



Chapter 7

Appointment of the Construction Manager

Initial Steps

- 7.1 When the decision was taken on 21 July 1998 to adopt construction management as the procurement vehicle, it was also decided that the appointment of a Construction Manager would be undertaken “at the earliest opportunity”.²⁸⁷ The role of the Construction Manager is essentially to act as a consultant to secure and manage the services of trade or package contractors, each of whom are contracted directly to the client. The Construction Manager’s role does not include the undertaking of any actual construction work on site, but rather the management of others to do that work. It is highly misleading to refer to the Construction Manager as the “builder” or the “contractor”. Treasury Guidance²⁸⁸ emphasised the importance of planning the selection process, and that appointment should be on the basis of value for money and not on lowest price alone.
- 7.2 European procurement rules applied and DLE drafted the OJEC Notice²⁸⁹ which appeared in the Official Journal on 12 August 1998. It confirmed that the “restricted” procedure would apply in terms of which prospective tenderers would be subject to a selection process in advance of

²⁸⁷ SE/5/072-074 - Minute of Design Team Meeting of 21 July 1998

²⁸⁸ SE/5/421-448 - HM Treasury Guidance Note No 3: ‘Appointment of Consultants and Contractors’, December 1997

²⁸⁹ SE/5/075-077 - OJEC Notice for Construction Management Services, 13 August 1998

tender invitation. It disclosed a construction cost budget of £50 million and award criteria, as for the Architect, seeking the “economically most advantageous tender in terms of price, quality and other criteria”. It indicated a construction period lasting from 1 July 1999 to 29 June 2001, and a deadline for receipt of applications of 11 September 1998, a period of just four weeks from the first appearance of the notice. Pre-Qualification Questionnaires were sent to 29 potential applicants of which 15 were returned by the closing date.²⁹⁰ A meeting of the Interview Panel was convened on 25 September 1998 to consider the PQQs, which had already been assessed, scored and ranked by Mr McAndie and Mr Jim Fairclough, Secretary to the Interview Panel. After discussion, it was agreed that six would be invited for interview. A programme was set as follows:

‘6/7 October 1998	Interviews
30 October 1998	Issue invitations to tender (probably 4)
23 November 1998	Return of tenders
8 December 1998	Post tender interviews
Mid/end December 1998	Appointment made’. ²⁹¹

- 7.3 Prior to the interviews a comprehensive interview evaluation sheet²⁹² was devised by Mr Armstrong which was available to the panel. Interviews of the six candidates took place as planned on 6 and 7 October 1998 before a panel chaired by Mr Armstrong. The panel included Mr Stewart and Mr Fisher but, significantly, not Mrs Doig or Dr Gibbons. A full minute²⁹³ was taken of that meeting which decided that four candidates including Bovis, Sir Robert McAlpine and two others should be invited to tender. The day before the interview Snr Miralles faxed Mr Armstrong saying: “I think it is important that I’m part of the final selection of ‘construction manager’...” and “I know that my presence is not critical but if it is possible I’ll be happy to help”.²⁹⁴ Mr Armstrong, in a manuscript note, requested that when arranging final interviews his team should “remember Miralles”.

Evaluation of the Tenders

- 7.4 Invitations to tender were sent out with tenders due for return on 27 November 1998. In an email of 23 November²⁹⁵ Mr Armstrong advised Mrs Doig that a tender review meeting would be held on 2 December to “decide the recommended Construction Manager”, to be followed by a pre-appointment interview on 8 December 1998. Mrs Doig’s immediate response by way of

²⁹⁰ SE/5/078 – Minute from Mr Eric Kinsey to Dr John Gibbons and Mrs Barbara Doig, 15 September 1998

²⁹¹ SE/5/079-082(R) – Minutes from Mr Jim Fairclough to the Interview Panel, 25 September 1998

²⁹² SE/5/083-086 – Blank Interview Evaluation Sheets by Mr William Armstrong, September 1998

²⁹³ SE/5/087-092(R) – Note of Construction Management Interviews, 6 and 7 October 1998

²⁹⁴ SE/5/680-686 - Fax from Snr Enric Miralles to Mr William Armstrong, 13 October 1998

²⁹⁵ SE/5/093 - Minute from Mr William Armstrong to Mrs Barbara Doig, 23 November 1998

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a minute on 23 November 1998²⁹⁶ was to say that it was “premature to anticipate that there will be a single recommendation” and that “it may be that 2 or 3 of the bidders are in the field and much will depend on the final interview”. She said that there “may be interviews with several tenderers” and signalled her intention to be present, along with Dr Gibbons and Snr Miralles.

7.5 At this stage Mr Armstrong’s views as to future procedure were beginning, as he put it, to “diverge” from those of Mrs Doig. Mr Armstrong, despite the apparent agreement that there would be a round of post tender interviews on 8 December, told the Inquiry²⁹⁷ that once the panel had gone through a sifting system and an interview system which produced a number of construction managers considered to be capable of doing the job, all that remained would be to accept the lowest tender received if it was within the budget. Mrs Doig told the Inquiry²⁹⁸ that at this point she “started to be a little concerned” because the procedure envisaged by Mr Armstrong was not meeting the general framework which she understood to have been set, in terms of which a senior client presence should be involved. Mrs Doig’s understanding is supported by the minute of the meeting of the interview panel on 25 September²⁹⁹ where it records clearly that there would be post tender interviews in which she and Dr Gibbons would be involved.

7.6 The tenders were opened in the presence of Mrs Doig, Mr Armstrong, Mr Kinsey and Mr McAndie on 27 November 1998, and disclosed a range of tenders between £2,784,307.20 and £5,609,616.³⁰⁰ As well as a percentage fee, the tenders included estimated figures for staff costs and for site organisation costs, both of which fell to be reimbursed. DLE thereafter produced a report³⁰¹ which analysed the tenders. The report pointed out that in relation to staff costs Bovis and McAlpine respectively quoted increased figures of £29,000 and £38,000 if the start of work on site was to be May 1999 rather than July 1999, and that Bovis required an additional £500,000 (1% of the anticipated construction cost of £50 million) if a Parent Company Guarantee (“PCG”) was to be required, the other tenderers being prepared to provide this at no extra cost. The Bovis staff costs were also to be subject to inflation, which could add £200,000 to the total. For the purposes of their report DLE aggregated all organisational costs across the board at £3 million. The DLE report produced figures which can be summarised appropriately as follows:

²⁹⁶ SE/5/094 – Minute from Mrs Barbara Doig to Mr William Armstrong, 23 November 1998

²⁹⁷ Evidence of Mr William Armstrong on 3 December 2003, Paras 712 and 713

²⁹⁸ Evidence of Mrs Barbara Doig on 4 December 2003, Para 193

²⁹⁹ SE/5/079–081(R) - Minutes from Mr Jim Fairclough to the Interview Panel, 25 September 1998

³⁰⁰ SE/5/095(R) - Construction Management Confidential Tender Information, 27 November 1998

³⁰¹ SE/5/096-102a(R) - DLE Review of Construction Management Tenders, November 1998

Tenderer	£	
Sir Robert McAlpine	Adjusted tender value	4,846,466
Tenderer 2	Adjusted tender value	5,027,156
Tenderer 3	Adjusted tender value	6,136,756
Bovis	Adjusted tender value	5,572,162
	Add estimated inflation	200,000
	Add fee for PCG	500,000
	Total	6,272,162

It can be seen that, on the basis of DLE's assessment, Bovis was the highest tenderer. In her evidence Mrs Doig confirmed that there was a guideline figure of £5.5 million.³⁰²

7.7 A meeting to evaluate the tenders was held on 2 December 1998. The minute³⁰³ records that Mrs Doig and Mr Armstrong attended, as did representatives of EMBT/RMJM Ltd, DLE and Ove Arup. After lengthy debate it was concluded that Tenderer 3 would be dropped on cost grounds, and that Bovis would be dropped on the basis of "cost, the concerns over the 1% charge for a Parent Company Guarantee, and the non-availability of Mr Vic Richardson (their potential Project Director) on a full time basis." Correspondingly, it was "agreed that Sir Robert McAlpine and Tenderer 2 should be interviewed again, with client representation of Dr Gibbons and Mrs Doig present, and members of the previous interview panel would indicate their preferred contractor (sic) before the interviews took place". There were some difficulties in arranging a date for the final interview but it was eventually fixed for 4 January 1999, when Snr Miralles could be present.

Candidates for Final Interview

7.8 After a surprising delay of nearly two weeks, on 15 December 1998 Mrs Doig minuted Mr Armstrong saying:

"... I have been very carefully considering whether as client representative I should accept the recommendation that 2 firms only should be interviewed at the final stage. I have consulted John Gibbons for a wider client cum construction industry perspective and also revisited Mr Fisher's and Mr Alan Tweedie's, Associate, Ove Arup & Partners³⁰⁴ views (on Bovis). They have confirmed respectively that their initial rejection (of Bovis) was based on interview performance on the day rather than overall confidence in the firm's technical/professional competence and concern about the lead construction manager's availability and long-term commitment to a £50 million project (rather than £200 million).....

³⁰² WS/25/001-021 - Mrs Doig's First Witness Statement, 4 December 2003

³⁰³ SE/5/103-104(R) - Minute of Meeting of 2 December 1998

³⁰⁴ Mr Alan Tweedie, Associate, Ove Arup & Partners, South Queensferry

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I have decided that Bovis should be interviewed on the grounds that the cost position does not in itself rule them out and we are now more fully apprised of their commitment to The Scottish Office as client. In particular their experience at the Museum of Scotland with a challenging design team working under great time and cost pressures has been regarded as very satisfactory”.³⁰⁵

- 7.9 In a minute of his own of 15 December 1998 Mr Armstrong demurred, pointing out that the advice that Mrs Doig was receiving was contrary to the views arrived at during the interview and tender process, and that Bovis were £926,000 more expensive than the lowest tenderer, not counting their requirement of 1% for a PCG.³⁰⁶ He described the “firm decision” made at the tender review meeting, which Mrs Doig had attended, and suggested that her desire to see them again was a waste of time and would “build up false hopes as far as Bovis is concerned”.
- 7.10 Mrs Doig replied repeating her instruction that Bovis should be interviewed and added that she disagreed that it would be a waste of time.³⁰⁷ She wished to see the successful appointment assessed against other tenderers in terms of value for money, key personnel and their way of working.
- 7.11 There was confusion in relation to certain aspects of the meeting on 2 December 1998. Mr Armstrong’s understanding was that while the outcome of the meeting was no more than a recommendation,³⁰⁸ EU procurement law and guidance on procurement required acceptance of the lowest tender and that there was no requirement for a further round of interviews. While Treasury Guidance on the appointment of consultants and contractors³⁰⁹ does not specifically envisage a post tender final interview, I do not read the guidance or understand procurement law to preclude such a step in the process.
- 7.12 More difficult is the question as to whether the decision to hold final interviews with two tenderers only was one which Mrs Doig was entitled to reopen. Mrs Doig had been present at the meeting on 2 December 1998 but whether her role was that of an observer or a participant is less clear. She described herself as having attended the meeting as an “observer”³¹⁰ although it is noted that in the minute of the meeting her name tops the list of attendees; hardly indicative of mere observer status. The position in that respect is not recorded in the minute nor does the minute record any dissent on her part to the decision to proceed to final interviews with two tenderers only. Indeed in evidence Mrs Doig admitted that she had “missed

³⁰⁵ SE/5/106 - Minute from Mrs Barbara Doig to Mr William Armstrong, 15 December 1998

³⁰⁶ SE/5/107R - Minute Mr William Armstrong to Mrs Barbara Doig, 15 December 1998

³⁰⁷ SE/5/108 - Minute from Mrs Barbara Doig to Mr William Armstrong, 16 December 1998

³⁰⁸ Evidence of Mr William Armstrong on 3 December 2003, Para 811

³⁰⁹ SE/5/421–448 – HM Treasury Procurement Guidance No.3 ‘Appointment of Consultants and Contractors’, December 1997

³¹⁰ Evidence of Mrs Barbara Doig on 4 December 2004, Para 244

a trick” in this respect.³¹¹ Mr Fisher had not expected Bovis to be further involved.³¹² He remembered Bovis as having been “lacklustre” at their interview in October³¹³ and found it “a bit surprising”³¹⁴ that Mrs Doig had consulted with him about the possibility of reinstating them. In principle he thought that the reinstatement of a candidate at that stage was not “improper, in that the client has the prerogative to make a judgment” and even to “change his or her mind”.³¹⁵ Mr Stewart agreed with that view.³¹⁶ In the circumstances, and while there may have been an absence of clarity in relation to the purpose of the meeting of 2 December 1998, I cannot conclude that Mrs Doig was not entitled to revisit its conclusion as to the number of tenderers to participate in the final interviews.

7.13 Where I have greater difficulty is with Mrs Doig’s decision to readmit Bovis to the process without also reconsidering the position of Tenderer 3. As set out in paragraph 7.6, DLE had reported that Bovis was the highest of the four tenderers, after appropriate adjustments to ensure that like was compared with like. Their analysis of the figures appears to me to be correct. At the tender review meeting on 2 December Tenderer 3 had been excluded on cost grounds. Bovis had been excluded not only on cost grounds, including those related to the PCG, but also on account of the non-availability of Mr Richardson. The tenders of Bovis and of Tenderer 3 both exceeded the guideline of £5.5 million. Mrs Doig’s minute of 15 December 1998 to Mr Armstrong indicated that Bovis’ cost position did not in itself rule them out and that they should be probed further on the issue of the PCG and on their personnel. Her minute did not however suggest that these initial concerns had been resolved. Rather she chose to proceed on the basis of informal considerations. She referred in evidence to her “own informal networks”³¹⁷ in relation to Bovis’ performance on the Museum of Scotland contract. These included having “got some information from the press”³¹⁸ and her awareness of how well Bovis had handled a great many site visits to the Museum of Scotland (designed by signature architects) in the year before its completion and the pressures of a fixed Royal opening date for that building.³¹⁹ She was unable to provide me with any satisfactory reason for her selection of Bovis to be readmitted to the process. It did not occur to her that there might be legal considerations.³²⁰ While, as I have found in the preceding paragraph, Mrs Doig was within her rights to revisit the decision of the tender review meeting and to invite a third tenderer to take

³¹¹ Evidence of Mrs Barbara Doig on 17 December 2004, Para 359

³¹² Evidence of Mr Hugh Fisher on 15 December 2003, Para 860

³¹³ *ibid*, Para 880

³¹⁴ *ibid*, Para 888

³¹⁵ Evidence of Mr Hugh Fisher on 15 December 2003, Para 888

³¹⁶ Evidence of Mr Brian Stewart on 11 March 2004 (pm), Para 28

³¹⁷ Evidence of Mrs Barbara Doig on 4 December 2003, Para 290

³¹⁸ *ibid*, Para 399

³¹⁹ WS/25/001–021 - Mrs Barbara Doig’s First Witness Statement, 4 December 2003

³²⁰ Evidence of Mrs Barbara Doig on 4 December 2003, Paras 309 and 330

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part in the final round of interviews, it is my view that such a decision is one which should only have been taken on the basis of a proper evaluation of the comparative positions of both of the two excluded tenderers and on a basis which provided a clear audit trail. In these respects her decision was flawed.

- 7.14 I am conscious that there have been questions of propriety raised in relation to the circumstances leading to Bovis being invited to final interview. The Inquiry heard evidence from Dr Gibbons in relation to his encounter with the Managing Director of Bovis Europe at the opening of the National Museum of Scotland on 30 November 1998.³²¹ Dr Gibbons explained that this was a brief social encounter that took place amidst a busy gathering that included the Queen. He rejected any suggestion that this had in any way disposed him favourably towards Bovis. I have no basis on which to reject Dr Gibbons' evidence on this matter and have nothing to suggest there was anything amiss in his relationship with Bovis as a candidate for the construction management contract.

The Selection and Appointment of Bovis

- 7.15 The final round of interviews took place on 4 January 1999 before a panel chaired by Mr Fisher and including Snr Miralles, Dr Gibbons and Mrs Doig; Mr Armstrong having departed by this time. The proceedings were the subject of a detailed note³²² which discloses that Mr John Anderson, Managing Director of Bovis, said that his company would provide a PCG without any additional charge and it was on this basis that the contract was eventually awarded to Bovis. This had the effect of reducing the Bovis tender by £500,000, which very significantly improved its competitiveness with that of the other four tenderers. I have not been addressed on the legality of allowing such a post tender variation and I refrain from making any comment in relation to the legal implications of the position. It does however appear to me, on elementary considerations of fairness as between competing tenderers, that if one tenderer was effectively permitted to change a very material aspect of the financial basis upon which its tender was submitted that is an opportunity which should have been afforded to the others.
- 7.16 In all other respects the final interviews on 4 January 1999 appear to me to have been conducted in a way which was thorough, fair, and well documented. In this respect it can be contrasted favourably with the proceedings in the final rounds of the designer selection competition. A comprehensive and transparent evaluation system was adopted from which the completed evaluation forms have been produced to the Inquiry.³²³ Of the eleven members of the interview panel, ten completed the evaluation forms, in each case ranking Bovis

³²¹ Evidence of Dr John Gibbons on 3 February 2004, Paras 334 to 351

³²² SE/5/120-125(R) – Note of Construction Management Final Interviews, 4 January 1999

³²³ SE/5/083-086 - Evaluation Sheets: Construction Management Appointment, September 1998

significantly ahead of the other two candidates. Out of a maximum of 100, Bovis' average score was 82 whereas that of the next highest was only 65. The note recorded the panel's unanimous view that Bovis had performed by far the best of the final three candidates at interview stage and "although their tender bid was not the lowest one it was crucial that a company that the client and Design team felt comfortable with was selected for this most crucial of roles in the Project."³²⁴

- 7.17 It was agreed that, subject to a few financial clarifications to be resolved at a further meeting with DLE, Bovis should be appointed as soon as possible. Following the interviews DLE issued a final tender report³²⁵ which confirmed that the Bovis' PCG was to be provided at no extra cost and that the revised Bovis bid was £5,371,919. On 6 January 1999, following the discussions with DLE, Bovis wrote to Mr McAndie confirming certain points arising from the tender and saying:

"Our Construction Management Fee is 1.25% to be converted to a lump sum on agreement of the Project Cost Plan."³²⁶

The copy of that letter produced to the Inquiry bears Mrs Doig's initials confirming that it was received by the Project Team.

- 7.18 On 7 January 1999 Bovis was informed³²⁷ of the intention of the Scottish Office to enter into a contract and a formal letter of intent was issued on 19 January.³²⁸ The formal legal Memorandum of Agreement subsequently entered into between Bovis and the Scottish Office was, for some reason which was not clarified in evidence, not actually signed until 22 and 25 October 1999. Schedule 1(J) confirmed the fee of 1.25% but failed to make any provision for conversion of that fee to a lump sum on agreement of the Cost Plan. Had the contract reflected the evident willingness of Bovis to convert their fee to a lump sum, the issue of fee capping which arose in 2003 would not have been a problem in relation to Bovis. Further, the conversion of their fee to a lump sum would have served as a powerful incentive to Bovis to apply maximum rigour in relation to cost control. I am aware that in his 2000 Report the Auditor General³²⁹ made the very valid point that it might have been appropriate for the fees of the consultants, including Bovis, to have been tapered so that the percentage fee would reduce as a proportion of construction cost as that cost increases. I agree with that observation although, in the context of Bovis' appointment, it is not as significant as the

³²⁴ SE/5/120-125(R) – Note of Construction Management Final Interviews, 4 January 1999

³²⁵ SE/5/109-119 - Report from Mr Hugh Fisher to Mrs Barbara Doig, 7 January 1999

³²⁶ SE/5/273-275 – Letter from Mr Harry Thorburn to Mr Ian McAndie, 6 January 1999

³²⁷ SE/5/126 - Letter from Mr Jim Fairclough to Mr Gordon Ash, 7 January 1999

³²⁸ SE/5/135-136 – Letter from Mrs Barbara Doig to Mr Gordon Ash, 19 January 1999

³²⁹ Auditor General for Scotland's Report of September 2000, Para 3.35

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possible conversion to a lump sum upon agreement of the Cost Plan. I did not hear evidence on these points and accordingly I am not in a position to criticise any individual in respect of them. I do however regard this as a significant deficiency in the Bovis contract documentation.

- 7.19 Both in terms of EU procurement law and in terms of guidance,³³⁰ unsuccessful tenderers should be afforded the opportunity of a debriefing. I heard evidence from Mr David Boyle, Director of Sir Robert McAlpine that his company requested a debrief after the selection process but that no satisfactory response was received to three letters from him dated 7 January 1999,³³¹ 22 February 1999³³² and 16 April 1999.³³³ In her closing submission to me Ms Laura Dunlop QC, appearing for the Scottish Executive, frankly acknowledged that there had been a failure in this respect for which she expressed her regret. I have been informed as to the specific circumstances that led to this administrative oversight and it is very understandable why one individual was not available to conduct a debrief. The system should have allowed for someone else to have taken on the task. It did not and a legal requirement was neglected.
- 7.20 It is my understanding that, despite the eventual offer of a PCG by Bovis at no additional cost, in the event that offer was not taken up and had still not been taken up as recently as February 2004 when the point was raised in the Finance Committee of the Parliament and when the SPCB recommended that such a PCG should be obtained from Bovis. I understand that this may now have been done. While I recognise that Bovis is a major and reputable company, this is something that should have been done at a much earlier stage.

³³⁰ SE/5/421-448 - HM Treasury Guidance No 3: 'Appointment of Consultants and Contractors'

³³¹ MS/8/003 - Letter from Mr David Boyle to Mr Jim Fairclough, 7 January 1999

³³² MS/8/004 - Letter from Mr David Boyle to Mr Jim Fairclough, 22 February 1999

³³³ MS/8/006 - Letter from Mr David Boyle to Mr Jim Fairclough, 16 April 1999