

Our reference: 2010 065  
7 October 2021

BY E-MAIL

**Mr. P. Swift**  
**Claims Management and Adjusting Ltd**  
**Malling House**  
**Town Hill**  
**West Malling**  
**Kent**  
**ME19 6QL**

## **Alleged overcharging by Kier Highways Ltd**

Dear Mr. Swift,

I write with reference to your letter to Sarah Dunlavy of 13 April 2021 and the 16 questions that you posed within that letter. My apologies for the delay in responding. Due to the extensive number and length of questions it has been necessary to review your previous correspondence and Freedom of Information Act requests. This has been to ensure that you have a full and correct response to your questions.

This letter primarily responds to your complaint of 19 April 2021 (our reference 22837818, also raised with our Chief Executive under reference CX99475). I note that you have submitted a number of similar requests under the Freedom of Information Act, in addition to your complaint. As this letter also covers the principles of points that were raised in your other correspondence, it addresses your other requests, as follows:

- 18993085 – 3 November 2020;
- 19626589 – 26 November 2020;
- 21277088 – 4 February 2021;
- 21653889 – 18 February 2021;
- 22401086 – 17 March 2021;
- [23307281](#) – 15 April 2021;
- 24064681 – 13 May 21; and
- 24056381 – 13 May 21.

In reviewing this correspondence, it became apparent that some of your previous questions were misinterpreted and the information you were given in response was incorrect. My apologies for this. The purpose of this letter is to clarify and correct the position.

**Your letter expresses a number of views and opinions, some of which refer to practices that apply outside Birmingham and particularly with Highways England contracts. While you may consider those points relevant, this response is confined to matters as far as the Council is concerned, as I am unable to offer a view on these other matters.**

## **Context**

The following is the relevant context of how services are provided and charged for.

1. The Council holds a contract with Birmingham Highways Ltd (BHL) for highway maintenance and management services. This contract commenced on 7 June 2010 and is due to run until 6 June 2035.
2. Kier Highways Ltd has been subcontracted to BHL since 1 April 2020, delivering services under an Interim Services Contract. The council pays for the cost to BHL for this contract.
3. The Interim Services Contract is an NEC4 Option E Term Services Contract. This is a standard form of contract used throughout the engineering industry, tailored to the specific requirements of the services required.
4. This is a 'cost reimbursable' contract. The terms of the contract mean that BHL pays Kier Highways Ltd for defined costs that are acceptable under the contract upon confirmation and demonstration of those costs. BHL (and therefore the Council) pays Kier the full charge of employing all the staff and resources required to provide all of the services under the contract.
5. Under the payment arrangements, BHL pays an agreed Management Fee to Kier in addition to the actual cost of service provision. The Management Fee is subject to Kier's performance against defined Key Performance Indicators. The Management Fee includes Kier's profit and management / overhead costs.
6. Where a third party is responsible for damage to the Council's highway infrastructure:
  - a. Kier repairs the damage using the resources that it employs and for which it charges BHL under the Interim Services Contract, within the submission of its full service provision costs.
  - b. BHL reviews and approves those costs in accordance with its contract. The approved cost is paid by BHL to Kier and (after the Council's own review) the Council pays the approved cost to BHL.
  - c. Kier acts to recover costs that it has incurred from third parties where the third party is at fault. To calculate the cost to the third party, Kier uses a Schedule of Rates (KSoR) that is specific to this contract.
  - d. All recovered costs in relation to third party claims are deducted from the costs that are billed to BHL and thus to the Council. There is no benefit to Kier as you have asserted. Schedule 15 of the Interim Services Contract between BHL and Kier is attached, which relates to all claims. Paragraph 15 is the relevant paragraph.
7. Table 1 below shows what Kier is paid against what they pay. In relation to a claim against a third party, Kier makes no direct profit, other than the profit

element that is included within its wider Management Fee applicable under the contract. The Kier Management Fee does not change as a result of third party claims and the rate is fixed under the contract.

**Table 1**

<b>What Kier pay</b>	<b>What Kier is paid</b>
Staff costs, materials, plant and equipment, charged to BHL within overall service costs.	Staff costs, materials, plant and equipment paid by BHL as part of service costs.
Management and overhead costs.	Management Fee for performance on the contract overall, paid by BHL
All amounts paid by the third party are deducted from the cost to BHL, calculated for the incident using KSoR.	Costs recovered from the third party to Kier, calculated for the incident using KSoR.

## **Your questions**

In response to your 16 questions to Ms. Dunlavey:

### **1. It is apparent you agreed a set of rates other than KSoR with Kier Highways: Please provide the rates and explain the above contradictions/conduct.**

There is no schedule of rates that was agreed under this form of contract (NEC4 Option E). Costs are the approved costs, as described under point 4 above.

As stated in 6.c above, a Kier Schedule of Rates (KSoR) is used in this process to assess the costs chargeable to the third party for the incident. Without doing so, there would be no means of assessing the costs chargeable to the third party in a manner that takes account of the full costs applicable.

The KSoR is therefore not what Kier charges BHL (and therefore the Council) but what is charged to the third party. BHL (and therefore the Council) is meeting these costs through the payment of the direct service costs (included under 6.a above) plus the Management Fee, net of the amounts recovered by Kier (6.d above).

I have attached the Kier Highways leaflet *An Insurer's Guide to Incident Management and Claims Recovery*.

I would stress that there is a separate process for challenging the costs applied as part of any individual claim, which is based upon the individual circumstances of the claim.

The reason for the apparent contradiction in the responses you were given is that there was a misinterpretation of the position as explained earlier.

**2. Please explain the contradiction and provide the source of the information giving rise to your 25/11/2020 reply in which you also wrote:**

***There is full transparency with the Kier contract and the way Third Parties and subcontractors are being dealt with.***

***There is not an opportunity for Kier to generate a profit from claims.***

As per your first question, the apparent contradiction is explained above. However, the fundamental point that this is not an opportunity for Kier to profit from claims remains correct.

**3. Please advise the profit element you believe is associated with the KSoR rates being utilised and**

**a. how Kier profit; the fixed management fee.**

As stated in 5 above, the Management Fee that Kier is paid is an agreed percentage and fixed fee, modified by Kier's performance against the KPIs for the contract overall. Since this is not paid by the third party in recovery of the costs of the claim or amended as a result of third party claims and recovery, this is not relevant.

As Kier passes on the full amount charged to the third party (calculated under KSoR) to BHL then I fail to understand how you can consider that Kier is making a profit from this.

**4. Please advise your knowledge of this uplift amendment and provide the correspondence (to include contract variance) associated with the intention to make an amendment, the discussion and ultimate acceptance**

There has been no variation to the contract to do this because the rates themselves do not form part of the contract.

**5. Explain how Kier are not profiteering i.e. substantiate the statement**

Please see point 7 above and the response to your question 3.

**6. Explain why Kier's use of KSoR (the rates you describe) not disclosed previously?**

As stated under the response to your question 1 above, this was due to a misinterpretation of the position. The position is corrected above.

**7. Advise whether BCC billed by Kier using KSoR and:**

**a. If 'yes' why have you withheld the rates and given the impression KSoR were not used**

Please see points 2, 4 and 6 above.

**b. If 'no' please advise why not and supply the rates utilised by Kier to bill BCC and**

Please see points 2, 4 and 6 above.

**c. Explain why these differ**

Please see point 6 above.

**8. If there was an agreement, why was this not previously conveyed?  
Please:**

**a. Provide a copy of the agreement for Kier to adopt KSoR and**

**b. The date of this**

This is explained under point 6 above.

**9. Please provide a copy of the agreement, as at the date the contract was agreed, setting out how Kier are to bill Third parties**

Please see Schedule 15 of the Interim Services Contract.

**10. Explain why they have been withheld previously; why were they deemed commercially sensitive**

As explained in response to your question 1, this was due to a misinterpretation.

**11. Provide a copy of the rates submitted with the original tender**

As explained under the response to your question 1 above, no rates were submitted.

**12. To what 'tendered rates' are you referring.**

**a. Please provide a copy**

As explained under the response to your question 1 above, no rates were submitted and the response on 5 March 2021 was an error.

**13. What changes have occurred to the agreed rates since the tender submission and on what dates. Please provide the variations and when they became effective.**

As explained under the response to your question 1 above, no rates were submitted.

**14. You state 'When required and which is reasonable, claims handlers and solicitors will be used to recover costs that are due'. Please explain what is meant by 'when required' with regard to solicitors, the circumstances and**

This means when reasonably considered as required by Kier Highways Ltd in performing its obligations under the Interim Services Contract.

**15. Provide the agreement that sets out this conduct being agreeable.**

Please refer to paragraph 10 of Schedule 15 of the Interim Services Contract.

**16. Please provide all exchanges between BCC and Kier relating to my FoIA requests**

There have been no exchanges between the Council and Kier relating to your Freedom of Information Act requests. All information has been requested and provided through BHL.

## Summary

We have paused fully reviewing your complaint whilst this further information has been produced and I trust this answers your questions and clarifies the position regarding the apparent contradictions with previous responses.

However, in line with the complaints policy if you are unhappy with the response you may ask for a review of this complaint. This will then be referred to an Independent Complaints Champion under the second stage of our complaints process and will respond to you within 20 working days. A copy of the process can be found below

[https://www.birmingham.gov.uk/downloads/download/4087/bcc\\_compliments\\_comments\\_and\\_complaints\\_policy](https://www.birmingham.gov.uk/downloads/download/4087/bcc_compliments_comments_and_complaints_policy)

Yours sincerely,

Neil Farquharson  
Group Auditor, Birmingham Audit  
Finance & Governance Directorate