

**Ruaridh Connor**

**From:** Clare Norman  
**Sent:** 12 September 2005 09:04  
**To:** Ruaridh Connor  
**Subject:** FW: Contract position with PB  
**Follow Up Flag:** Follow up  
**Flag Status:** Red

Received	Issued	9	9	5
Document Number	000380			
Signature	[Redacted]			
For Information				
For Action				
File location	40.02.03.01.02 PB			

**From:** Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]  
**Sent:** 09 September 2005 20:03  
**To:** Gerry Henderson  
**Cc:** ian.kendall [Redacted] Clare Norman; Jim Cahill  
**Subject:** Re: Contract position with PB

Gerry

Landed now.

On breach of tender rules, sanction would be to curtail PB cadidacy. I need to think over whether tie could, for example set off the cost of discussing these close out matters at inordinate length with PB. Not an auspicious start if it was applied.

In terms of putting other bidders back in play, I would estimate a best case 3- 4 month delay and less than optimal outcome on contract terms/pricing. Tie has absolute discretion on terminating process at no cost or liability but no doubt PB would seek to argue they have beenacting in good faith and might seek to assert this as a defence.

Inability to close with PB might cause other unsuccessful bidder to challenge process, though unlikely.

Fast track prouement mght be justifiable on grounds of public sector cost implpications but always a risky call. In practical terms however, who is the market? MM and WSA and their offerings are in ferior on all counts.

I think what is going on here is that MJ has underestimated PB Inc. approval process very badly. 40 points is a clear violation of the tender which was technically clean of contractual qualifications after two rounds of clarifications.and PB won in part because of this and tie's ability to evaluatetheir vriant on accepted terms and conditions.

Kind regards

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

**From:** Gerry Henderson <Gerry.Henderson@tie.ltd.uk>  
**To:** Fitchie, Andrew <Andrew.Fitchie@dlapiper.com>  
**CC:** ian.kendall [Redacted] ian.kendall [Redacted] Clare Norman <Clare.Norman@tie.ltd.uk>; Jim Cahill <Jim.Cahill@tie.ltd.uk>  
**Sent:** Fri Sep 09 12:10:23 2005  
**Subject:** FW: Contract position with PB

Andrew,

I have followed Ians instructions, in terms of contact with PB.

Please consider the other points raised for DLA.

Having spoken to MJ, with the same robust stance, I believe that they

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shall be able to close out next week.

I have also outlined your comments re the contract and MJ completely accepts our and was due to respond one hour ago.

I shall keep you, and Ian posted.

Gerry.

-----Original Message-----

From: Ian Kendall [mailto:ian.kendall@dlapiper.com]  
Sent: 09 September 2005 07:40  
To: Gerry Henderson  
Subject: Re: Contract position with PB

Gerry,

I do not have the contracts with me. Therefore I am unprepared to allow any concessions to the wording. MJ's e-mail suggests 40 issues and as a result PB then pulled out of signing the SDS. The examples are not as he describes them merely wording. I am not prepared to discuss so-called agreed principles as we have gone way beyond that. He has signed a tender form stating compliance and now opens up the question as to whether this was a falsely provided certificate.

Instruct DLA to advise on damages arising under tender and certificates improperly given under the ITN.

You are therefore to relay verbally to MJ that "I am not prepared to work with his organisation if he is incapable in the UK of reaching an agreement with me and then delivering it. New York was only involved with respect to a refusal to deliver an ultimate PCG and that he will note that the issues below are nothing to do with PCG". MJ "is therefore respectfully requested to remove all issues unless specifically PCG related or already under discussion with the prior to Board meeting" - this means IPR only from the below list (you check and confirm) and get an agreed form of words from AF satisfying PB's new requirements on IPR for Tuesday morning. This is of no consequence to the to agree. If he cannot do the above he is to get the single manager in PB who has the requisite authority to close this deal into Edinburgh next week at a time when I am not in Parliament. I want you to tell MJ that "PB's actions are now costing the tram project significant loss as they are on the critical path. We reserve our position not to award this contract as we believe that PB - should they raise 40 issues they are in specific breach of the tender conditions."

Instruct DLA to tell the today what time delay happens if I crater the SDS procurement and re-bid under emergency provisions (like Liverpool). I do not believe that I will be able to kick PB out and re-open discussions with WSA or MM but make sure.

Regards,

Ian

-----Original message-----

From: "Gerry Henderson" Gerry.Henderson@tic.ltd.uk  
Date: Thu, 8 Sep 2005 17:22:53 +0100  
To: "Fitchie, Andrew" Andrew.Fitchie@dlapiper.com  
Subject: Contract position with PB

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> Andrew,  
>  
> I have copied Ian in to this e-mail and fully expect an instruction  
> overnight from him and trust that our joint stance is endorsed.  
>  
> As discussed, we are not prepared to negotiate on any element of the  
> contract.  
>  
> Please make contact with PBs Legal Advisors and continue to present  
> our  
> robust stance. I have spoken to DH and MJ today and confirmed that we  
> cannot move on the intent of the contract. If there are any cosmetic  
> alterations that may be made to resolve their fresh internal issues,  
> please advise.  
>  
> Regards,  
>  
> Gerry,  
>  
>  
>  
> -----Original Message-----  
> From: Gerry Henderson  
> Sent: 08 September 2005 17:13  
> To: 'Jenkins, Mike'  
> Cc: Hutchison, David; Jim Cahill; Ian Kendall; Stewart McGarrity;  
> Clare  
> Norman; Barry Cross  
> Subject: RE: Current Position on Ed Tram  
>  
> Mike,  
>  
> Thank you for, at last, committing something to e-mail relating to why  
> you were unable to sign the contract on Monday.  
>  
> It has been a major disappointment to us for your organisation to  
> raise  
> potential issues at this very late stage.  
>  
> Quite frankly, we are unable to change the intent of the contract and  
> our Legal Advisors, DLA, are fully aware of this. Public  
> accountability  
> dictates that any material alteration would impact on the contract  
> award.  
>  
> I have forwarded your comments to DLA and request contact details for  
> your Legal Advisors together with a description of the perceived  
> difficulty relating to IPR.  
>  
> We are happy that you are working, internally within PB, to put both  
> organisations in the position that we were at prior to Monday of this  
> week.  
>  
> Regards,  
>  
> Gerry Henderson.  
>  
>  
>  
> -----Original Message-----  
> From: Jenkins, Mike [mailto:JenkinsM@pbworld.com]  
> Sent: 08 September 2005 15:40  
> To: Gerry Henderson  
> Cc: Davidson, Stan; Hutchison, David; roddy.gordon@watsonburton.com  
> Subject: Current Position on Ed Tram

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- > Importance: High
- >
- > Gerry,
- >
- > Further to our telephone conversation this morning, I would like to
- > confirm where we are at with regards being in a position to execute
- > the
- > contract.
- >
- > Following receipt of the final document on Thursday last week for
- > final
- > checking we have received some 40 comments from the New York office
- > which need to be addressed before they can recommend to the respective
- > company boards that the contract and guarantees can be signed. Whilst
- > we
- > consider most of the issues are not of a material nature and are
- > working
- > to resolve them without affecting the current documents, four issues (
- > the first 3 discussed earlier today) need to be addressed. They are:
- >
- > 1. IPR.
- > As you are aware we have agreements in place with patent holders which
- > restricts what we are able to commit to with regards rights to IPR. I
- > have been advised that to commit to the current We therefore request
- > that a discussion take place between DLA and our advisors to agree a
- > mutually acceptable amendment.
- >
- > 2. Retention.
- > The non provision of or failure to maintain a retention bond should
- > mean
- > that as a minimum further payments would be made less the retention. I
- > have been advised that the current wording of Section 12.7.4.4 does
- > not
- > reflect this principle and needs to be amended to reflect this.
- >
- > 3. Novation Agreement.
- > Clause 7.5.1 lists out the events that may delay the SDS provider and
- > includes "by reason of any breach by the infraco of the Infraco
- > Contract". Clause 7.5.2 limits the SDS extension of time to that which
- > the Client is entitled to under the Infraco Contract. This indicates
- > that the SDS provider is not entitled to any extension of time and
- > possibly damages for actions by the Infraco which delays the SDS
- > Provider but which do not entitle Infraco to an extension. This is
- > clearly a drafting error and needs amending.
- >
- > 4. Quality Assurance.
- > Clause 6.2 includes "if in the opinion of the client" a deliverable is
- > non-compliant then we are obligated to treat this as an error or
- > omission under the contract. As the wording of this clause is reliant
- > on
- > someone's "opinion", it makes it impossible for the SDS Provider to
- > successfully challenge any deliverable being rejected regardless of
- > the
- > validity of such a rejection and requires us to rectify the issues. I
- > would like to consider with you some safeguard in this respect
- > particularly post novation when this could become a major issue with
- > the
- > Infraco and his interpretation of the agreement.
- >
- > I do not believe these to be a change of agreed principles but more a
- > need to refine the words to reflect the principles.
- >
- > We are working to clear the issues with New York on Monday morning
- > which
- > will allow recommendation to both parent company board members to
- > approve execution of the Guarantees. The earliest I expect this to be

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> achieved is Wednesday but this could take a couple of days longer. I  
> assure you that I am personally working on getting to a position where  
> we can execute this contract and am endeavouring where possible to  
> achieve the earliest resolution of this.

>  
> regards,  
> Mike

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