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**From:** Fitchie, Andrew  
**Sent:** 05 May 2008 11:37  
**To:** 'Alastair Richards - TEL'; 'Geoff Gilbert'; 'Willie Gallagher'; 'Graeme Bissett (external contact)'; 'Steven Bell'; 'Stewart McGarrity'; 'david.mackay@[REDACTED]'; 'Geoff Gilbert'  
**Cc:** Horsley, Chris  
**Subject:** RE: Bad behaviour or behaviour which has exposed BBS to delay

**Legally privileged and FOISA Exempt**

Gents


Further evidence, unfortunately that there is a considerable amount of woodworm in BBS's final pricing.

I realise the imperatives but BBS's approach is totally at odds with the issue of **tie's** formal Notice of Intent to award in mid March.

It is my opinion that they have either deliberately or negligently misrepresented their final financial offering to **tie**. We can discuss this at 1pm but what is very important, in terms of procurement law, is that **tie** achieves an outcome which preserves the real ability to sustain BBS's tender and contract remaining the most economically advantageous tender, based on the Evaluation Criteria, in which price was dominant, with technical offerings broadly equal and other evaluation criteria at second order.

kind regards

**Andrew Fitchie**  
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**From:** Alastair Richards - TEL [mailto:Alastair.Richards@tie.ltd.uk]  
**Sent:** 05 May 2008 10:36  
**To:** Geoff Gilbert; Fitchie, Andrew; Willie Gallagher; Graeme Bissett (external contact); Steven Bell; Stewart McGarrity; david.mackay@[REDACTED]  
**Cc:** Horsley, Chris  
**Subject:** RE: Bad behaviour or behaviour which has exposed BBS to delay

One point on maintenance:

on the 8th April we received the final maintenance pricing for Phase 1a + 1b including mobilisation of £27,934,566.

on the 24th April we received what was supposed to be a more detailed breakdown of the figures, instead we received a revised price of £29,648,357. An increase of £1,713,791. No justification other than Scott Macfadzen superficially on his car phone saying that it was pro-rata to the length of Phase 1b.

At preferred bidder the Phase 1b pricing was on a marginal basis, which was in line with that submitted on the 8th April, not on a simplistic pro-rata basis.

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**From:** Geoff Gilbert  
**Sent:** Mon 5/5/2008 8:48 AM

**To:** Fitchie, Andrew; Willie Gallagher; Graeme Bissett (external contact); Steven Bell; Stewart McGarrity; Alastair Richards - TEL; david.mackay@[REDACTED]  
**Cc:** Horsley, Chris  
**Subject:** RE: Bad behaviour or behaviour which has exposed BBS to delay

Two other points:-

1. BBS altered their position on liability caps after nomination of preferred bidder moving from caps underwritten by PCGs to a mix of performance bonds and a lower cap underwritten by PCG.
2. In January BBS struggled to meet the close programme we had laid down. We invited them to propose a programme which we then agreed. They did not meet the dates they proposed in their programme.

Otherwise I agree with the points Andrew has made.

Regards

Geoff

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**From:** Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]

**Sent:** Fri 02/05/2008 15:59

**To:** Fitchie, Andrew; Willie Gallagher; Graeme Bissett (external contact); Steven Bell; Stewart McGarrity; Alastair Richards - TEL; david.mackay@[REDACTED]; Geoff Gilbert

**Cc:** Horsley, Chris

**Subject:** RE: Bad behaviour or behaviour which has exposed BBS to delay

Gents

Apologise:

Para two: "... *in a transparent manner and to ensure equality of...*"

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**From:** Fitchie, Andrew

**Sent:** 02 May 2008 15:53

**To:** Willie Gallagher; Graeme Bissett (external contact); Steven Bell; Stewart McGarrity; Alastair Richards - TEL; david.mackay@[REDACTED]; Geoff Gilbert

**Cc:** Horsley, Chris

**Subject:** Bad behaviour or behaviour which has exposed BBS to delay

Willie

### **Combustibles to pick from:**

It may be worth pointing out to BB that under the rules of the ITN, any tender submitted by BBS is automatically valid for 12 months (unless specifically qualified otherwise) from the date of its submission and this includes any revised submissions) - so that the BBS preferred bidder submission is valid until October 2008. The ITN rules do not offer any protection against market conditions; these are for the bidder to deal with. Under procurement law, there is no obligation on a contracting authority to permit the revision of a bid price because of a mistake or omission, particularly where there has been a lengthy procurement with every opportunity for the bidder to review its offering.

Under the Negotiated Procedure, there is (on the basis of the jurisprudence) latitude for the contracting authority to "tune up" its deal with the preferred bidder, once the real competition is finished but it is quite clear that, legally, the simple addition of a significant percentage of the contract price with little explanation and no fair exchange would place the contracting authority in straight breach of its obligation to compete the award in a transparent and equality of treatment to bidders. This is the more so, because **tie** has

already give formal notice of intention to award at which point price, scope, programme and terms must be firm.

**Leaving aside the question of tie's authority, the above provides a very powerful procurement law public accountability reason why BB need to accept that if they refuse to withdraw the demand , tie cannot proceed - without importing a serious risk - in the absence of the re-balancing in the exchanges proposed in the shopping list - and, in my view, all of them.**

- **BBS driven** Architect themselves of delay to Contract Close (and therefore market exposure to currency fluctuation) because of obsessive approach to negotiations post preferred bidder. Months of painstaking and pedantic "contract alignment" by lawyers on marginal issues, uncontrolled by clients because no clients in meetings and no decisions taken to remove minor points. BB and S separately represented for all contract discussions. Inevitable time and efficiency consequences.
- Reneging on commercial positions (unrelated to other matters) agreed prior to Preferred Bidder. Examples:

**1. BB driven** - sudden refusal on the provision of straightforward parent company guarantees, models of which were in the procurement documentation issued on October 2006 and were **not** marked up or comment upon. Period to reach agreement: November to April ;

**2. BB driven** - refusing to accept latent defect liability period previously agreed to in clear terms, with the benefit of advice legal advisors in the room at the time. Over elaborate liability position emerged with limited client input over a period of months. Negotiated as a BB position and an S position, not a BBS position.

**3. BB driven** - changing agreed position after acceptance of effect of change in law

- **BB driven** - long periods of BB absence from commercial/contractual discussion resulting in lawyer dominance, jeopardising efficient outcome on commercial points

**BB driven** - no effective commercial lead during negotiations resulting in unmanageable backlog of commercial decisions and consequent repetitious "parking of issues" during negotiations post preferred bidder. Consequent lack of commerciality and absence of prioritisation of issues.

**BB driven** -Inability to deliver key schedules to the Infracore Contract in a way which unnecessarily prolonged post preferred bidder phase eg programme , milestone schedule, **tie** obligations.

**BB driven** - late and entrenched commercial positions: HSE KPI, SDS "mark up"

**S driven** -sudden revelations on corporate policy re opening previously agreed positions and sucking in time and cost: eg third party uninsured economic loss 7 days in March . Halt on PCG negotiations because tax and JV liability issues, resulting a loss of two weeks and the emergence of a complex PCG structure.


- **BB driven** - Due diligence carried out on SDS design over 4 months appeared to have no result whatsoever on acceptance of design responsibility
- **BB driven** - Pricing negotiations lead by BB lawyers.
- **BB driven** - evidence that main players in supply chain approached far too late in relation to provision of collateral warranties and an inability/refusal to name key subcontractors until recently - meaning supply chain was not stabilised until very recently.
- **BB driven** refusal to provide key information to any normal time scale - **Milestone schedule**
- **BB Driven** - Skeletal team and removal of bid project manager

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