

Control Number : Fathom-01-00033737
Group Identifier : Fathom-01-00033737
Attachment Status : Freestanding
Key Date : 02/05/2008 15:53
Sort Date : 02/05/2008 15:53

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From: Fitchie, Andrew
Sent: Fri 02/05/2008 2:53:15 PM
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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