for the contract price and to the contract programme. Tactically of course, if

they have under-priced the job and got themselves way behind programme through their own errors, this may also be the sanction that they fear the most.

This project has been dogged by the need to 'hit the next deadline' sometimes to the cost of taking a longer term view. BB have used our sense of urgency and the need to get things done to their advantage ever since they were appointed as preferred bidder, and we need to be patient, hold our nerve and play the longer game. I know this is difficult given the stakeholder and political pressures, but as I said at the board yesterday, once we have decided where we want to get to, the critical issue is one of timing. Our apparent indifference as to whether they start the on-street works or not has definitely confounded them.

I am more than happy to cover this in more detail at our next briefing.

Regards

Richard

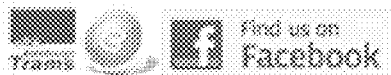
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