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PSC(JD)

From: Sarah Graham PFD SP Proj

Date: 3 April 1998

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## BA/POCL AUTOMATION PROJECT: HMT-LED WORKING GROUP

**Purpose of Submission**

(i) Report progress on

- the HMT-led Working Group, set up to draw together information and analysis preparatory to the inter-Ministerial meeting to decide the best route forward on the BA/POCL automation project;

- developments on project delivery since last report to Ministers at the turn of this year.

(ii) Note that the timetable implied by the Working Group's suggested plans would mean an inter-Ministerial decision before the Summer recess is unlikely.

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(iii) Propose the Minister writes to the Paymaster General urging a much earlier inter-Ministerial decision, and suggesting the basis on which this might be done.

**Timing**

For discussion at the meeting arranged for Wednesday, 8 April; and for the letter to be sent later that day, if the Minister agrees.

**Cross-Government consideration of the BA/POCL automation project: current position.**

1. Our Secretary of State wrote to the President of the Board of Trade on [ ] pressing the case for an urgent decision on the future of the project, and stressing the importance of reaching an agreed cross-Governmental view.

2. At the same time, the Chief Secretary wrote to Margaret Beckett on 3 March, proposing that, in order to help progress the necessary information-gathering and analysis that Ministers would need to take that early decision, a small Treasury-led group of officials should be set up to take forward the necessary work, including:

- an independent assessment of whether the BA/POCL automation project is technically viable; and if so, how quickly it can be completed and at what cost;

- the direct and indirect costs of cancellation and of any alternative available to deliver the project's objectives.

3. Our Secretary of State and Margaret Beckett agreed, although we did so with a strong proviso about the need to move forward quickly. Under the original proposals, the work was supposed to be completed last week.

4. HMT set up the Working Group immediately; and have commissioned papers on the

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costs of alternatives and the wider implications should the project fail. On the key issue of the independent assessment, however, progress has been more difficult.

## The Expert Panel

5. HMT had originally envisaged that the technical work of the review would be undertaken by consultants, possibly PA who reported on the project last September. The Group have concluded however that it would be difficult for consultants to address the many commercial and contractual sensitivities involved as well as the technical issues. Instead, they propose to set up an "expert Panel" to be chaired by Adrian Montague, the head of the Public/Private Sector Task force within HMT, himself from the private sector. HMT have also interviewed a number of people to serve on this panel and propose to appoint:

- Alec Wylie, former head of the Northern Ireland Social Security Agency, who has considerable knowledge of this project; and

- Bill Robins, former Director General of Communications at the MoD, who has extensive experience of large-scale IT projects, and also of security issues around IT systems.

The panel will employ PA Consulting to provide technical advice. The membership and support for the Panel have been proposed on the basis that it is likely to be acceptable to all parties; this will be confirmed.

## Handling the review

6. Initial discussion in the Working Group threw up some difficult handling questions. DSS have been very concerned that the HMT-led Group's work should not in any way compromise the position of the public sector parties (BA and POCL) in any future negotiation with ICL or litigation eg by adopting a too open approach with ICL. The most secure position for us is likely to be achieved by conducting all independent assessment under

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the terms of the 'audit' provision provided by the contract, which would ensure the Panel's report was not 'discoverable', should litigation subsequently occur.

7. DSS also propose that, following ICL being placed in formal breach of contract last November, we should no longer delay in activating the customary 13 week 'cure' notice.

8. Others in the Group are concerned that both the combined use of the 'audit' clause and the parallel issue of the 'cure' notice, could force ICL to adopt an equally defensive position, and could prejudice the outcome of the review by creating a momentum towards termination. The DSS position on these issues has been weakened by our inability so far to gain the agreement of our contract partners, POCL, to either approach, though we are still hoping to do so.

9. The Working Group have therefore looked for an approach which balances these concerns and are now pursuing the following way forward:

- we will aim to maximise co-operation by ICL in the review by emphasising the independence of the expert panel, and the opportunity this provides to ICL to put its case to Government;

- ICL will be told that the report of the panel will be confidential and they will not be shown parts dealing with BA's and POCL's performance. (Note this will not prevent ICL getting access to the report of they litigate);

- as a separate issue, the two public sector contracting parties (BA and POCL) will decide whether it is necessary to activate the 'cure' period. If they decide to do so, the Working Group would emphasise to ICL that this is intended simply to protect the contractual position of the parties, and would in no way prejudice the conduct and outcome of this review.

10. This approach will only be successful if ICL's full co-operation can be assured. If,

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nowithstanding the Group's intentions, ICL adopt an overly aggressive approach, it will be necessary to stand down the Panel and revert to a more contractual approach using the 'audit' clause.

**Current position on project progress**

11. Since we last reported to you at the turn of the year, there have been 2 significant developments:

- an independent assessment commissioned by the BA/POCL programme lawyer has provisionally reported that, in all material ways, the fault for the delays in the programme since February 1997 lies squarely at ICL's door; this supports our case for termination of the contract on grounds of ICL's breach;

- POCL/BA monitoring of the project shows slippage even on the revised timetable submitted by ICL in the Autumn; this means that the current 12 month delay may be extended.

12. At the same time, our existing serious concerns remain, most importantly:

- current plans still do not cover the full contracted functionality. There are 2 issues of particular importance, Security (Extended Verification Procedures), and NON-ISDN offices/mobile configurations. Pathway are not yet in a position to tell us HOW and WHEN this contracted functionality will be delivered.

**Where do we go from here**

13. The difficulties surrounding the independent assessment are those which led to the HMT proposal to act as "honest broker" in the first place and to try to achieve an independent assessment of the project's deliverability and affordability: POCL and ourselves

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have different objectives and therefore a different view of the seriousness of ICL slippage and failures on functionality to date, and of the risks for the future. The Working Group is now therefore being held up by POCL/BA failure to agree - the very issue which has made it difficult for us to get DTI Ministers to share our view of the urgency of a decision some months ago.

14. You may wish therefore to try and take back the initiative into your own hands, where it lay before the Alistair Darling letter of 3 March 1998. We suggest that the best way forward, without unnecesarily antagonising HMT who are our natural allies in pressing for an early decision, is to propose the following:

- to revert to our original proposal for an early Ministerial meeting to decide the best route forward, setting on one side the timetable of the current Working Group's proposed activity on the independent assessment; the Alistair Darling letter of 3 March left open the possibility of such a meeting;

- that the Working Group is asked to assemble such information as it already has on the areas within its remit, and that this material should be available for the Ministerial meeting;

- that this meeting should be designed **either** to take a decision on whether or not to proceed with the project; **or** if it feels it does not have sufficient information available to do so, to take note of the consequences for DSS.

15 An early draft of a letter to the Paymaster General along these lines is attached for your consideration.

16. At the same time, you are asked to note the BA Chief Executive's plans to protect the Department's, and therefore to some extent the Government's, contractual position by "starting the 13 week clock ticking", following up the forward notice of breach issued to ICL last November. This is explained below.

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**Issuing the 'cure' notice**

17. The DSS view is that it is now necessary that the contracting parties, BA/POCL, issue this notice. You may remember that at the point when BA/POCL placed ICL formally in breach of contract for failure to deliver the due operational trial (November 1997), it would have been usual and unremarkable to also activate the 13 week clock. This is a provision within the contract which allows the party in breach 13 weeks in which to 'cure' the problem before invoking the possibility of contract termination: POCL felt unable to agree to this normal course of action.

18. Since then, however, BA/POCL have received the draft of the independent expert assessor's report. In addition, with the setting up of the HMT-led Working Group and a clear timetable for a Ministerial decision on the best route forward, the joint BA/POCL lawyer's strong advice is that *not* to serve the 13 week notice could materially disadvantage our negotiating position whatever the outcome will be: there will be a commercial negotiation with ICL, whether Ministers' decision is to proceed or to terminate.

19. Against this background we are seeking again POCL's agreement to join us in serving the 13 week notice. However, should they not agree to do so, the BA Chief Executive plans to issue the notice unilaterally, given the paramount importance of protecting the Department's position on a commercial contract. DSS alone could stand to lose up to £30 million in lost programme savings and additional costs, for the 13 weeks we would need to continue with the contract, should Ministers decide to terminate, without having issued the 'cure' notice beforehand. There is also an issue around ICL's interpretation of the non-issue of the customary notice: their lawyers could well argue that we have tacitly accepted the breach, if we fail to serve the notice. Finally, we are not persuaded by POCL's reasons for refusing to join us: our understanding is that they accept the programme lawyer's view, but are withholding agreement as a negotiating ploy with DSS on the wider contractual implications of DSS business.

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20. It must also be noted DSS and POCL will have different degress of flexibility in future negotiations with ICL. Over recent months Pathway have sought price increases, contract extensions and a commitment to buy "other" services. It seems certain if they are to continue with the programme Government will have to offer something in these areas. DSS are fully bound by EC Gatt regulations. We cannot legally agree to price increases or contract extensions unless we accept that we have caused delay or increased cost to Pathway. Since the replan and recontracting in February 1997 this is clearly not the case. This has been confirmed by the draft independent report commissioned by the programme lawyer. Regarding "other" services the EC advert limits DSS to benefit payment. We cannot legally buy other services without further competition. Our other suppliers (particularly those bidding for ACCORD) must surely object and we believe we would be better place to obtain these services by other means. There does not appear to be a way of DSS meeting Pathway's aspirations within the existing legal procurement framework. POCL, however, believe they are not bound by EC Gatt and the EC advert allows POCL a much wider interpretation on what service they can buy under this contract.

21. It has to be acknowledged that there are presentational problems of proceeding with the issue of this notice unilaterally, both in terms of the overall negotiating position with ICL if only one party proceeds, and the way our action might be ~~-~~ albeit mistakenly - viewed by ~~the other~~ parties in the wider Whitehall and public ~~context.~~ However, in contractual terms, the balance is clearly towards issuing the notice, if necessary unilaterally. When issuing the notice we will make it clear this does not imply a decision to terminate. All options remain open.

**Summary**

22. You are asked to note:

- the current position on the HMT-led work to gather information for an inter-Ministerial decision on the BA/POCL automation project;

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- the implications of that for the timing of a Ministerial decision on the project, which could slip beyond the Summer recess;

- developments on the project's progress since our last formal report to you;

- the BA Chief Executive's planned issue of the 13 week 'cure' notice;

and consider:

- the proposed alternative timing for a Ministerial decision and way of facilitating it; and, if you agree

- the attached draft letter for you to send to HM Paymaster.

**<u>Next steps</u>**

23. A meeting is arranged for you to discuss the issues and proposed way forward with officials on Wednesday, 8 April at 2.00 pm.

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**DRAFT LETTER: 6/4/98**

Paymaster General

**BA/POCL AUTOMATION PROJECT: PROGRESS ON AN INTER-MINISTERIAL DECISION ON THE BEST ROUTE FORWARD**

1. You will be aware that Harriet and I have been seriously concerned for some time about the delays and additional costs arising from the £1 billion PFI project under which Post Office Counters were to be automated and a new secure Benefit Payment Card introduced by April this year. I first wrote to Alistair Darling about this last September; and more recently Harriet has written to Margaret Beckett urging an early decision on the best route forward given the vital importance to all concerned of the project's objectives and the serious implications for us if we do not take a decision very soon.

2. Since then, our concerns have continued to increase, both around the project progress and likely deliverability, and around our contractual vulnerability when we reach a negotiating position with our ICL partners - which we are bound to do, whatever we decide is the best route forward.

3. I know that Alistair shares our view of the urgency of a decision. In order to help progess this, he suggested an inter-Departmental group of officials under the Treasury's oversight to help in the process of providing the necessary information and analysis that needs to inform our decision; and we agreed that as part of that process

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an independent audit of the deliverability and cost of the project would be helpful. This work was proposed to be completed in 2-3 weeks - in other words, by last week.

4. I have just received from my officials a progress report of this information gathering work, and in particular the current view that an independent assessment will be more difficult than had originally been thought and will take at least a further 2 months from now to achieve. This timetable would take us up to the end of June before Ministers were being asked to consider the issues - which are many and complex - which in turn would mean that a decision, informed by the results of any necessary negotiations with ICL, even by the Summer recess would almost certainly evade us. To leave a decision so long cannot be acceptable, not only from a DSS perspective but from a wider Government point of view too we could be open to criticism if we fail to act.

5. Against this background, it is my view that we have now moved to the point where we must take a decision on the basis of the information we have; and as a first step, I propose we should re-think our plans for assembling the information we need, with a view to a Ministerial meeting at the end of this month. I suggest that the Working Group is therefore asked as a matter of urgency to set out for us the information they have available on all the issues which it was tasked to pursue, including a preliminary view from the independent Panel; and to identify where there are any significant gaps.

6. The main area where I am aware we may have difficulty in assessing the impact of options around the project, is the likely effects on POCL automation. I assume that a firm view of POCL's long-term business objectives and strategy for achieving them will be part of the current Post Office review, not due to report for some while. If in the event this were to lead colleagues to the view that we were unable to reach an agreed way forward on the information available, it should be in the full knowledge that we would in effect be taking a decision by default. If the project is allowed to continue into the Autumn, we would be weakening our negotiating and contractual position to a point where termination (except at full cost to Government) is not an option. We would also need to acknowledge the position formally with a number of important consequentials, including the re-negotiation of the contract terms with ICL

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in the interim, and, since additional funding will be an issue, consideration of how this could be arranged, given the EC/GATT restrictions on changing Government contracts. We would therefore need to address how the necessary funding could be channelled to ICL, taking account of the legal advice we are now receiving that it cannot be done through my Department.

[to be concluded in the light of the discussion with PSC(JD)]

**John Denham**

Copied to: The Prime Minister?
The Chancellor?
Secretary of State
President of the Board of Trade
Chief Secretary to the Treasury
Sir Richard Wilson

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Route 400 Mail Time 18:25:36 Date 07/04/98

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Subject: BA/POCL AUTOMATION PROJECT: PROGRESS

Please see attached is latest versions of submission to PSC(JD) and draft
letter to HM Paymaster General.

Craig Lewis - please give to George McCorkell a.s.a.p.

Data file: MATHAMEN.064
File type: DATAFILE
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Data file: CHSECTR.064
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