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**From:** Steven Bell  
**Sent:** 18 March 2008 16:31  
**To:** Geoff Gilbert  
**Subject:** FW: Close out discussions 13 March 2008: Commercially confidential: FOI(S)A Exempt

**Importance:** High  
**Sensitivity:** Confidential

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**From:** Steven Bell  
**Sent:** 14 March 2008 16:34  
**To:** 'ian.laing@pinsetmasons.com'; 'Richard.Walker@bilfinger.co.uk'; 'Flynn, Michael (Siemens TS)'  
**Cc:** Stewart McGarrity; Willie Gallagher; Jim McEwan; Geoff Gilbert; Fitchie, Andrew; Dennis Murray  
**Subject:** FW: Close out discussions 13 March 2008: Commercially confidential: FOI(S)A Exempt  
**Importance:** High  
**Sensitivity:** Confidential

The finalised proposal as discussed at 14.30 this afternoon is:

### 1. Value Engineering

Amend the Value engineering wording set out in Section 5 of Schedule 4 to reflect the principles agreed with Dennis Murray on 13/3/08 and as emailed to Scott McFadzen and Ian Laing on 13/3/08.

### 2. Network Rail Immunisation

Network Rail Immunisation is included within the InfraCo Contract as per letters exchanged with Siemens and followed up by emails Bell/Flynn on 14/3/08.

### 3. Liabilities

- i. **tie** will indemnify BBS against third party claims made against BBS which arise as an unavoidable consequence of BBS executing the InfraCo works in accordance with their obligations under the InfraCo Contracts. (New Clause)
- ii. BBS will indemnify tie/CEC against third party claims made against tie/CEC arising from BBS/ BBS Party negligent acts (78.1)
- iii. BBS will indemnify tie/CEC against third party claims made against tie/CEC arising from BBS breach of contract [REDACTED] (78.1.2)

Third Party Agreements and commitments identified from the contract are not subject to the foreseeability test.

#### 4. Milestones and Consents

Pay 90% of milestone payments on Sectional Completion until all necessary consents are in place and pay the retention of 10% on receipt of the same

#### 5. Post tie Default

Agree post tie payment default occasioning suspension (Clause 88.9.2?) at 60 days

#### 6. Schedule 16

Network Rail possession related costs schedule 4 / Schedule 8 costs as a result of InfraCo fault is agreed at a cap of £40k per individual incident up to a cumulative sub-cap of £500k.

#### 7. Dispute Resolution:

- a. The duration of the IRP is 20 days
- b. If BBS subcontractors do not accept DRP flowdown, HGRCA compliant adjudication, to be permitted
- c. Tie not to be exposed to any additional costs by reason of adjudication to DRP to assist BBS supply chain.
- d. Final Account to be provided by Service Commencement. Any claims submitted after 6 months from Service Commencement are excluded.
- e. Drafting subject to the DLAP working through the agreed points with Pinsett Mason / Biggart Baillie
- f. No revision to TSA/TMA.

Items 1,2,4,5,6 & 7 are agreed with CEC. The item on 3 highlighted in red is not and we would like a call now to discuss immediately.

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**From:** Steven Bell  
**Sent:** 13 March 2008 20:48  
**To:** flynn.michael@siemens.com; 'Richard.Walker@bilfinger.co.uk'; 'Scott.McFadzen@bilfinger.co.uk'  
**Cc:** Fitchie, Andrew; Jim McEwan; Geoff Gilbert; Dennis Murray; Graeme Bissett (external contact)  
**Subject:** Close out discussions 13 March 2008: Commercially confidential: FOI(S)A Exempt  
**Importance:** High  
**Sensitivity:** Confidential

Gentlemen

For the record I wanted to document the proposals put forward to BBS for resolution of the outstanding points on InfraCo Terms and Conditions, Schedule 4 and Network Rail Immunisation.

I believe this can be closed out in acceptable form for both of us with a final Principal's call tomorrow morning at 09.30. Please confirm your availability and intent.

**Original proposition from tie**

tie proposes that:

If BBS will:

- 1. Retain the wording as specified in the Wiesbaden agreement with respect to Value Engineering

And

- 2. Include the wording on Network Rail Immunisation as per discussion with Siemens covered in attached note

And

- 3. Agree a summary of the "Contract Package Status Matrix"

Then tie will:

- 8. Remove requirements on the disputed liabilities (IPR and 3<sup>rd</sup> party obligations) that persist beyond issue of the Reliability Certificate for 3<sup>rd</sup> Party Claims

And

- 9. Pay 75% of milestone payments on Sectional Completion until all necessary consents are in place and pay the retention of 25% on receipt of the same

And

- 10. Agree post tie payment default occasioning suspension (Clause 88.9.2?) at 60 days

And

- 11. Finalise Clause 16 with a 10% sub cap on possession related costs

And

- 12. Dispute Resolution:
  - g. The duration of the IPR is 15 days as per tie's earlier proposal
  - h. In respect of the HGCA disapplication, tie agree that move direct to adjudication where BBS provide QC opinion that the disapplication in the Tram Acts does not apply to a particular subcontractor's claim
  - i. Time bar on bring claims remains at 3 months
  - j. All other provisions remain as drafted

Note: Already proposed by tie and BBS on 13/3/08:

- 1. Where it is technically impossible for Infracore to comply with a Third Party Obligation, tie provide relief via a tie change (drafting available)
- 2. Forth Ports and Stakis Hotels indemnity in Clause 78.4 and 78.5 deleted (clause refs as Suzanne Moir draft received on 9/3/08)

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**Counter from BBS (Text added in Red)**

BBS proposes that:

If BBS will:

1. ~~Retain the wording as specified in the Wiesbaden agreement with respect to Value Engineering. Amend the Value engineering wording set out in Section 5 of Schedule 4 to reflect the principles agreed with Dennis Murray on 13/3/08.~~

And

2. Include the wording on Network Rail Immunisation as per discussion with Siemens covered in attached note \* no comment made by BBS\*

And

3. ~~Agree a summary of the "status Matrix"~~

Then tie will:

1. ~~Remove requirements on the disputed liabilities (the obligation to indemnify in respect of IPR and 3<sup>rd</sup> party liabilities obligations) that persist beyond issue of the Reliability Certificate for 3<sup>rd</sup> Party Claims and indemnify the InfraCo in respect of any such liabilities (Where Infraco does not make recovery under the OCIP Insurance)~~

And

2. ~~Pay 75~~ 90% of milestone payments on Sectional Completion until all necessary consents are in place and pay the retention of ~~25~~ 10% on receipt of the same

And

3. Agree post tie payment default occasioning suspension (Clause 88.9.2?) at 60 days

And

4. ~~Finalise Clause 16 with a 10% sub cap on possession related costs~~ Agree that the Infraco shall have no liability for possession related costs.

And

5. Dispute Resolution:

- k. The duration of the IRP is 15 days as per tie's earlier proposal
- ~~l. In respect of the HGCA disapplication, tie agree that move direct to adjudication where BBS provide QC opinion that the disapplication in the Tram Acts does not apply to a particular subcontractor's claim~~
- m. Time bar on bring claims ~~remains at 3 months~~ - none
- n. All other provisions remain as drafted in PM mark up of [10/03/08]

End of BBS response

Tie cannot accept this counter proposal in its current form but can see a possible solution. We must achieve that tomorrow morning. I have discussed issues on Immunisation with Michael Flynn and await a revised proposal later this evening.

Steven

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