

01-MAR-1999 14:38 FROM BIRD &amp; BIRD

TO GRO

P.02/05

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Our Ref:

## MEMORANDUM

Your Ref:

Legally Privileged & Confidential

TO: Sarah Graham, DSS

CC: Vince Gaskell, BA  
Nick Gray, Slaughter and May  
Pat Kelsey, BA/POCL  
Dave Miller, Horizon  
Ron Powell, DSS Solicitors Branch

FROM: Hamish Sandison, Bird & Bird

DATE: 1 March 1999

RE: BA/POCL : PROJECT PLAN

Jeff Triggs

Please give me  
a ring on GRO

GRO

discuss.

DWM

1 March 99.

1. You have asked for my advice on how best to protect the public sector position, both specifically in relation to recent discussions with ICL Pathway on the project plan and more generally in any discussions which might take place between ICL Pathway and HM Treasury or other Government Department. My advice is set out below.

2. The first essential is of course to reply to John Bennett's most recent (February 25th) letter on the project plan. As in the past, my strong recommendation is that our reply should be robust and comprehensive, setting out in one place a self-contained and persuasive statement of the public sector position, not merely a formal rebuttal for the record.

3. In my absence from the office, my partner Howard Rubin is briefed to settle a reply tomorrow with the parties concerned, based on a draft which he and I have prepared over the weekend.

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K:\B\POCL\001\MEMO\GRAHAM\1711\Walden\*

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4. Following my conversation with you today, I appreciate that there may be reasons why you would wish the reply to be as conciliatory as possible, and I am very happy for you and the others concerned - with Howard's advice - to soften the tone of our initial draft. However, to protect the public sector position, I consider it vital that the following points are made clear to ICL Pathway, in whatever language you and your colleagues consider most appropriate for the occasion.

5. First, all discussions on the project plan have been and must continue to be "without prejudice." This means that the Authorities do not waive their rights and remedies with respect to earlier project delays, particularly ICL Pathway's failure to complete Operational Trial by the 21 November 1997 deadline which was agreed in CCN105.

6. Second, all project plans agreed on a working basis since CCN105 are "Subject to Contract", i.e., not contractually binding, unless and until formally agreed in accordance with the change control procedures contained in the Related Agreements.

7. What this means in practical terms is that ICL Pathway has been working at its own risk since it failed to achieve the last project plan which was formally agreed in CCN105, and that the Authorities have no obligation to pay for work done since then.

8. Secondly, as well as replying to John Bennett along these lines, I think it is essential that the same message is conveyed in any other communications with ICL Pathway which are made by representatives of HM Treasury or other Government Departments. In addition, it would be extremely helpful if these other representatives could make clear that they are not speaking on behalf of the contracting authorities (BA and POCL), and are not purporting to affect their contractual position.

9. I hope that this Memorandum is useful. I am happy to discuss - my secretary knows how to reach me.

GRO

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TX/RX NO. 2103

P03

01-MAR-1999 14:39 FROM BIRD &amp; BIRD

TO GRO

P.04/05

HXR/SJB

1 March 1999

DRAFT

Without Prejudice and Subject to Contract

Thank you for your letter of 25 February. I am disappointed - and somewhat puzzled that you should wish, at this point, to change the basis of our discussions that have served us well over the life of the project to date.

As I read your letter, it would appear that you wish to establish that a contractually binding project plan was agreed in correspondence following the Corbett discussions of last year. This ignores, however, that those discussions were without prejudice to the notice of breach of 24 November 1997 and were, in any event, by necessity subject to contract. What this meant, as we have repeatedly made clear, is two things. First, by discussing a revised project plan, the Authorities did not waive any of their rights and remedies with respect to earlier project delays including in particular, ICL Pathway's failure to complete Operational Trial by the due date of 21 November 1997 (which was agreed in CCN105). Second, unless and until formally agreed in accordance with our change control procedures, any revised project plan arising from these discussions is informal and not contractually binding.

You also state that the DSS has unilaterally varied the multi-benefit testing programme. This is not the case, in the first place, for the reasons already explained, the current testing programme has no contractual status. Secondly, quite apart from that, and as pointed out in George's earlier letter of 16 February, the failure to start Model Office Testing by the promised date of December 1998, must mean that we review the remainder of the testing programme, including the multi-benefit testing.

Continued..../

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Tremendous progress has been made by all parties in moving towards a resolution of these matters. As you acknowledge in your letter this can only progress if matters are to proceed on a "without prejudice" and "subject to contract" basis. I believe it is in all our interests to establish an agreed and practicable basis for taking forward the day to day work on the project, while discussions on the wider aspects of the project's future continue.

I hope you will consider that this is a constructive way forward and will agree to resume our meeting on this basis.

Yours sincerely

Dave Miller

cc: Vince Gaskell, BA Project Director

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