
From: Fitchie, Andrew
Sent: 14 February 2010 23:13
To: 'rush_aj@[REDACTED]'
Subject: Re: DRP CEO Meeting with Richard Walker - 12thFebruary-STRICTLYPRIVATE & CONFIDENTIAL

Sensitivity: Confidential

Legally priveleged

Sea anchor- agree. It is hellish for the Project guys to have to face off with BSC and provocation is not difficult.

TS- is still bossing the largest Scottish infrastructure contracts, the rail projects (which include Borders (for better or worse), Forth Replacement, E to G electrification Aberdeen Ring and M80. Maybe pipeline will slow but despite aspirations SFT is not a substitute implementer and there is no specialist client left in SG itself, save on pure roads.

I have often wondered how long TS clockwork was wound for but so far I do not think there any real signs of a central will to dismember TS and close the next GE comes, nor will there be..

RW reply- regret, not sure I ever saw your draft for this. Repudiatory breach has to be a tie Default (the contract does not permit acceptance of repudiation outside of (i) tie non payment or (ii) tie mate rail breach which frustrates or impedes material part of Works for 45 days. I will forward you my note to Steven earlier tonight (sorry not on blackberry) on this. BSC would have to argue combination of non p*yment and material breach frustrating their efforts. This would have to be MUDFA access block plus Prelim disallowance (Negative Certification). I consider that on the latter, tie needs to tread carefully around Clause 88.9 which gives Infraco a suspension right (after 90 days if tie does not pay (60 if the CEC guarantee is invoked) and tie has not give an effective withholding notice under 69.3 (set off). If I were Pinsents that is where I would go.

Talking about "finding a repudiatory breach" is not smart. If you can capture this, very good.

Agree on disclosure/confidentiality a side show and none of it goes to termination or Best value arguments.

Kind regards
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From: Anthony Rush <rush_aj@[REDACTED]>
To: Fitchie, Andrew
Sent: Sun Feb 14 20:30:51 2010
Subject: Re: DRP CEO Meeting with Richard Walker - 12thFebruary-STRICTLYPRIVATE & CONFIDENTIAL

Thanks Andrew - I am sure we are aligned on this. I have never seen anybody manipulate the press.

I am interested in your thoughts about TS and SG having influence on BB. My intelligence is that TS have a waning influence on transport policy. Please expand.

I think you are aware that I feel strongly that we have to show consistency in our dealings - that's why we should put forward an O2 solution having entered in OSSA.

I am keen on the letter I drafted earlier which placed Walker on the record (unless he denies) and by implication BB and Siemens unless they disown him.

He will be on the record of wanting to get out of the Agreement by "finding" a repudiatory breach. Now

either we are not been told something or neither of us can see what that could be.

On the matter of confidentiality the redress would be by way of damages - passing facts to stakeholders can hardly give BB grounds for damages especially if those facts are not exempt under FOISA. The converse applies of course.

Your "sea-anchor" analogy is apt to me just as I look out on the stormy Atlantic. I think we are also aligned in attempting to get our colleagues to resist retaliation.

Tony

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From: "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>
Date: Sun, 14 Feb 2010 20:06:10 -0000
To: <rush_aj@[REDACTED]>
Subject: Re: DRP CEO Meeting with Richard Walker - 12th February-STRICTLYPRIVATE & CONFIDENTIAL

Tony

I think we are aligned on FOISA. The thrust of the advice is that playing with media and subtle briefings about BSC poor behaviour/contracting needs very careful control. Richard is focused on being proactive with media.

Stake holder information must be provided absolutely, but the timing and precise content of this is vital for tie and your commercial strategy. My role here is to be as responsive as possible but also to be a sea anchor on tie being too public with comment on BSC but sometimes I simply do not have the whole picture ie- is what tie management need to do quickly to react/comment translating well (legally) into a media briefing?.

I would not underestimate TS/SG's influence on BB.

Kind regards

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From: Anthony Rush <rush_aj@[REDACTED]>
To: Graeme Bissett <graeme.bissett@[REDACTED]>; Fitchie, Andrew; David Mackay <david_mackay@[REDACTED]>; Richard Jeffrey <Richard.Jeffrey@tie.ltd.uk>; Stewart McGarrity <Stewart.McGarrity@tie.ltd.uk>; Steven Bell <Steven.Bell@tie.ltd.uk>

Sent: Sun Feb 14 19:22:06 2010

Subject: Re: DRP CEO Meeting with Richard Walker - 12th February-STRICTLYPRIVATE & CONFIDENTIAL

I will reply to Andrew's email later when I can look at it on my lap-top.

But two things leap to mind.

Firstly FOISA de facto establishes what can be in the public domain. If we embark on any bulletin we would have to make certain that there is not more information which can be requested under FOISA - claiming exemption (even if justified) would be seen as being deliberately evasive.

I am not certain I follow Andrew's thinking about CEC and for that matter TS and SG. As shareholder's and funders they are entitled to accounting information. I haven't seen the funding agreements but those I have seen have made relevant provision.

My other concern is the idea of responding through the press. Over the years I have been wisely advised against it. The press will print their story not yours - responding gives oxygen. I strongly advise against it.

My suggestion is list those topics which would not be exempt under FOISA and what we are obliged to report if asked to our stakeholders.

Then brief on those issues.

Tony

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email rush_aj@[REDACTED]

From: graeme.bissett@[REDACTED]

Date: Sun, 14 Feb 2010 18:45:06 +0000

To: Andrew Fitchie<andrew.fitchie@dlapiper.com>; Tony Rush<rush_aj@[REDACTED]>; David Mackay<david_mackay@[REDACTED]>; Richard Jeffrey<Richard.Jeffrey@tie.ltd.uk>; Stewart McGarrity<stewart.mcgarrity@tie.ltd.uk>; Steven Bell<Steven.Bell@tie.ltd.uk>

Subject: Re: DRP CEO Meeting with Richard Walker - 12th February-STRICTLYPRIVATE & CONFIDENTIAL

Wise advice, I should have framed the question differently, so can I have the information suggested in case I am asked under conditions of proper confidentiality. Other folk in the team might also want the briefing for similar purposes.

I leave the judgement on more formal structured information to others.

Thanks.

Regards

Graeme

Graeme Bissett

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Sent from my BlackBerry® wireless device

From: "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>

Date: Sun, 14 Feb 2010 18:25:16 -0000

To: <graeme.bissett@[REDACTED]>; <rush_aj@[REDACTED]>; <david_mackay@[REDACTED]>; <Richard.Jeffrey@tie.ltd.uk>; <stewart.mcGarrity@tie.ltd.uk>; <steven.bell@tie.ltd.uk>

Subject: Re: DRP CEO Meeting with Richard Walker - 12th February -STRICTLYPRIVATE & CONFIDENTIAL

Legally Privileged and FOISA exempt

Gents

Having considered how tie can "up the ante" in terms of telling it like it is, my view is that there are essentially four rules about discussion with third parties. A judgment is needed on whether CEC is effectively a third party for these purposes because of the difficulty around security of information. These rules apply equally to media contact and the more so because of the colouring that any comment may get when published or played back directly by the journalist to BSC to provoke reaction. And so whatever is imparted needs to:

1. pass the "non confidentiality" test - the comment must not give or allude to data that is either be within the contractual definition of 'Confidential' this is information that ought reasonably to be treated in confidence or has been expressly designated by BSC as confidential. The precise details of DRP outcomes are, for example, confidential in my view until the parties have agreed or acted to treat these as binding. Bear in mind that a party can waive confidentiality by choosing to a disclosure or by building on a point that suits when a disclosure by the other party occurs. So that tie's selected disclosures would tend make FOISA requests harder to rebuff on the basis that the argument for confidentiality of categories of commercial information which is disclosed selectively will be punctured if similar information is made known.

2. Pass the "fair comment or justifiably strong opinion based on technical and commercial facts analysis" test. Here, tie is assisted by its public law responsibilities to be reporting what is happening on site and why. Unlike BSC, tie has no contractual obligation to talk to BSC first about tie press briefing, though in the past there may have been/still be some reciprocal understanding about not being inflammatory. It may be that tie could think about certain types of more critical project update information being included in regular bulletins.

3. Pass the "founded on fact and careful assessment" test to ensure there can be no assertions by BSC about tie negligent misstatement damaging BSC or tie deliberate and ill-founded criticism hurting their reputation. Tie should not be drawn to comment on individuals.

4 Pass the "definitely qualified to make well informed and up to date comment" test - so that all tie's quotes/briefings come from one or two undeniably knowledgeable and senior sources. So that the constancy of tie's message and its credibility is sustained.

It is obvious that the how long, how much and whose fault questions dominate minds and this is where comment from tie requires individual tailoring depending upon context, audience, short or longer term purpose etc.

I am pretty clear that, in practical terms, attempting to apply general principles to rapidly changing facts or BSC's actions is likely to lead to sub optimal and reactive strategy.

What would work, perhaps, is for me to sit down with Mandy and draw up the style of bulletins on each topic and perhaps set a structure whereby there is a regular legal input to Comms.

Please let me know if this would serve the objectives and I will meet with Mandy.

Kind regards

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From: Graeme Bissett <graeme.bissett@[REDACTED]>
To: rush_aj@[REDACTED] <rush_aj@[REDACTED]>; Fitchie, Andrew; 'David Mackay' <david_mackay@[REDACTED]>; 'Richard Jeffrey' <Richard.Jeffrey@tie.ltd.uk>; 'Stewart McGarrity' <Stewart.McGarrity@tie.ltd.uk>; 'Steven Bell' <Steven.Bell@tie.ltd.uk>
Sent: Sun Feb 14 10:31:20 2010
Subject: RE: DRP CEO Meeting with Richard Walker - 12th February -STRICTLYPRIVATE & CONFIDENTIAL

As a more general point, there will be an increasing need to tell tie's side of the story well in the coming weeks as media and other interest increases. Could we have a short but snappy summary of some key features of BB's inadequacies, factually based, for use in corridor type conversations when appropriate, but not for circulation. These would include :

- Number of claimed changes versus Estimates received and estimates received very late
- An aggregation of the £value of change estimates now agreed – their initial bid versus the settled (or near-settled) sum.
- A short statement capturing their failure to establish supply chain contracts
- The difference between their original programme and the latest effort (2+ years ?)
- Tie's informal estimate of the impact of utilities (the most-often quoted failure on tie's side) – preferably an estimate that has already been played to BSC.

There may be other punchy stats or points to make.

I would prefer that this was available quickly and in summary, rather than ask for any detailed compilation effort.

Regards
Graeme

Graeme Bissett
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From: Anthony Rush [mailto:rush_aj@[REDACTED]]
Sent: 12 February 2010 11:21
To: Andrew Fitchie; David Mackay; Graeme Bissett; Richard Jeffrey; Stewart McGarrity; Steven Bell
Subject: Re: DRP CEO Meeting with Richard Walker - 12th February -STRICTLYPRIVATE & CONFIDENTIAL
Sensitivity: Confidential

I am not certain that TS has at the end of the day a great influence on this matter - if they have they should seek both sides of the story and not engage in tittle tattle.

If this has any significance it shows that BB know that their position is based on weak foundations.

Maybe send TS an update of ETN's claimed and outcomes by way of a "background" report on a contractor engaged in infrastructure - copy it to Barry White at SFT. We are a public authority with an implicit duty to inform other authorities on material matters.

Tony

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From: "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>

Date: Fri, 12 Feb 2010 10:52:33 -0000

To: David_Mackay<david_mackay@[REDACTED]>; Graeme Bissett<graeme.bissett@[REDACTED]>; Richard Jeffrey<Richard.Jeffrey@tie.ltd.uk>; Stewart McGarrity<Stewart.McGarrity@tie.ltd.uk>; Steven Bell<Steven.Bell@tie.ltd.uk>; Anthony Rush<rush_aj@[REDACTED]>

Subject: RE: DRP CEO Meeting with Richard Walker - 12th February - STRICTLYPRIVATE & CONFIDENTIAL

Legally privileged and FOISA exempt

Richard


Thank you for this.

I have learnt informally that BB have talked to Transport Scotland senior management in some detail about their issues on ETN. Seemingly, examples have been given to TS about **tie's** unreasonableness, **tie's** lack of readiness once the contract was signed -in particular the immature design and generally lack of realism about how much the Project would cost. Specific DRP outcomes have been mentioned (unsurprisingly RRRW).

I am sure that these discussions were on the back of regular M80 contract meetings. I know that tie has high level connection to Transport Scotland an it may be worth checking what BB have been portraying as the current position.

kind regards

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From: Anthony Rush [mailto:rush_aj@[REDACTED]]

Sent: 12 February 2010 10:18

To: Julie Thompson; David_Mackay; Graeme Bissett

Cc: Steven Bell; Susan Clark; Stewart McGarrity; Mark Hamill; Alastair Richards; Mandy Haeburn-Little; Brandon Nolan; Fitchie, Andrew; Dennis Murray; Frank McFadden

Subject: Re: DRP CEO Meeting with Richard Walker - 12th February - STRICTLYPRIVATE & CONFIDENTIAL

Sensitivity: Confidential

Richard

Dealing first with Cl. 56.7 - I read this as applying to Performance of the system. However as I alluded in my previous email we have conceded to their non-performance in the past. Applying the contract more strictly herefrom will put them in breach of Cl. 80 if they do not progress with the works with due expedition.

I am waiting for Brandon's conclusion - but I worry that a Court would take the view that Liquidated Damages provide compensation.

We may be able to demonstrate that Infraco has been negligent in the manner they have managed SDS - again Brandon will comment on how we can gain redress.

Their failure in programming is another material failure.

I trust nobody has any doubts about taking a strict line on the contract terms.

I find Walker's approach extremely unprofessional - but I think he realises that he is unlikely to get another job in UK after this and I doubt he has a future with BB. Anxiety will be his motivation.

Having said all of this I am minded that our position is strengthened by putting O2 heads of terms on the table when we hold the 6.5 meeting.

We did agree a PSSA and we were negotiating an OSSA. Any test of reasonable behaviour would expect us to put a proposal for OSSA which we think compliant with Public Law.

I also believe that it is important for David to have the moral high ground on this point when he meets Goss. The way matters are unfolding leads me to believe that the meeting could be a defining moment.

Tony

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From: Julie Thompson <Julie.Thompson@tie.ltd.uk>

Date: Fri, 12 Feb 2010 09:25:57 +0000

To: 'david_mackay@[REDACTED]' <david_mackay@[REDACTED]>; GraemeBissett (external contact)<graeme.bissett@[REDACTED]>

Cc: Steven Bell<Steven.Bell@tie.ltd.uk>; Susan Clark<Susan.Clark@tie.ltd.uk>; Stewart McGarrity<Stewart.McGarrity@tie.ltd.uk>; Mark Hamill<Mark.Hamill@tie.ltd.uk>; Alastair Richards<Alastair.Richards@tie.ltd.uk>; Mandy Haeburn-Little<Mandy.Haeburn-Little@tie.ltd.uk>; brandon.nolan@mcgrigors.com<brandon.nolan@mcgrigors.com>; Fitchie, Andrew<Andrew.Fitchie@dlapiper.com>; rush_aj@[REDACTED]<rush_aj@[REDACTED]>; Dennis Murray<Dennis.Murray@tie.ltd.uk>; Frank McFadden<Frank.McFadden@tie.ltd.uk>
Subject: DRP CEO Meeting with Richard Walker - 12th February - STRICTLY PRIVATE & CONFIDENTIAL

A formal meeting under the DRP process to discuss Balgreen Road and Baird Drive Retaining Walls took place this morning.

On Balgreen Road, BSC have accepted our latest offer of £298k, this compares with their original estimate of £800k.

On Baird Drive, our latest estimate is £700k, theirs is £1.4m – on this basis we have agreed to push this to Adjudication.

Richard Walker then asked me if there was anything else I wished to discuss and I replied that I thought we had done all the talking that was of any use.

He then said that “if this was a marriage I would be asking for a divorce.”

I explained that it is not as simple as that, that we have a contract, he has partners and we have a tram to build.

He said that if we were unable to find a divorce they would look for a tie default in order to terminate the contract.

I asked if he was speaking officially on behalf of the Consortium and he said that he was not but he did not want to carry on with this job in the current relationship and it would be best for everyone if we could find a divorce.

He then added that of course if we were able to sign an On-street Agreement, divorce might not be the best arrangement.

I suggested that he seeks formal approval from the Consortium and Bilfinger Berger to put this issue on the table at our meeting on 2nd March and that I would similarly seek the approval of my Board to enter into discussions but on the clear understanding that the default position for both parties must be to continue with the works in accordance with the existing contract.

I was enormously encouraged by this discussion. It is very clear to me that they have absolutely no appetite for completing this work in accordance with the original contract.

I also see very little prospect of them starting on-street anytime soon.

I think it is very important that we hold our nerve now and do not let up on our forceful approach to the application of the contract.

Regards

Richard

Julie Thompson
PA to Chairman - David Mackay
PA to CEO - Richard Jeffrey
PA to Tram Project Director - Steven Bell

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