

# **RESPONSE TO AUDIT REPORT ON DAVIS SCREEN**

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## **INTRODUCTION**

1. This report is a response to the report produced in December 2006 by the Audit and Risk Management Section entitled, “Derby Advertising Video and Information Screen (DAVIS) Project” (“The Audit Report”) and to concerns raised by the Audit and Accounts Committee and in particular Councillor Richard Smalley, a member of that Committee.
2. I should make it clear at the outset that, unless stated otherwise, the detailed chronology of events as set out in Section 3 of the Audit Report is accepted.
3. I do not accept however the report’s findings that “a number of the Council’s Contract Procedure Rules (CPR) and Financial Regulations were not adhered to ...” (paragraph 1.25 of the Audit Report). It is important in this respect though to differentiate between when Bob Flack was dealing with the project, up to his departure on 29 August 2003, and when it was subsequently taken on by Richard Williams and his team.

## **INITIAL DEFICENCIES**

4. During Bob Flack’s time there were clear breaches of CPR such as:
  - No specification was prepared.
  - No competitive tender process was conducted or waiver sought.
  - The IT Manager was not consulted prior to purchasing the screen.
5. Additionally from the legal files there is no indication that Bob Flack drew up a business plan or risk assessment for the Project. The Audit Report certainly does not refer to one. Even more basically the following aspects do not appear to have been addressed by him except in the most cursory manner;

- **Planning Permission for the Sign**

No application was submitted until 8 October 2003.

- **Licence to Display the Sign**

There had been some contact and discussion with the Co-op regarding the use of their shop on Exchange Street/East Street (see e-mail of 30 June 2003) but no heads of terms have been agreed nor had the Estates Section been asked to negotiate any.

- **Insurance**

No quote had been obtained or requested for insuring the sign though Clare Wasteney (Legal) had specifically suggested Bob Flack contact Bill Fisher in the Resources Department on this issue (see her e-mail of 14 July 2003).

- **Technical/IT Advice**

Similarly there is nothing to indicate that Bob Flack sought IT or technical advice regarding the specification for the sign or its installation and connection though Clare Wasteney, in her e-mail of 14 July 2003, commented that, "as far as the annexure (specification) is concerned I have no comments and assume this is OK with the technical guys."

- **Communications**

No contact was seemingly made by Bob Flack with the Council's Communications Team to see what use the Council could make of the screen, for example advertising its own events.

## LEGAL AGREEMENT JULY 2003

6. Despite all these unknowns and shortcomings (acknowledged in the Audit Report at para 3.1.7) Bob Flack nonetheless signed the Agreement with Jayex for the screen on 23 July 2003.
7. It has always been my opinion (see my note of 2 October 2003 and minutes of meeting on 11 October 2004) that though the Agreement was signed by Bob Flack on behalf of “Derby City Centre Management” (DCCH) Jayex had a strong case to enforce the agreement against the Council as it was signed by a Council officer who held himself out as such and had ostensible authority to enter such agreements. This was certainly Jayex’s view (see Bob March’s letter of 17 October 2003).
8. In Bob Flack’s defence I believe that he was under a good deal of pressure from the City Centre Management Team to come up with and deliver profit generating schemes, the proceeds of which could be used to fund their events. Also his role and the geographic location of his office in Irongate may have meant that he was isolated from colleagues in the Council. I cannot however speak with authority on these matters.

## POSITION AT SEPTEMBER 2003

9. Whatever the reasons by the time Richard Williams became responsible for the project in September/October 2003 he inherited a position where the Council were in my opinion **legally committed** to an Agreement under which they were responsible for:
  - obtaining all permissions for the sign (eg planning permission, licence from the building owner) – Clause 4.
  - securing and paying for an electricity supply for the sign –

Clause 5.

- insuring the sign – Clause 7.
- paying for an ADSL telephone link and usage – Clause 6.

## **PAYMENT PROVISIONS**

10. The payment provisions in Clause 2 of the Agreement were even more problematic. They effectively required the Council to pay 24 monthly instalments of £3,750 + VAT (total £90,000) which the Council were obliged to start paying “one month prior to installation”.
11. The clock was therefore ticking on the run down to payments when Richard Williams took over the project but there were still some fundamental issues, like planning permission and the Co-op licence, to resolve.

## **RICHARD WILLIAMS ACTIONS**

12. Richard Williams, in stark contrast to Bob Flack, assembled a team to help and advise him:
  - Planning – Sara Claxton
  - Legal – John Rourke/Clare Wasteney/Stuart Leslie
  - Technical – Paul Hemmings/Trevor Brindley/Dave Sloman
  - Financial – Martyn Marples
  - City Centre – David Best

In addition he consulted:

- Estates – Steve Meynell/Jim Oldford
- Telephone Link – Ann Richardson
- Communications – Teresa Knight
- Insurance – Bill Fisher

13. With the approach Richard Williams achieved:

- Planning Permission – was applied for (8 October 2003) and granted (26 November 2003) (DER/10/03/01833)
- Signed Co-op licence – 14 March 2005
- Revised payment arrangements with Jayex – see paragraphs 16 - 25
- A direct agreement with advertising sales firm – see paragraph 28 - 32
- Signed new Agreement with Jayex – 14 July 2005
- A warranty to cover the first year – paragraphs 26 and 27.

## **CO-OP LICENCE**

14. It is accepted that some issues took considerably longer to resolve than anticipated, in particular the finalising of the Co-op licence. This was mainly due to the Co-op power supply being insufficient (See my email to Bob March of 18 Feb 2005) and the difficulties in securing a suitable alternative electricity supply for the sign which ultimately led to a separate cabinet housing having to be installed in East Street by Central Network with all the inherent delays (see my emails to Tim Findlay 29 April 2005).

15. However, the finally agreed Co-op licence had significantly improved terms to those originally proposed by the Co-op. Initially the Co-op wanted a 3 month rolling licence terminable by 3 months notice (see my e-mail of 30 March 2004 to Richard Williams). This would have meant they could have terminated the licence at relatively short notice

and left the Council with little time to find an alternative location. The final version of the licence gave a minimum 18 month period, with a requirement for a minimum 6 months notice to terminate.

## **RENEGOTIATION OF PAYMENT PROVISIONS**

16. During the period in which the licence was being negotiated with the Co-op Richard Williams, with help from other members of his team, particularly Martyn Marples and myself, renegotiated the terms of payment with Jayex.
17. Jayex's initial view was that the instalment payments (see paragraph 10) were due from 20 September 2003 as the screen was then built and ready for delivery (see Bob Marsh's letter of 17 October 2003). However by November 2003 the principle of the Council buying the screen outright had been agreed and by June 2004 a price of £80,500 had been agreed payable as follows;
  - ❖ 70% of the total sum when the revised agreement was signed
  - ❖ 20% on the screen arriving in Derby
  - ❖ 10% 30 days after installation.
18. However as, time went by and no new agreement was signed Jayex got increasingly concerned at receiving no payment (see David Best's email of 18 August 2004 and Clare Wasteney's of 7 October 2004) and by 5 October 2004 Jayex wanted immediate payment of the total price (see Bob March's email of 5 October 2004).
19. By this time the Council team also had concerns over the revised payment prospects (see minutes of meeting of 11 October 2004). Firstly because no one from the Council had inspected the screen at this point and secondly, even though planning permission had been obtained at this time, the Co-op licence was still unsigned. There was therefore no guarantee that there was anywhere to put the sign.

20. It was agreed internally that we shouldn't make payments until the Co-op licence was signed and the screen inspected. However it was considered necessary to agree some payment arrangements with Jayex in order to prevent them commencing legal proceedings which had already been threatened by Bob March in his letter of 17 February 2004. It was also felt that the offer of payment could be used to secure revised and improved warranty proposals from Jayex (see paragraphs 26 & 27).
21. Eventually in November 2004 (see Richard Williams email to Bob March of 2 November 2004 and Bob Marsh's response of 5 November 2004) it was agreed with Jayex that the payments would be rescheduled on the following basis:
- ❖ First payment of £49,350 (70%) - on;  
(a) satisfactory inspection of the screen  
(b) Co-op signing the licence
  - ❖ Second payment of £21,150 (20%) - On installation of the screen
  - ❖ Third payment of Of £10,000 (10%) - When the screen has been installed and is confirmed to be working.
22. However though the screen was inspected and found satisfactory in November 04 (see Paul Hemmings email of 29 November 04) there were unexpected delays in signing the Co-op licence and in February

2005 Jayex again raised concerns that they had received no payment (see my email of 11 February 2005 to Richard Williams)

23. Following discussions with Richard, Martyn Marples and Paul Dransfield it was agreed to pay Jayex £10,000 immediately out of the proposed first instalments of £49,350 on the basis that the screen had been inspected and found to be satisfactory and the delays in signing the Co-op licence were no fault of Jayex's (see my email to Bob March of 18 February 2005).
24. In the event the Co-op licence was signed (14 March 05) before the £10,000 payment was made so the first instalment of £49,350 was made in full on 31 March 2005.
25. The second and third instalments were made in August 2005 shortly after the installation and commissioning of the screen in July 05.

### **Warranty**

26. The Council team also managed as part of the negotiations on the payment to persuade Jayex to give a warranty that the screen would be free from defects in material and workmanship for a 12 month period from the date of commissioning (see Richard Williams' email to Bob March of 20 October 2004).
27. Jayex had argued against this saying it exposed them as the manufacturer's 12 month guarantee had ran out in October 2004 because the screen had been stored by them for 12 months prior to that date. However they finally accepted the Council's proposal in late October 2004 (see Bob March's email of 25 October 2004 to Richard Williams) as part of the revised payment arrangements. This is formally included in the agreed Heads of Terms signed in July 2005 (clause 1.4).

## **Agreement for Advertising Sales**

28. The position on this has not been clearly understood or set out in the Audit Report. Crucially under the terms of the Agreement between Jayex and the Council (CCMT) of 23 July 2003, Jayex, and **not** the Council were responsible for appointing the nominated sales company, at least for the first 12 months (Clause 3). Jayex initially appointed City TV – Belfast but by May 2004 (see minutes of Project Team Meeting on 19 May 2004) had changed this to City Publications in Cardiff. My file does not reveal the reasons why but the Audit Report states (paragraph 3.2.5) that it was agreed at a meeting on 25 March 2004 between Richard Williams, Bob Marsh and David Best.
29. The Council however were unhappy with this and wanted a direct relationship with City Publications. We also considered City Publications proposed cut of the sales revenue at 65% (see City Publication's letter of 9 August 2004) to be excessive. The latter was subsequently reduced to 35% (see minutes of team meeting on 11 October 2004).
30. Once the date for installation of the screen was known with some certainty City Publications were contacted by the Council to agree a direct relationship (my email of 24 May 05 to Roger Fry).
31. As part of the negotiations the period of the agreement, originally proposed by City Publications as 2 years (see letter of 9 August 2004) were amended to 18 months so it tied in with the length of the Co-op licence and meant the Council would not be tied to the Sales Advertising Agreement if the Co-op decided to terminate the licence.
32. The Heads of Terms of agreement with City Publications were finally signed on 6 October 2005.

## CONCLUSION

33. I have set these matters out in some detail because I believe they show that having found themselves in what the Audit Report recognises was a “difficult position” (paragraph 1.2.4) the Project Team lead by Richard Williams, addresses and significantly improves the Council's position (see paragraph 13 of this note).
34. However no one, not least myself, will contest that the project was perfectly managed. However what the Audit Report fails to take account of in its criticism was that Richard Williams and his team had little room for manoeuvre after Bob Flack left. They were stuck with Jayex and their screen and the time to draw up detailed plans and specifications had passed. Jayex were already by October 2003 pressing for delivery of the screen and for payment to be made and were soon threatening legal action.
35. **This then takes us to the nub of the issue which is this: when Bob Flack signed the agreement with Jayex in July 2003 he in my opinion legally committed the Council to it.**
36. This is a fundamental point. A point that the Audit Report hints at or makes oblique references to, usually when referring to the CCMT not being a legal entity (see paragraphs 1.2.3 & 3.1.8, 3.1.11 & 3.1.13) but never fully grasps. Indeed at paragraph 3.1.6 the Audit Reports bizarrely seems to suggest that no agreement was “entered into”.
37. The significance of that Agreement in July 2003 is that everything thereafter was **not** a procurement exercise. A contract had been signed. A binding commitment to Jayex given. There was no opportunity then to go off elsewhere and seek alternative bids. It was a case of making the best of a bad job.

38. The negotiations with Jayex after Bob Flack left did not breach Contract Procedure Rules as Contract Procedure Rules did not apply nor could they. To call them “post-tender negotiations”, as the Audit Report does, is wrong. Post tender negotiations are undertaken after bids are received but before the contract is awarded. This was not the case here.
39. The Jayex screen project was rightfully the subject of an Audit Report. It has been accepted by all involved that there are lessons to be learnt and the report is right to highlight, as it does, (at paragraph 4.1 and recommendation 1), the Governance of Partnership issues and, to an extent, the Project Management deficiencies (paragraph 4.10 and recommendation 12) but it is misconceived and wrong to say that Contract Procedure Rules were breached after Richard William’s team took over responsibility for it.