

STATES OF JERSEY

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COMMITTEE OF INQUIRY INTO TENDER PROCESS AND AWARD OF BUS SERVICES CONTRACT: RESPONSE

**Presented to the States on 30th August 2005
by the Environment and Public Services Committee**

STATES GREFFE

RESPONSE TO BUS COMMITTEE OF INQUIRY REPORT (R.C.58/2005)

The Environment and Public Services Committee is pleased to be able to respond to the report produced by the Committee of Inquiry. As the report contains much detailed analysis, this response will concentrate primarily on the recommendations as set out in Chapter V. This does not necessarily imply that the Committee agrees with or supports all the comments made within the body of the report.

There are 2 general comments which the Committee wishes to emphasize before considering each recommendation in turn –

1. A number of the recommendations made have already been acted upon. Both the Department and the Committee acknowledged that there were lessons to be learnt from the bus tendering process and had already instigated changes in project management and departmental administration prior to the appointment of the Committee of Inquiry.
2. The Department has submitted both written and oral evidence which the Committee considers contests some of the conclusions and recommendations of the Committee of Inquiry. The Committee is disappointed that this evidence appears to have been ignored.

References to ‘the Committee’ in this response refer to the Environment and Public Services Committee. The Committee of Inquiry will be referred to by its name in full.

Recommendation 1

Any project that involves the use of external consultants should have a proper monitoring programme, with a senior manager of the sponsoring Department made responsible for managing the relationship with the consultants and monitoring their activities. Such a manager should have adequate time and other resources to be able to perform his duties effectively.

The Committee does not disagree with this first recommendation but is unsure what the Committee of Inquiry is implying by the word ‘monitoring’. Assigning a senior member of staff to manage and oversee the contract of external consultants is sound management practice and the Committee ensured this was in place for this particular project. However, that senior member of staff did not replicate the work of those consultants – he oversaw their work, ensured deliverables were received on time, was the first point of contact for any queries they had, ensured relevant information was forwarded to them and that they were involved at necessary meetings or deliberations. He managed the relationship and monitored their activities as the recommendation states. Duplicating a consultant’s work would be an ineffective use of a senior officer’s time.

The Committee fully endorses the final part of this recommendation and accepts that adequate time and resources were not put in place to ensure a more effective project management role. The outcome was achieved but only by departmental officers working exceedingly long hours and far beyond what an employer should reasonably be asking of their staff. The Committee has ensured that lessons were learnt from the Bus Tendering process – for example, dedicated resources were put in place to draft the Solid Waste Strategy, which has recently been approved by the States.

Recommendation 2

Any project that relies on the enactment of legislation to grant the Committee (or, in future, the Minister) the necessary powers, and that is run in parallel with the operational part of the project, must be planned and monitored carefully to ensure that timetables are set with reference to the legislative process and that the two parts of the project do not lose synchronisation with one another.

This Committee endorses this recommendation which emphasizes that projects which are reliant on new legislation should be very carefully planned and monitored so that each element is kept in synchronisation. A Risk Analysis on this project undertaken in July 2001 identified this aspect as a potential issue especially as it is outside the direct control of an individual Committee. Furthermore, the Committee has no control over decisions

of the States.

The Department advised the Committee of Inquiry of the actions taken to ensure that the law drafting element was kept in parallel with the tendering process in a letter dated 19th July 2005 which commented on the draft report. The Department wrote –

"Once the Bus Strategy was approved at the end of July, discussions were held with the Chief Officer of Policy and Resources to secure law drafting time. While it was agreed that this time would be found, it was clear that it would not be before October, 2001. This, together with other matters, then meant that a revised date for new operations to begin was set as September, 2002. (The Bus Strategy had set the time as spring 2002.)

Andium was appointed; the format of the revised legislation approved in mid-October and the drafting instructions forwarded to the Law draftsman on 26th October, in the knowledge that drafting had to start in November to meet the planned date of approval of the revised Regulations at the end of January, 2002.

While emergency changes to legislation resulting from the 9/11 terrorist attacks delayed the start of drafting, a model law was produced on 22nd November. A series of revisions and consultation with DVS together with a change in PSC, (R. Hacquoil took over as President) meant that the model law was only approved by PSC at the beginning of February, following which the Law Draftsman prepared draft Regulations. It was also necessary to determine the level of fine to be set for certain infringements, particularly in aspects of the law administered by Home Affairs. The Attorney General was asked to establish the level of fine.

The draft Regulations were approved by PSC on 25th February (although a further small change to wording of an article was approved on 18th March) and lodged in the States on 19th March. It was always envisaged that the revised legislation would be in place prior to appointing the operator.

The Bus Strategy Steering Group and PSC were apprised of the revised timetable throughout this period."

The Committee firmly believes that the delays in law drafting, and the subsequent delay in announcing the Committee's preferred operator, were not a result of any mismanagement within the Department. Those delays were, however, reflective of the inherently uncertain and inexact nature of the law drafting process.

Recommendation 3

Careful consideration should be given as to what should be done in the event that the States do not enact the necessary legislation as drafted (or at all).

The Committee agrees with this recommendation but reminds the Committee of Inquiry that the legislation changes required to allow competitive tendering for the public bus service were effectively approved 'in principle' by the States as part of the Bus Strategy – part (c) of the Bus Strategy (P.104/2001) states –

"to charge the Public Services Committee to prepare and present to the States for approval amendments to the Motor Traffic (Jersey) Law 1935, as amended, and any other legislation as appropriate, to give effect to the strategy ... "

The Committee considers that the Committee of Inquiry has not recognised that a States decision had been made and that an individual Committee is entitled to expect that decision to be supported at subsequent meetings. The Committee does acknowledge that the States could reject something it has asked a Committee to bring forward but, as far as the tendering process was concerned, the relevant Committees which were affected by the new law were consulted and there was a 'political will' to see this project through.

The Committee does accept that, with the benefit of hindsight, it would have been helpful if a timetable of events had been included within the Bus Strategy so the States could have acknowledged the timescales at that time.

Recommendation 4

In the absence of “Transfer of Undertakings: Protection of Employment” Regulations such as are in force in the United Kingdom, in the event that a Committee or Minister has to give an undertaking as to future terms and conditions of employment it should be “on terms no less favourable than those in force on [the operative date].”

The Committee does not understand how the inclusion of the term ‘no less favourable than’ will ensure that the shift allowance experience cannot recur. If the tender documents had included this phrase, the Committee believes the issue could still have arisen and tenderers could have submitted bids on differing terms and conditions but still fulfilled the ‘no less favourable than’ clause.

However, the Committee does accept that absolute clarity as to employees’ terms and conditions must be ensured in any future tendering process. To this end, the Committee had already amended the Conditions of Contract for Local Bus Services agreed between the current operator and the Committee (of which the Committee of Inquiry had received a copy) to include a clear statement regarding the operative date. Clause 18.3, which refers to ‘Consequences of Termination’, includes the following conditions –

“On expiry of the Contract . . . the Committee shall . . . require in any tender documentation that the incoming service provider submit proposals that ensure that all of the Contractor’s staff . . . are taken on by the incoming service provider on the same terms and conditions as apply at the date of the issue of any tender documentation . . .”

What this revision does is to ensure that ‘the operative date’ is not some months in the past – as it was during the tender process under review where the 1st August date had been agreed by the States during the Bus Strategy debate – but is current and relevant. The Committee believes this will ensure that all tenderers submit bids on the same basis and any change to terms and conditions can then be accounted for subsequently.

Recommendation 5

Where the actions of third parties could materially affect an ongoing project, a suitable person from within the sponsoring Department should be assigned to monitor those activities and report all developments to the person responsible for the overall management of the project.

The Committee is unclear as to whom the ‘third parties’ referred to in the recommendation relates.

If the Committee of Inquiry is referring to the activities of external consultants on the project, it could not identify a material difference between this recommendation and the first one. The Committee does not accept that a departmental officer should duplicate the work of a consultant who has been engaged to offer professional advice and undertake specific tasks. Moreover, the Committee of Inquiry acknowledged this fact in its deliberations when it agreed with Mr Muir that –

“having regard to the role and experience of Halcrow, it was unnecessary and it would have been inefficient for Mr. Muir to have duplicated the work of the consultants by conducting a detailed review of the tender documents.” (Ref. 3.71 Col report).

Another interpretation of the ‘third parties’ could be, for example, the Transport and General Workers Union who negotiated an agreement which materially affected the terms and conditions of the bus drivers at that time. If this was the intention of the Committee of Inquiry, the Committee does not disagree with the recommendation but would submit that it is not necessarily easy to monitor activities from a distance. Furthermore, all parties would have to be in agreement that the Department has access to information which may be of a confidential nature.

Recommendation 6

The Committee should take immediate action to determine whether the £186,000 payment in respect of the shift allowance and of appropriate sums for any services rationalised as a part of the compensation for the

shift allowance subsequent to year 1 can be recovered, either from Connex or from any other person. The Committee should also seek advice on whether they should seek to negotiate appropriate adjustments to the contract price in respect of any on-going reduction in services.

The Committee accepts this recommendation in the light of the Committee of Inquiry's report and the evidence provided to it. The Committee will be seeking the advice of the Attorney General as to what options are available to it.

Recommendation 7

It is clear that the Committee's accepted liability for payment of the Shift Allowance for the first year of operation of the Bus Service Contract without the benefit of considered legal advice. We therefore recommend that no Committee, Minister or Department should accept a liability without taking proper legal advice.

The Committee cannot disagree with this recommendation as it is not only good practice but also the norm as far as this Department and Committee is concerned. However, evidence has been submitted to the Committee of Inquiry which clearly shows that both "considered" and "proper" legal advice was taken on this matter. In the same letter referred to in Recommendation 2, the Department advised the Committee of Inquiry of this fact—

"The Department did seek advice on the claim from the Law Officers. This advice was sought in the letter dated 27th March, 2003. The Law Officers initially responded by e-mail on 17th June and provided further oral advice that settlement of the claim in the context of an ongoing contractual relationship was a more pragmatic issue than a question of pure legal analysis.

It is understood that the LOD will confirm such advice."

The Committee rejects any suggestion that proper legal advice was not taken on this matter.

Recommendation 8

Departments should maintain readily accessible, accurate and validated records of all projects undertaken, and management should foster a culture of reliance on validated fact rather than received wisdom.

The Committee agrees that relevant records should be maintained of all projects and would argue that such records were maintained in regard to this project. However, the Committee does not accept that the Department had a culture of 'received wisdom'. The Department and Committee do, at times, rely on the professional expertise and advice received from its external consultants. As stated above, it would be poor use of resources to replicate and double check a consultant's deliberations and resultant advice. That advice is based on their previously acquired knowledge together with their professional expertise in particular fields. The Committee does not consider this to be 'received wisdom' and does not accept that such a culture exists.

Once again, the Department commented to the Committee of Inquiry in this regard –

"The term 'received wisdom' is used throughout the report. This term should be explained in more detail. The Department's understanding of the context is that the Public Services Committee (PSC) and Department relied on the advice provided by others rather than gathering its own facts and evidence. Reports were prepared on the facts and evidence available to the Department and PSC from its advisers and its partners. When dealing with professional organisations, integrity is expected. Similarly, communication is a two-way process and if one party does not communicate, having previously indicated that it would if a matter of interest arises, then it is not unreasonable for the other party to assume the status quo.

It is speculative to assume that all of the evidence and facts available to the Committee of Inquiry (CoI) could have been gleaned from the various parties involved at the time."

As mentioned above in relation to Recommendation 5, the Committee of Inquiry agreed that it would have been inefficient for a senior officer to have duplicated the work of external consultants in so far as reviewing the tender documents was concerned.

Recommendation 9

Senior management within each Department of the States should ensure, so far as possible, that all relevant information is available to Committee Presidents or Ministers when Answers to Questions from States Members are being prepared.

In as far as it practical and possible in the timescales, senior managers always ensure all relevant information is available to Presidents. It is inconceivable that officers would not ensure this would happen as a matter of course. Senator E. Vibert asked 18 questions of the then President of the Committee. Timescales for collating the answers to States Questions are very tight and, although every effort is made to ensure all relevant information has been stated in the answers to the questions or communicated to the President, in this case the information was incomplete. This was not done knowingly on the part of either the President or the Department.

Recommendation 10

The Greffier of the States should put in place a procedure to ensure that, in the event of an Inquiry having to examine the records in his care, no alteration can be made to those records (even in such details as the numbering of pages) without the persons conducting the Inquiry being made aware of the proposed alteration and the reasons for it.

The recommendation is wholly directed to the States Greffe and the Committee has no comment to make.

Recommendation 11

Whenever a sub-committee, steering group or similar subordinate body has been appointed by a Committee or other superior authority for specific purposes, separate and detailed minutes should be made and preserved of the proceedings of the subordinate body including the bases for its decisions and recommendations.

The Committee supports this recommendation but notes that the Department did seek support from the States Greffe to minute all meetings of the Bus Strategy Steering Group but such a resource was unavailable. The Committee and Department has already recognised the importance of ensuring staff are given sufficient time and other resources to allow, for example, full documentation of meetings and this has worked very successfully for the drafting of the Solid Waste Strategy.

Furthermore, as the Department advised the Committee of Inquiry in its letter of 19th July 2005, the Bus Strategy Steering Group mostly met in the course of formal Committee meetings and therefore decisions were recorded in the main Committee minutes.