

EDINBURGH TRAM INQUIRY

CLOSING SUBMISSIONS ON BEHALF ON DLA PIPER (SCOTLAND) LLP

11 MAY 2018

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Part I – Introduction and Summary of Submissions

Introduction

1. This written submission is lodged for and on behalf of DLA Piper Scotland LLP (hereinafter “DLA”). It has been prepared in accordance with the Note issued by Lord Hardie dated 15 March 2018. Lord Hardie’s Note directs that in their written submissions Core Participants are to “*provide a reasoned statement indicating what the Core participant considers to have been the cause(s) for the delay, increase in cost and other failures of the project and who was responsible for, or contributed to, such delay, increase in cost and other failures.*”¹. The Note lists various issues that are of interest to the Inquiry.
2. This submission will not address all of the issues listed in Lord Hardie’s Note, but only those considered relevant to DLA.

Overview

3. In this submission, it will be contended that there were a number of separate but related causes of the delays, increased costs and other failures associated with the project. DLA acknowledges that the project ran into considerable delay and exceeded its originally stated budget and that identifying the causes of this is a matter of considerable public importance. However, it will also be submitted that the project has ultimately been a significant success for the City of Edinburgh. At

¹ Note, 15 March 2018 3rd page.

least from the City's perspective, it has acquired a very significant, profit generating asset which has brought with it many social and economic benefits to the City. Particularly in light of the grant provided by the Scottish Government, the asset now owned by CEC is bound to be worth vastly more to the City than the City had to spend to acquire it. Prior to embarking upon the project CEC considered that a tram would bring many social and economic benefits to the City of Edinburgh. It would be inappropriate to speculate on whether all of the anticipated benefits have been obtained. However, the project has been such a success that CEC intends to extend the line further.

4. In terms of delays, there can be no doubt that the construction of the project (both MUDFA and Infracore) took longer than had been estimated. It will be submitted that there are a number of reasons for that. In terms of cost increases, it is important to understand what one means by that term. The eventual cost of the project clearly exceeded the estimated budget by many millions of pounds and delivered a tram line that was shorter in terms of track length than had initially been hoped for by CEC and tie. However, it will be submitted that it is far from established that the project which was delivered could ever have been completed for less, or if so, how much less.
5. The Inquiry will recall that the Scottish Parliament had decided that the project was to proceed. There was political support for the project across all but one of the main political parties in central government. Central government was clear that it would provide the majority of the funding for the project. Tie was charged with delivering the project and a procurement strategy was adopted which split

the MUDFA works and the SDS design from the Infraco works. The selection of that strategy was not one that DLA controlled. That was primarily a commercial matter for tie and CEC. It was selected by tie and actively promoted by Mr Ian Kendall, tie's first Project Director². It was a fundamental principle of the strategy that MUDFA and SDS design would be sufficiently completed before the commencement of any Infraco works³. From a legal perspective, the chosen procurement strategy makes sense. However, as was well understood, it depended on the MUDFA and SDS design work being sufficiently well advanced when the Infraco contractor was appointed to enable the contractor to begin work on a reasonably well settled design and with a largely clear path. Common sense tells one that there would always be some detailed design development that would take place during the Infraco works and there might be some overlap with MUDFA⁴, but the principle of a largely settled design and substantially completed MUDFA was well understood. Of course, knowing at any point in time how much of the SDS design and MUDFA work was outstanding, and how likely it was that those issues could be managed and at what cost, was entirely a technical and commercial matter for tie and CEC's City Development Department.

6. In accordance with the chosen strategy, tie proceeded with *inter alios* the MUDFA and SDS design. However, it allowed insufficient time between MUDFA and Infraco for MUDFA to be completed and for the SDS design to be completed. Tie proceeded to preferred bidder stage in relation to the Infraco contract when, as was well known to all parties, MUDFA was incomplete and SDS design was very

² Fitchie Statement, para 4.96-4.99

³ Fitchie Statement, para 2.26; Geoff Gilbert Statement paras. 15 and 25

⁴ The ITN informed Infraco bidders that the MUDFA work would be "substantially complete" not entirely or even practically complete; Fitchie Statement para 4.151

late. As was known, or at least plainly obvious, bidders could never have fixed a price for the Infraco works as they did not know what specification it was that they would be designing to, nor what disruption might be encountered due to incomplete MUDFA works. It was clear in the evidence given by senior BBS executives that no contractor would accept those risks⁵. If Mr Walker of BBS had been asked to give a price to assume those risks, then that price would have been £1bn⁶. That comment was plainly not a flippant one, and rather involved recognition of that which was obvious to everyone: a fixed price was simply not achievable. Tie and CEC knew that there was a risk that the MUDFA work would be late and it knew that the SDS design was far from complete. However, it decided to take the risks, contrary to its own procurement strategy. It was of course for tie to assess what the risks associated with that were and how they might be managed as compared to the risks that would be associated with adopting a different course (such as increased construction costs arising from any delay in proceeding⁷). Those were commercial matters for tie to assess, not matters upon which it would ever have been possible, or even appropriate, for DLA to advise.

7. For its own reasons, the Scottish Government withdrew Transport Scotland (“TS”) from the process prior to the Infraco contract being entered into. That removed a significant bank of knowledge and expertise in the area of major rail procurement from the process. Tie lacked such knowledge and experience itself. That was broadly accepted by the tie executives who gave evidence, most of

⁵ Joachim Enenkel Transcript, page 126, line 2 to 15; Richard Walker Transcript page 9, line 19;

⁶ Richard Walker Statement Appendix 1 para 25 and Transcript page 175, lines 18 to page 177, line 3

⁷ Mr Gallagher testified that delaying Close by 3 months would have cost tie around £15-20m. See his transcript, page 46, line 19

whom did not have significant light rail expertise. It now seems that tie's track record was, to say the least, questionable, having been removed from the Stirling-Alloa-Kincardine rail project⁸. The removal of TS from a large public procurement project of this nature seems to have been unprecedented⁹. Had Transport Scotland not been withdrawn, it is possible that tie might not have made some, or all, of the mistakes it made pre-contract in terms of assessing risks and quantifying their potential financial consequences¹⁰.

8. By December 2007 there was mounting political pressure on tie to make progress. However, as tie and CEC were well aware, the MUDFA works were behind programme as was the design of the Infraco works. In December 2007 senior representatives of tie met with senior representatives of BBS at Wiesbaden. DLA was not present at, or involved in, this meeting, which was technical and commercial in nature. They struck a deal there which allowed BBS to sign up to the infraco contract. They did so fully aware of the fact that this was the best they could do at that time but that it contained numerous pricing assumptions which would not, or might not, hold good. If tie had not agreed to the pricing assumptions, BBS would not have signed the contract. As already observed, no contractor would have agreed to fix its price for an incomplete design and when MUDFA was not complete.

⁸ CEC01318113_26

⁹ Ainslie McLaughlin Transcript, day 1, page 208, lines 4 - 10

¹⁰ It was of course a condition of the Government's grant being re-instated that TS become fully involved, which happened after CEC reversed its decision to end the line at Haymarket and after the Mar Hall mediation, that TS be fully re-engaged. See McLaughlin Transcript, day 1, page 195, lines 3 - 15 & day 1, page 202, lines 20 - 25

9. It appears that pausing to await completion of MUDFA and completion of the design was not an option for the City as pausing would potentially mean the end of the project and the government funding of it¹¹. Stopping altogether was unthinkable for both political and commercial reasons. Political, because Parliament had already decided that the project was to happen and there had already been public commitments given¹² and huge disruption caused by MUDFA¹³. Commercial, because the City would have ended up with no tram and a massive bill to repay MUDFA and other costs to the Scottish Government¹⁴. As at 7 May 2008 CEC had already spent £136.5m of the total budget.¹⁵ The Inquiry has heard evidence that this might have involved a need to repay the grant in one fiscal year. However, even if that is not correct, the Government would likely have demanded repayment leaving the City with a big bill and no tram. Had the project been stopped then, CEC would clearly not have been complying with the conditions of the Government's grant, which required delivery of a tram system. As Mr Fair testified, it would then have been open to the government to demand repayment of sums already paid. Whether to do that or not would have been a political decision based at least in part on the impact that repayment would have on CEC. Mr Fair was clear that at the point of contract Close repayment would have been "*manageable*".¹⁶ In contrast, by continuing with the project CEC ensured that it received a £500m grant from the Scottish Government and

¹¹ See Tony Glazebrook Transcript page 157, line 19 to page 159, line 22; Neil Renilson Transcript, Day 2, page 116 line 11 - page 117, line 19; Willie Gallagher Transcript, page 46, line 19 - page 47, line 21 which put the cost of a three month pause at £15-20m

¹² See Trudi Cragg Statement TRI00000029_002 and John Swinney Transcript, page 48, line 6 – page 49, line 12

¹³ Donaldson, Transcript, Page 135, lines 8 to 20

¹⁴ Note that when Government thought the line was going to be stopped at Haymarket it froze the remaining tranches of grant money. If the tram had not proceeded at all it seems highly likely that the Government would have had an obligation to seek repayment of the full sum it had already paid out.

¹⁵ CEC00079902_13

¹⁶ Fair Transcript, page 179, lines 4 - 17

secured an asset for the City with a value that far outweighed CEC's capital contribution.¹⁷ Note that for its own reasons CEC has not recorded a value for the tram system in its asset register¹⁸.

10. So, tie took a decision to do the best deal that it could in the circumstances. It did so with its eyes open. BBS was never going to take the risks of incomplete MUDFA and design. So, in order to get the tram deal done, tie had to, and did accept those risks. Both tie and CEC officials understood the risks and decided to permit tie to assume them. Tie took the view that it was better to sign the contract and then fight the inevitable Notified Departures as they came. However, it seems that the commercial minds within tie who were responsible for assessing and quantifying the risks associated with that decision significantly underestimated them and grossly underestimated the contingency required to provide for them. Those were commercial matters exclusively for tie, not DLA.

11. As is demonstrated below, it seems clear beyond peradventure that those within tie and CEC legal both knew and understood what tie was signing up to. Schedule Part 4 of the Infraco contract was drafted by tie. Tie was responsible for drafting and populating the QRA. Tie assessed the amount of the required contingency allowance. DLA had no role in such commercial matters. In any event, tie was warned by DLA about the consequences of what it had agreed to in Wiesbaden. CEC officials were also made well aware of these matters in DLA's written advice letters.

¹⁷ See Jennifer Dawe Transcript, page 94, lines 5 – 14

¹⁸ Stuart Fair Transcript, page 190, line 3 to page 192, line 14

12. Post-Close, BBS adopted a highly contractual approach. Tie's strategy of fighting Notified Departures failed as BBS swamped tie with them. It seems that those within tie responsible for assessing and quantifying the risks massively miscalculated. There was no continuity within the senior team at tie. Relations between tie and BBS broke down. The project ground to a halt.

13. By the time of the Mar Hall mediation, DLA was no longer involved. DLA is not in a position to offer the Inquiry any insightful view on why the deal that was struck at Mar Hall was considered acceptable by CEC. However, it may be that the cost that was eventually agreed to was what it was always going to be for this tram because of the strategy that had been adopted once SDS and MUDFA fell into delay.

14. In short, the contract that tie signed up to was the best deal possible at the time it was signed and in the circumstances that then existed. In particular, it was the best deal available given the state of the MUDFA works and the incomplete SDS design. It reflected the commercial deal that tie had to do because of the strategy adopted and the fact that MUDFA ran late and design was incomplete. CEC got value for money in that it got the tram it was always going to get for the money it paid. That tram is a success. It is profitable and seen as a project worth extending to Newhaven.

DLA Witnesses

15. A former partner of the firm who retired in January 2011, Andrew Fitchie, and a current partner, Dr Sharon Fitzgerald, were called to give evidence to the Inquiry.

Andrew Fitchie

16. Andrew Fitchie was clearly a highly qualified and experienced lawyer with extensive experience of dealing with major infrastructure projects. It seems clear that he worked tirelessly on the tram project and genuinely put his heart and soul into delivering the project in accordance with his instructions. Mr Fitchie was robustly and rigorously cross examined by senior counsel to the Inquiry for a day and a half on 10 and 11 October 2018. On 10 October, after being subjected to a full day of cross-examination, and near to 4.30pm in the afternoon, Mr Fitchie was clearly exhausted. Under forceful cross-examination by senior counsel to the Inquiry, and at times when pressed directly by the Chair of the Inquiry, Mr Fitchie gave evidence which might suggest failings on his part to prevent misleading information being given by tie to CEC relative to whether or not the scope and risk of the project had changed from the Final Business Case¹⁹. However, that evidence needs to be placed in context. It came in response to questioning during which he was not shown all of the relevant documents together and at a stage which was late in the day when Mr Fitchie was clearly exhausted²⁰

¹⁹ 10 October 2018, page 187, line 16 - & page 195, line 25

²⁰ As the Inquiry is aware, Mr Fitchie had travelled from the west coast of the USA the day before his evidence and would also have been dealing with the consequent time difference.

17. The issue was taken up again on 11 October. It may be suggested that on 11 October 2017, Mr Fitchie appeared, under further vigorous cross-examination, to accept that he had been aware that, in the Close Report, he had knowingly misled CEC about Schedule Part 4, and that he failed to do anything about that. Any apparent concessions followed upon the putting to Mr Fitchie of highly selective parts of relevant documents. Without being shown the full suite of documents that CEC officials had before them at the time, the weight that can be given to that evidence is questionable. It is also important to note the full answer appearing on page 86, line 8 of the transcript. There, Mr Fitchie attempts to explain that he relies on the DLA letters which require to be read along with the Close Report. Inquiry Counsel chose not to explore that further. The Close Report was a tie document. It was, however, accompanied by the DLA letters²¹.

18. In re-examination, and when the complete documents were shown to Mr Fitchie, Mr Fitchie gave quite different answers to those given to Inquiry Counsel. In fairness to Mr Fitchie, the points that were put to him by Inquiry Counsel ought to have been put in context and after giving him a fair opportunity to see the whole of the relevant parts of all of the relevant documents. The context of these passages and documents as put by Mr Dunlop was highly relevant. However, it was only in re-examination that Mr Fitchie was shown the complete documents as a package, as CEC had received them. When that was done Mr Fitchie clearly demurred to the prior suggestion that the Close Report was misleading. Indeed, whatever might have been Mr Fitchie's view, when the Inquiry reads the documents discussed between Mr Dunlop and Mr Fitchie in the above passage of

²¹ CEC01372309; CEC01312368; CEC01347797

evidence, it is submitted that, it can come to no other conclusion than that DLA had made tie and CEC aware of the relevant risks, in particular, the risks associated with the Pricing Assumptions, risk of MUDFA delay and SDS design delay. That was DLA's responsibility. Quantifying the risks was a matter entirely for tie. As will be demonstrated, both tie and CEC understood these risks. Further submissions will be made later in this document concerning why DLA contends that Mr Fitchie was entitled to treat CEC as an informed client and why it was reasonable for him to assume that between CEC's dedicated in-house legal, technical and commercial departments CEC should have understood what tie was entering into.

19. The CEC legal officials who testified after Mr Fitchie (Lindsay and MacKenzie) broadly accepted that, if one reads the whole suite of documents, then one is left in no doubt about the risks being assumed by tie relative to the various pricing assumptions. Indeed, Mr MacKenzie did that. Accordingly, it may be that, in the end, not much really turns on the criticisms levelled at Mr Fitchie.

20. It should also be noted that, whilst Mr Fitchie was challenged on a number of issues, one point where there was no such challenge was his evidence²² of a meeting with tie officials on 9 April 2008, at which there was a clear discussion of risks. A file note recording that meeting was produced to the inquiry by DLA at the outset²³. This was one of a batch of attendance notes which were typed up by Mr Fitchie's secretary on 23 February 2011 in the course of his organising the

²² Fitchie's statement at 7.320

²³ DLA00006319

DLA project files for handover prior to his pending retirement²⁴. Mr Fitchie was not present in the office full time and not in the office at all after early March 2011 until his retirement from the firm on 6th June that year, so he did not correct the errors in his secretary's typed note, including the provisional date which had been entered. There has subsequently been some suggestion by the solicitor to the Inquiry that the provenance of this document is doubted by the Inquiry, and that accordingly little or no weight may be given thereto. This is a cause of great concern to DLA, for (at least) two reasons. First, it suggests that a view may already have been taken on a point of some importance, which would not be appropriate. Second, any such view would be arrived at in circumstances where the point simply was not put to Mr Fitchie.

21. On this latter aspect, it is of course recognised that the proceedings are an inquiry, and not a proof or trial. Nevertheless, the point is one of simple fairness, and it is plain that the inquiry must still act fairly. As Lord President Cooper observed²⁵, "the most obvious principles of fairplay dictate that, if it is intended later to contradict a witness upon a specific and important issue to which that witness has deponed, or to prove some critical fact to which that witness ought to have a chance of tendering an explanation or denial, the point ought normally to be put to the witness in cross-examination". This "most obvious principle of fairplay" has not been followed here if, as the solicitor to the Inquiry has suggested, the provenance and genuineness of the file note are to be impugned.

²⁴ See paragraph 97 below

²⁵ *M'Kenzie v M'Kenzie* 1943 S.C. 108

22. Leaving notions of fairplay to one side, it is in any event clear that any such challenge would be wholly unfounded and potentially prejudicial. The inquiry has seen evidence for the file note showing that it was produced by a member of staff other than Mr Fitchie in February 2011²⁶ – long before any claim was made against DLA. There is no basis whatsoever for supposing that this file note was fabricated.

Sharon Fitzgerald

23. Dr Fitzgerald was an impressive witness, whose evidence can be accepted in its entirety. That evidence is broadly supportive of Mr Fitchie, and of the effort he put into what was on any view a very difficult project.

Part II – Submissions on Specific Issues Listed in Lord Hardie’s Note

A - Procurement Strategy

24. There does not appear to be any real doubt about the basis of the procurement strategy that tie and CEC elected to use. CEC set up tie as its delivery agent and tie was freed from the normal constraints in terms of salary etc which would otherwise have applied. This was done to enable tie to recruit expertise and pay market rates²⁷. The strategy depended on tie negotiating and entering into an SDS design appointment and procuring the execution of the MUDFA works in advance of it procuring the Infracore Contract. The success of the strategy

²⁶ Original metadata can be provided if required

²⁷ McLaughlin Transcript, day 1, page 145, line 1; McLaughlin Statement, para 130

depended on the SDS design and the MUDFA works being sufficiently well advanced at Infraco procurement to allow the Infraco Contractor to make a firm price based on a settled design and the assumption that the MUDFA works would be out of the way of the Infraco Contractor's workforce when they required access to the tram pathway²⁸.

25. This strategy was tie's preferred approach and it was taken forward by Ian Kendall. The strategy appears reasonably sound if it can be managed and followed. However, it seems clear that tie was unable to achieve the key objectives of the strategy by May 2008. Inevitably, that meant that tie's strategy either had to change to deal with the fact that the SDS design was not complete when the Infraco contract was concluded or tie had to take management steps to recover the original strategy. It was for tie to adapt its strategy as it saw fit, and it did so with its eyes fully open.

26. Notwithstanding the obvious fact that tie was charged with deciding on strategy from a technical and commercial perspective, Mr Fitchie gave tie options in relation to how it might react to the position it found itself in. These were set out in his advice to tie's most senior executives both verbally and most explicitly in his email of 31 March 2008²⁹. Mr Bell's evidence was clear that tie understood where it was³⁰. It appears that tie's revised strategy, recognising that the SDS design was not complete and recognising risks concerning MUDFA, involved fighting Notified Departures as and when they arrived. Mr Reynold's gave evidence to the effect that he discussed matters with Willie Gallagher who understood that the

²⁸ Fitchie Statement, para 4.91, but see Fitchie Statement generally from 4.64 onwards.

²⁹ CEC01465933

³⁰ Discussed in detail later in this submission

original procurement strategy had to change³¹. It was not for DLA or Mr Fitchie to try to assess how successful, or otherwise, that strategy might end up being. It was not for DLA or Mr Fitchie to assess whether or not tie's risk allowances and contingencies were adequate to cover tie if Notified Departures were made and resulted in additional payments becoming due.

B – Governance and Project Management

27. In so far as this heading includes the issue of any conflict between tie and CEC, the following are DLA's observations. The Inquiry will appreciate that DLA had no direct involvement in setting up the reporting lines between tie and CEC or between the project organs and TS. DLA was not involved in the project's management.

28. It is contended by DLA that the perceived risk of conflict between CEC and its wholly owned subsidiary, tie, is more theoretical than actual. At a corporate level, tie existed to serve CEC's stated goals of obtaining £500m of central government funding to use to procure a tram system which CEC desired should be built to serve the citizens of Edinburgh. The decision to use an arm's length company to achieve CEC's goal was not a matter on which DLA was asked to advise and it may have been a structure that was imposed on CEC, or at least strongly recommended, by central Government³².

³¹ Reynolds Transcript, day 2, page 37, line 7 to page 38 line 22

³² Michael Howell Transcript, page 2, line 23 to page 4, line 10; Donald Anderson Transcript, page 195, lines 15 - 22

29. Given the wholly owned status of tie and the fact that it existed to further CEC's aims, if adequate steps had been taken by CEC to ensure that it understood what tie was doing (through proper reporting lines and governance) and if CEC had taken adequate steps to understand the Infracore Contract (for example reading the DLA advice letters and the contract) there is no reason to perceive that any actual conflict would have arisen. That was also how a number of witnesses saw matters in practice, certainly at a corporate level³³.

30. It is of course accepted that, at a more granular level, individuals within tie could, in theory, make decisions based on self interest and not in CEC's interest. DLA is not asserting that that actually happened but is accepting that, in theory at least, it could. However, that is a risk that is present in any organisation where the individuals involved might have interests which do not fully mirror those on whose behalf they are meant to be working. Indeed, it would apply to a department within CEC just as it would to a wholly owned subsidiary of CEC. However, that aside, it is submitted that, at a corporate level, with proper oversight by CEC officials, there was no real risk of tie's interests diverging significantly from CEC's interests.

31. In terms of oversight, it is submitted that CEC had more than adequate machinery at its disposal to ensure that it was able to monitor and over-see tie's work. The most obvious way for CEC to exercise its powers was through its status as tie's owner. As owner CEC was able to put in place adequate reporting and communication lines to enable its officers to obtain whatever information

³³ See Ewan Aitken Transcript, page 151 lines 6-13; McGougan Transcript, page 66, lines 2-25; Lindsay Transcript, page 27, lines 3-14; Fitzgerald Transcript, page 129, line 1 to page 130, line 5; McGarrity Transcript, page 79, line 22 to page 80, line 24.

CEC needed. CEC could, had it seen fit, have set up structures to enable tie board representation by CEC officers with express reporting rights.

32. In fact, CEC seems to have adopted a very hands off approach. That was its decision. Had it wished to be more hands on, that was open to it. From DLA's perspective, it is submitted that there was nothing unusual about it acting for tie whilst also extending a duty of care to, and treating as joint client, tie's owner. CEC legal was at liberty to be more involved with the day to day project management than it was. However, in terms of the legal department, as the evidence of Ms Lindsay, Mr MacKenzie and Mr Smith³⁴ demonstrated, for different reasons, they chose not to be. In the case of Ms Lindsay, she sought to delegate to Messrs MacKenzie and Smith. In the case of Messrs MacKenzie and Smith, they chose to ignore Ms Lindsay's instructions and to distance themselves from the contract as opposed to engaging with DLA who were willing and able to share their expertise with them. DLA was tie's lawyer but had undertaken to report to CEC as instructed by tie³⁵. It was open to CEC to obtain its own independent legal advice had it wished. CEC legal appears to have debated that issue internally at some length and decided that that was not a course it wished to follow. It elected to accept the duty of care letters issued by DLA, on their express terms.

³⁴ Discussed in detail below, see para 82 & 113

³⁵ See Fitchie Statement, para 7.66 & 11.48

33. It is submitted that, in a real sense, there was, or ought to have been, no conflict between tie, as a corporate entity, and CEC. Equally, there was nothing unusual in the arrangement that DLA had with both of them³⁶.

C – Legal Advice

34. In this section DLA will make submissions in relation to its appointment and role in relation to CEC. Submissions on the advice actually given in relation to specific matters will appear later in these submissions under other relevant headings.

Appointment of DLA

35. Following upon a tender process DLA was appointed by tie in relation to the provision of legal services for the Edinburgh Tram, Lines One and Two by way of a letter from tie dated 19th November 2002³⁷. The appointment refers to and incorporates a number of standard conditions. These really speak for themselves.

Role in relation to CEC

36. Tie requested that DLA provide a letter confirming that it would owe a duty of care to CEC. The first such letter was issued on 23 June 2005 and it confirmed that, from 5 December 2003 onwards, a duty of care had been owed by DLA to CEC. The bases upon which that duty of care was assumed by DLA are set out

³⁶ As discussed below, this is a standard approach, and is indeed the one adopted by McGrigors when it acted for tie and CEC (Nolan Transcript page 207, line 7 to page 209, line 2). The same partner at Pinsent Masons, Brandon Nolan, now acts for both tie (renamed CEC Recoveries) and CEC. It is accepted by DLA that it is a different partner at Pinsent Masons that represents Bilfinger Berger.

³⁷ ADS00001; Fitchie Statement TRI00000102 para 2.13 and para 4.21 – 4.26

in express terms in the body of the letter. The letter invites both tie and CEC to execute a docquet at the foot of the letter in order to put the undertaking into effect. Neither tie nor CEC issued such formal acceptances. However, parties plainly continued to engage after the issuing of the letter, and it is accepted by DLA that the express terms of the duty of care letter applied and that a duty of care, on the terms set out in the letter dated 23 June 2005 has existed since 23 June 2005, but back-dated to 5 December 2003. CEC has clearly accepted that the draft duty of care letters apply to DLA's appointment.³⁸

37. The 23 June 2005 duty of care letter (hereinafter "Duty of Care Letter 1") makes very clear that tie remained DLA's client and that DLA could rely on tie's instructions as being identical to those of CEC as if emanating from CEC and as taking into account CEC's objectives and best interests (clause 1). It also makes clear that DLA will receive its instructions from tie, not CEC. DLA also sent a letter to tie on the same date, in which DLA explained the express terms upon which it had issued Duty of Care Letter 1³⁹.

38. In 2007 copies of the foregoing two letters (unsigned) were sent by tie to Gill Lindsay⁴⁰. It seems there was internal discussion within CEC in relation to this issue. Nick Smith and Colin MacKenzie had reservations about whether a joint client arrangement was enough, particularly given the fact that DLA had been removed from the project for a lengthy period of time⁴¹. However, in her evidence, Ms Lindsay made clear that she understood and accepted the basis

³⁸ CEC02087209

³⁹ DLA00006301; Fitchie Statement 2.18 – 2.20 & 4.34.

⁴⁰ CEC01564769

⁴¹ CEC01564769; CEC00013273; Fitchie Statement paras. 7.40 – 7.46

upon which the duty of care was being undertaken⁴². She recalled that either she or Mr MacKenzie actually signed the letter⁴³ (albeit no signed copy has been produced). Ms Lindsay requested a further letter setting out DLA's duty of care owed to CEC in a discussion with Mr Fitchie and on 16 August 2007 he followed that up with an email and a draft letter reiterating the duty of care and also acknowledging CEC as a joint client with tie⁴⁴. In a memorandum to Mr MacKenzie, Ms Lindsay noted that the proposal for DLA to treat CEC as a joint client was an "*extension of the previous duty of care arrangement*".⁴⁵

39. The provision of a duty of care letter by a solicitor appointed by one company to a related entity is entirely normal practice. Indeed, it is the basis upon which McGrigors were engaged for both tie and CEC after they took over from DLA⁴⁶. There is absolutely nothing unusual about such an arrangement, which proceeds on an assumption that the interests of the two related entities are "aligned"⁴⁷.

40. It is submitted that CEC was plainly in no doubt at all about the nature and scope of the duty that DLA was assuming to it. The terms of the letters discussed above obviously speak for themselves. DLA could hardly have been clearer as to the scope and extent of the duty it was willing to undertake to CEC and as to the assumptions on which that undertaking was conditional. In any event, the internal communications between Ms Lindsay and her second in command, Mr MacKenzie put beyond doubt that they were well aware of the significance of the

⁴² Lindsay Transcript, page 30, lines 13 and 18

⁴³ Lindsay Transcript, page 34, lines 14 - 15

⁴⁴ CEC01711054; CEC01711055; Fitchie Statement para 2.21 & 4.37

⁴⁵ TIE00897231

⁴⁶ Nolan Transcript, 7 December 2017, pages 207 – 209; CEC00774999

⁴⁷ Nolan Transcript, page 208, lines 13 - 18

terms of the letters. In his email of 24 August 2007 to Ms Lindsay⁴⁸, Mr MacKenzie refers to Mr Fitchie having previously been “emphatic” in relation to the fact that tie was DLA’s client (prior to DLA agreeing to treat CEC as a joint client). Mr MacKenzie then writes: *“Broadly speaking the new letter simply makes clear that DLA will now regard CEC as a joint client (as opposed to the previous offer of a simple extended duty of care). However, this is caveated on the basis that DLA are (and always have been) instructed by tie and as such are assumed (and have been assumed) to take into account all of CEC’s requirement, objectives and best interests.”*

41. It was a matter entirely for CEC to decide whether or not it wished to accept the offer that was made to it by DLA on the conditions that it was offered (and for which no additional fee was charged). Had it wished to, it was of course open to CEC to obtain its own independent advice and to decline DLA’s proposal. It chose not to do that, asking Mr Fitchie for yet another copy of the letter in October 2007⁴⁹.

42. CEC is clearly bound by the clear and unambiguous conditions under which the duty of care and joint client status were offered by DLA. The letters are free from any ambiguity. It is trite to say that the scope of a solicitor’s duty is set by the terms of his retainer. This was explained by Oliver J in *Midland Bank -v- Hett, Stubbs & Kemp* thus: “The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.” The Inquiry will of course take account of the fact that DLA was

⁴⁸ CEC01567520

⁴⁹ Fitchie Statement para 2.21 & 4.39, 4.51

dealing with senior, experienced lawyers within CEC's legal department who fully understood what was being offered and its express conditions and assumptions⁵⁰. Indeed, Ms Lindsay clearly accepted that "*the way it worked*" was that tie was DLA's client and reported to tie, except when specifically asked either by tie or CEC to report to CEC directly⁵¹.

D – Scottish General Election (May 2007) and decision of TS to change role.

43. The political dimension to the decision to change TS's role is not a matter upon which DLA can shed a great deal of light. The SNP was however against the tram. There was concern within tie that the new SNP administration would cancel the project altogether⁵². However, Parliament voted for the project on a motion. Mr Swinney gave evidence that, whilst not binding on the Government, as the Parliament had voted to proceed with the project he, and the SNP Government, had undertaken to accept that vote⁵³. Mr Swinney's position was that he withdrew TS in the interests of clarity of roles, highlighting that tie was to deliver the project and that central government would not pay more than the funding commitment of £500m⁵⁴. Mr Swinney was clear that the project was going ahead.

44. Whatever might have been Mr Swinney's reasons for withdrawing TS, it is submitted that the evidence which has been heard by the Inquiry demonstrates that the loss of TS's experience, expertise and guidance may well have left tie seriously lacking in technical, and possibly commercial, experience relative to the

⁵⁰ C.f. the assertion of Inquiry Counsel, Fitchie Transcript, 10 October, page 50, line 23.

⁵¹ Lindsay Transcript, page 187, line 17 to page 188, line 13

⁵² Gallagher Statement paras. 10 - 12

⁵³ Swinney Transcript, page 12, line 11 to page 13, line 6

⁵⁴ Swinney Transcript, page 20, line 5 to page 23, line 4

sort of issues and problems that might be encountered on a light rail project⁵⁵. This lack of experience might explain the scale of tie's under-estimating of the risks related to MUDFA and SDS design delays and the potential cost implications of these.

E- SDS

45.DLA refers to and adopts the evidence of Mr Fitchie in his statement (TRI00000102) at paras 2.37 – 2.55.

The Award of the Design Contract

46.DLA advised tie in relation to the award of the SDS design contract. There were five bidders for this work and so strong competition amongst them⁵⁶. The appointment that was eventually entered into provided tie with standard contractual levers to ensure that tie could require the SDS designer to deliver its services in accordance with the procurement strategy. Mr Fitchie lists these in his statement at para 5.21 and they can be seen in the clauses he mentions in the appointment (CEC00839054). Dr Fitzgerald also comments on the range of different protections contained in the SDS Contract at pages 41 to 42 of her statement.

⁵⁵ See for example Duncan Fraser Transcript page 25, line 24 to page 26, line 12 and Tony Glazebrook Transcript, Day 2, page 38, line 24 to page 39, line 7

⁵⁶ Fitchie Statement, para 5.20

The scope of services undertaken.

47. Mr Fitchie discusses various provisions in the SDS contract in his statement (paras 5.25 – 5.77). These paragraphs are adopted by DLA. Otherwise there is no comment by DLA.

Progress to December 2007, difficulties encountered, the reasons for these difficulties and remedial measures attempted

48. There can hardly be any doubt that, by December 2007, it was common knowledge amongst all parties involved that SDS was very late⁵⁷. Ms Lindsay gave evidence that she was aware that the design risk associated with SDS was not being passed to BBS and would be retained by Tie⁵⁸. So did Mr MacKenzie⁵⁹. Tie was undoubtedly aware of this, hence the difficulties surrounding novation and the need for various pricing assumptions. It is clear that in December 2007 both TIE and CEC should have been aware that only about 60% of the detailed design had been submitted to BBS.⁶⁰ How late the design was going to be when it was eventually delivered, and to what effect, were technical and commercial matters upon which DLA was not in control. Furthermore, DLA was stood down from April 2007 until late August 2007 and so would not have had any knowledge of progress of the SDS design in that period.

⁵⁷ Indeed, it had been identified as being so late that tie had issued a bulletin to bidders in January 2007 amending the instructions to bidders – see Fitchie Statement para 5.82; CEC01824070

⁵⁸ Lindsay Transcript, page 83, line 21 to page 84, line 7; CEC01406011

⁵⁹ Mackenzie Transcript, page 154, lines 11 - 25

⁶⁰ David Crawley Transcript, page 84, line 22 to page 86, line 6; Tony Glazebrook Statement Question 24; CEC01387400_11; CEC01398245 at para 4.2

49. Upon DLA being re-engaged in late August 2007, the problems were evident⁶¹.

While DLA was not directly involved, it appears, largely for the reasons set out by Mr Fitchie in his statement⁶², that the reasons for these were numerous and that the blame for delays falls to be shared between the SDS designer (i.e. Parsons Brinkerhoff), tie and CEC. In so far as the fault lay with the SDS designer, the appointment contract provided tie with all of the contractual levers that it needed to force the designer to perform and to accelerate, at its own cost⁶³.

50. Mr Reynolds gave evidence which broadly accepted that PB could have done better but primarily laid the blame at tie and CEC's doors. He gave his view that, by July 2007, CEC changes and difficulties getting third party agreements in place delayed the SDS design by six months to a year⁶⁴. He also explained that there remained several major design issues outstanding when BBS priced the contract. He could not assist on how BBS priced, but he was clear that the pricing assumptions were required because of the incomplete design. He was clear that Mr Gallagher took a decision to proceed with Infracore Close aware of the position⁶⁵.

51. DLA's role was to provide appropriate legal advice on tie's rights and obligations.

DLA had no responsibility to manage the SDS work stream and had to rely on tie to do so. This is reflected in the style of persistent breach notice Mr Fitchie drafted for tie to use. It contained blanks to allow tie's technical people to insert

⁶¹ Fitchie statement para 5.156

⁶² Fitchie Statement, para 5.88 *et seq*

⁶³ Fitchie Statement, para 5.21

⁶⁴ Reynolds Transcript, day 2, page 24, line 21 to page 25, line 15

⁶⁵ Reynolds Transcript, day 2, page 48, line 18

the detail of the reasons they contended applied and were the fault of SDS⁶⁶. That reflects the reality of the situation, namely that it was for tie to manage the SDS design contract and it would be tie that would know why the SDS design was late, and who was to blame for that.

52. The important point however is that tie and CEC were aware that the design was late and incomplete with obvious consequences in terms of cost and price fixity and that remained the position at contract close⁶⁷. Tie decided to make a payment to the SDS designer as described in Mr Fitchie's statement at para 5.186 and elsewhere. This recognised that tie and CEC had been culpable in delaying the SDS designer. It also demonstrates that tie was well aware of the state of the design.

53. When asked, DLA, through Mr Fitchie, had a duty to give tie advice in relation to tie's rights against the SDS Designer, and its obligations to the SDS Designer. Nevertheless, DLA could not advise tie on the factual and technical issues that would obviously be fundamental to assessing the prospects of any claim or counter-claim. DLA did everything it could to put tie on notice that it might, depending on the facts, have claims and how to preserve those⁶⁸.

⁶⁶ CEC01642351 & CEC01642352

⁶⁷ Duncan Fraser Transcript, page 16, line 17; page 24, line 3, page 54, line 1; Tony Glazebrook Transcript, page 188, line 12 to 190, line 12; David Crawley Transcript, page 84, line 22 to page 86, line 6;

⁶⁸ See for example the email from Fitchie to Clark of 23 August 2009 at CEC00854847

F – MUDFA

Award of Contract

54. DLA has no comments.

Scope of Services

55. DLA has no comments.

Progress to December 2007, difficulties encountered, the reasons for these difficulties and remedial measures attempted

56. The MUDFA works began on the ground in Autumn of 2006. They were not completed by the time of the Infraco contract being closed in May 2008. That was well known to tie⁶⁹. As with the delay to the SDS design, the extent of the MUDFA delay and its likely impact on Infraco was a matter for tie's technical and financial people. They are not legal matters. It was for tie to assess the impact of these delays and how and whether they could be managed to avoid impacting on the Infraco works. DLA's role in relation to explaining the legal consequences of any impact on the Infraco works is discussed in detail below.

57. At the time of the Wiesbaden Agreement BBS was clearly concerned about the risks that might attend the fact that MUDFA was not complete and was, at that time, behind programme. Understandably, BBS was not prepared to take on that

⁶⁹ John Casserley Transcript, page 65 , line 5 to page 67, line 11; CEC01455620; CEC01293830

risk. By March 2008 tie was of the view that, while MUDFA had been problematic and was still late, steps had been, and were being, taken to try to recover the programme⁷⁰. At the Joint Tram Project Board meeting on 13 March 2008 tie reported that it was confident of making £3m of savings on MUDFA. It also reported that specific allowance had been made in the risk allowance for “MUDFA related issues”. The allowance was described as “significant”⁷¹. At the 9 April 2008 TPB meeting tie reported on Period 13 and indicated that construction work was 3-4 weeks behind programme⁷². By Close tie was reporting that MUDFA was back on programme and budget. These were entirely matters for tie to report on.

58. It would appear that, at Infraco Contract Close, Willie Gallagher thought that MUDFA delays were restricted to specific areas and could be managed. Whether or not that was correct was not a matter for DLA to advise on. DLA, as lawyers, could not second guess tie’s views on how late MUDFA actually was, or what that might mean in terms of costs and need for risk allowances. It appears now that MUDFA may have been later than tie thought and that the impacts of that in terms of programme and cost was significantly greater than tie anticipated⁷³. What is clear though is that BBS was never going to adopt the risk of MUDFA delay and disruption impacting on the Infraco works. Tie understood that and agreed to Pricing Assumption 24 as a result.

⁷⁰ CEC01455620

⁷¹ CEC00114831_0005 - _0009, paras 10.2 and 10.5.

⁷² CEC00114831_0020

⁷³ A full delay analysis has not been undertaken. See Iain McCalister Transcript, page 194, line 12 to line 23.

However, it seems not to be in doubt that MUDFA was still on site and in BBS’s way for a considerable period of time after BBS mobilised, See Foerder Transcript, page 12, line 21 to page 13, line 2.

G – INFRACO (up to appointment of preferred bidder)

59. The clear intention, as expressed in the ITN documents, was that the SDS design works would be substantially completed when the Infraco best and final offers were sought and that the MUDFA works would be substantially completed when the Infraco contractor mobilised. However, as will be discussed in more detail in section I below, neither of those assumptions proved to be correct. DLA was effectively stood down for 5 months until the firm was re-engaged in August 2007.

60. BBS was confirmed as preferred bidder in October 2007. For the reasons set out by Mr Fitchie in his statement, this decision was announced too early for tie's own commercial and political reasons and gave BBS the upper hand in negotiations. BBS was able to exploit its newly secure position in the absence of competitive tension to negotiate increases in price and improved contractual positions.⁷⁴

H – Involvement of Audit Scotland and OGC Gateway Reviews

61. DLA has no comments.

I – Events of December 2007

62. December 2007 was a pivotal period for the Infraco contract negotiations. Tie and CEC officials were aware that there was to be a meeting of the full Council on 20 December 2007. There was a need to report on progress at that meeting and it

⁷⁴ Fitchie Statement paras 7.94 – 7.95; Tony Rush Transcript, page 136, lines 11 – 24; Willie Gallagher Transcript, page 26, line 8 to page 27, line 21

seems that that became a key driver in the negotiations. It is no coincidence that the meeting in Wiesbaden took place when it did.

63. There were however several important meetings and events in the run up to, and in the period after, Wiesbaden. There seems to be no real dispute that a meeting took place in Edinburgh in early December 2007 between tie officials, including *inter alios* Geoff Gilbert, Mr Fitchie and Richard Walker, plus BB's lawyers. Mr Fitchie recalls Mr Walker telling him that the Infracore works would cost approximately £80,000,000 more than the contract price⁷⁵.

64. In his evidence Mr Walker denied saying this to Mr Fitchie in December 2007 but recalled saying something like it later, possibly in February 2008⁷⁶. However, when his evidence is taken as a whole, it seems that he accepted saying something similar in December 2007, albeit he contended it had been said to Mr Gilbert in Mr Fitchie's company⁷⁷. Mr Walker also confirmed that what Mr Fitchie recalled him as saying was what he thought at the time. It is submitted that, in the circumstances, Mr Fitchie's evidence on this is to be preferred. Mr Walker's evidence broadly accords with Mr Fitchie's, with the minor exception that Mr Walker cannot recall having the conversation at that time (as opposed to just later) or with Mr Fitchie (as opposed to with Mr Gilbert in Mr Fitchie's presence). Mr Fitchie had a very clear recollection of the conversation and of taking immediate steps to report it to others in the tie team.

⁷⁵ Fitchie Statement, para 7.123; Fitchie Transcript Page 73, lines 3 to 16, Page 75, lines 6 – 14

⁷⁶ Richard Walker Transcript, page 86, lines 15 - 23

⁷⁷ Richard Walker Transcript, page 177, lines 1 - 15

65. There was a meeting between senior tie executives and senior CEC representatives on 12 December 2007. This followed an internal tie meeting. The state of the SDS design and MUDFA works were discussed at both as was the issue of risk transfer⁷⁸. Mr Gallagher told the CEC officials that there remained a number of risks which could have cost and time consequences for tie and CEC. Mr Fitchie also gave similar warnings⁷⁹. Mr Fitchie informed the meeting that SDS was extremely late and that this would mean that BBS qualified its price⁸⁰.

66. On 12 December 2007 Mr Walker wrote to Mr Gallagher setting out BBS's stance on the assumption of design development risk⁸¹. He is clear that "Price Confidence" is subject to the information provided for those areas where design has been provided. He also refers in that letter to BBS "assumptions". These clearly relate to programme and design. In the attachments to that letter one finds certain pricing and programming "Key Assumptions". In its preparations for the Wiesbaden meeting tie produced a negotiation strategy paper which clearly recognises that the issue of who is to take on design development risk was at the forefront of the negotiations⁸². It is beyond doubt that tie and BBS went to Wiesbaden to try to thrash out that issue. Tie may well have hoped to leave Wiesbaden with a deal which involved BBS assuming the risks of design development, but what cannot be in doubt is that tie understood BBS's stance on that and that tie was aware that that was an issue for the discussions. That is

⁷⁸ Fitchie Transcript, page 81, line 11; Fitchie Statement, para 7.145

⁷⁹ Fitchie Statement, para 7.162

⁸⁰ Fitchie Statement, paras 7.117, 7.168-169, 7.171

⁸¹ CEC00547788

⁸² CEC00547770

clear from the terms of the meeting note from 18 December 2008 which clearly discusses the issue of what design risk should be taken by BBS⁸³.

67. Very shortly thereafter Mr Crosse and Mr Gallagher met with BBS senior management in Wiesbaden and then agreed what was to become the Wiesbaden Agreement. Mr Gallagher confirmed in his evidence that, subject to “tinkering”, the Wiesbaden Agreement was intended to remain and to act as the basis for the contract⁸⁴. The Wiesbaden Agreement is CEC02085660. It contains several important assumptions which went on to become Pricing Assumptions in the final Infraco Contract. Mr Walker followed up the Wiesbaden meeting with his email of 20 December 2007⁸⁵. During his examination of Mr Gallagher, senior Counsel to the Inquiry made the point that Mr Walker’s email could hardly be clearer in saying that BBS was not willing to take on the risk of design development rather than minor tweaking⁸⁶. That was, it is submitted, a fair observation for Inquiry Counsel to make. So was the observation by Inquiry Counsel under reference to CEC02085660, which appears at page 93 of Mr Gallagher’s transcript⁸⁷, to the effect that in the final signed version of the Wiesbaden Agreement it is “plain” that, at that stage, whilst BBS was taking responsibility for normal design development and completion of designs, it was not taking responsibility for the matters expressly excluded by the qualifications in the agreement.

⁸³ CEC00547800

⁸⁴ Gallagher transcript, page 54.

⁸⁵ CEC00547740

⁸⁶ Gallagher transcript, page 91, lines 9 - 11

⁸⁷ Lines 13 - 21

68. Lest there was any doubt, Mr Crosse accepted in his evidence that one of the matters that was to be discussed at Wiesbaden was who was taking on design risk⁸⁸. He was clear that the price was fixed subject to “*carve outs*”⁸⁹. He appeared not to accept that Wiesbaden was set in stone⁹⁰, but he did accept that the purpose of Wiesbaden was to price the contract, whilst the principles around what that meant were “slightly ambiguous”⁹¹. It is submitted that that categorisation of what was agreed in Wiesbaden might give a misleading impression and downplay the significance of the agreement which was reached and which was negotiated through several drafts⁹² until a version was signed by the most senior people from BBS and tie. Given the trouble taken to negotiate and execute the Wiesbaden Agreement it is incredible to suggest that it was not intended to have binding effect and for its core terms to be carried through to the final agreement. It similarly lacks credibility to suggest that tie was not fully aware of the consistent stance taken by BBS on the assumption of design risk before, during and after Wiesbaden. Quite simply, BBS had said, many times, that it was not willing to take on the risk of an incomplete SDS design and incomplete MUDFA works. That stance did not alter at all in the course of December 2007 and was set down in the Wiesbaden Agreement, which tie had negotiated and drafted without legal input from DLA.

⁸⁸ Crosse Transcript, page 135, lines 12 - 16

⁸⁹ Crosse Transcript, page 143, lines 2 - 7

⁹⁰ Which is of course true in a legal sense but must be understood in the context of a deal having been negotiated, drafted, revised and then formally executed by the most senior members of the parties’ negotiating teams.

⁹¹ Cross Transcript, page 171, lines 17 - 22

⁹² Some of the various versions are CEC00547793; CEC00547739; CEC00547746; CEC01495067; CEC01431387; and the final version is CEC02085660

69. Mr Fitchie's first involvement post-Wiesbaden was on 18 December 2007⁹³. He emailed comments on an incomplete draft whilst caveating those as not being "a legal view"⁹⁴. That was understandable given that he had not been involved in the negotiation and had just been presented with the draft agreement.

70. It is submitted that it is clear that the Wiesbaden Agreement was the genesis for the pricing assumptions that found their way into Schedule Part 4 of the Infraco contract. As Mr Gallagher said, subject to 'tinkering' the Wiesbaden Agreement was intended, and understood, by both BBS and tie, to form the essentials of the contract⁹⁵. Tie knew what it had signed up to, which was in any event "plain" from its terms⁹⁶. DLA was excluded from Wiesbaden and had no involvement in the agreement reached there. As was its entitlement, tie handled these commercial and technical negotiations itself. It was not DLA's place to second guess tie on commercial or technical matters and DLA was never instructed to do so. Only tie could know the commercial significance of the risks that it had agreed to take on and the likelihood of those risks becoming reality. What cannot be doubted is that tie's most senior executives at financial close understood that it was taking on the risks of the assumptions set out by BBS, and contained in the contract, falling⁹⁷.

71. Following Wiesbaden, CEC staff required to report to CEC and CEC approved the project. DLA was not involved in drafting that report⁹⁸ or attending the TPB meeting on 19 December 2007⁹⁹.

⁹³ CEC00547730

⁹⁴ Fitchie Statement, para 7.188; 7.195

⁹⁵ Gallagher Transcript page 54, lines 2 - 11

⁹⁶ Gallagher Transcript, page 93, line 18

⁹⁷ See below, and in particular Steven Bell's evidence

⁹⁸ Fitchie Statement, para 7.178

J – Events from January to May 2008

72. Understanding the events that occurred in the period from January 2008 to May 2008 is clearly key to understanding why the contract contains the terms it does and what tie and CEC understood. There is, understandably, a vast body of documentation and evidence concerning this period. This submission will not seek to address all of that material or all of the headings in Lord Hardie's Note dated 15 March 2018. It will focus on the most significant issues from DLA's perspective, namely: (a) Schedule Part 4/Pricing Assumption 1; (b) clause 80; and (c) Concerns Identified.

73. In relation to the other issues listed in Lord Hardie's note of 15 March 2018 under this heading, DLA adopts, as accurate, Mr Fitchie's Statement and his evidence. In particular, Mr Fitchie narrates, in some detail, the facts surrounding the Rutland Square, the Kingdom and the Citypoint Agreements¹⁰⁰. He also explains what was known and understood by all parties concerning the state of the SDS design and the MUDFA works.

74. In summary, it will be submitted that, as one would expect, tie negotiated both Schedule Part 4 and clause 80 with BBS. These are essential aspects of the commercial deal concluded between the parties. Both tie and CEC were aware of the terms and import of these aspects of the contract and the state of the SDS design and the MUDFA works. DLA's reporting confirmed, in an appropriate

⁹⁹ Fitchie Statement, para 7.205 – 7.212; CEC01483731; CEC01363703

¹⁰⁰ Fitchie Statement paras. 7.433 – 7.508

manner, that which was already well known. DLA had no part to play in assessing the technical or commercial aspects of the obvious risks that tie agreed to accept, nor whether the risk allowances made by tie were, or were not, adequate.

Schedule Part 4 and Pricing Assumption 1

75. Following Wiesbaden, tie's commercial representatives (mainly Geoff Gilbert) engaged with their opposite numbers at BBS to progress the deal towards close. Tie produced various iterations of Schedule Part 4¹⁰¹. Tie seems to have treated the Wiesbaden Agreement as setting the parameters for this document¹⁰². In an email exchange¹⁰³ between Stewart McGarrity and Geoff Gilbert (copied to others in tie) they discussed the fact that CEC had raised various items relating to pricing and funding upon which they (*viz* CEC) wanted answers/comfort before recommending that the Infraco contract should be awarded. This makes clear that CEC was alive to these issues. They included "*What design version was the BBS contract priced against and what changes have subsequently taken place*". Mr McGarrity provided Mr Gilbert with his own comments on this issue and Mr Gilbert confirmed that it was impossible to be definitive on it pending inter alia "*agreement of the Basis For Pricing to be included in Schedule 4*". So, it can be taken from this that both tie and CEC knew that the Infraco price was dependent on the design at the design drop, which all parties knew had moved on and remained incomplete.

¹⁰¹ CEC01447446 is an early draft. It seems to have been created by Bob Dawson and sent to Geoff Gilbert on 13 January 2008 under cover of CEC01495585

¹⁰² CEC01495585

¹⁰³ CEC01489318

76. On 29 January 2008 Nick Smith emailed Gill Lindsay, copied to Colin MacKenzie. This followed a meeting the previous night with Mr Fitchie. The email puts beyond doubt the fact that the CEC lawyers, and officers from City Development, were well aware of the state of the SDS design¹⁰⁴ and the potential for “*serious risk of increased cost to the project*” which were “*unquantified*”. Mr Smith also acknowledges that it would be “*impossible*” to require all drawings to be approved before financial close.

77. On 6 February 2008 Scott McFadzen of BBS sent Bob Dawson BBS’s draft of Schedule Part 4. Mr Dawson sent it to Mr Fitchie, with comments shown in track changes, in advance of a meeting that was due to take place 1 hour later¹⁰⁵. Tie was clearly negotiating this document with BBS and its genesis was Wiesbaden. The tracked comments from Mr Dawson and Mr Hickman demonstrate that they fully understood what this document meant and its legal consequences. The same day, Mr Steel of TSS marked up the draft Schedule Part 4¹⁰⁶. His comments are in turquoise on CEC01448356 and again make tie aware that there clearly will be a failure of certain of the pricing assumptions, in particular (a)(ii) and (a)(iv). In an email of the same date to Mr Gallagher, Mr Fitchie described the schedule as “*a contract within a contract*”¹⁰⁷. That, it is submitted, was an accurate description of the document, which tie and BBS had been negotiating since Wiesbaden.

¹⁰⁴ CEC01395151

¹⁰⁵ CEC00592614 & CEC00592615; Fitchie Statement, para 7.238

¹⁰⁶ CEC01448355

¹⁰⁷ DLA00006343

78. On 7 February parties entered into the Rutland Square Agreement¹⁰⁸. That agreement recognises (Schedule para 1.1) that the parties' commercial representatives are to meet to agree the remaining commercial principles and to then give instructions to their respective lawyers. That is, of course, how matters would always operate, with it being for the parties to negotiate their commercial deal and for the lawyers to then put that agreement into a binding legal contract.

79. Mr MacKenzie's email to Ms Lindsay of 12 February 2008, which was seen by Alan Coyle and Rebecca Andrew, makes clear that CEC was aware of the commercial risk associated with SDS design being incomplete¹⁰⁹. Also on 12 February 2008, there were exchanges between the senior commercial negotiators and Mr Walker and BBS's lawyer (excluding Mr Fitchie) in relation to whether or not Schedule Part 4 was settled¹¹⁰. Mr Gilbert makes clear that there is no intention to re-open anything that has already been settled.

80. Negotiation of Schedule Part 4 continued between the commercial representatives of the parties thereafter¹¹¹. Ian Laing then issued a further draft version on 22 February 2008¹¹². This made clear that BBS considered that the draft reflected the commercial deal reached between the commercial negotiators on each side (see, for example, comment on front sheet at CEC01449877_0001). DLA is not aware of anyone at the time having ever challenged that assertion, which certainly appears to DLA to have been entirely accurate. The genesis and development of Schedule Part 4 was undertaken by the commercial

¹⁰⁸ CEC01284179

¹⁰⁹ CEC01401419

¹¹⁰ CEC00592619

¹¹¹ CEC00592621 & CEC00592622

¹¹² CEC01449877 & CEC01449876

representatives of the parties. That is entirely as one would expect. It was for the commercial and technical representatives from the parties to assess whether or not the pricing assumptions would be likely to hold good or not and, if not, the commercial results of that, including whether or not contingencies were adequate. DLA could not advise on those issues. Mr Fitchie's email of 25 February 2008 emphasises that he had not been involved in the development of the draft issued by Mr Laing¹¹³.

81. On 28 February 2008 Mr Bissett met with Gill Lindsay, Donald McGougan, Andrew Holmes and Alan Coyle to brief them on the discussions that tie had been having that week¹¹⁴. One of the key matters under negotiation that week was of course Schedule Part 4. Ms Lindsay gave evidence that she was already aware that the design risk was not being transferred to BBS from earlier discussions¹¹⁵. Mr MacKenzie also gave evidence that he too was aware that this risk was to be retained by tie and CEC¹¹⁶. Mr Bissett's email indicates that he told CEC that tie was intending to manage risks post-Close.

82. On 29 February 2008 Ms Lindsay emailed Mr MacKenzie saying she considered risk associated with SDS design might be very significant and suggesting that she felt the risk allowance for SDS, at £3m, was too low¹¹⁷. In her evidence she accepted that assessment of the risk allowance was a commercial matter for tie¹¹⁸. What seems clear is that CEC legal were well aware of the risks

¹¹³ CEC01449710 See also Fitchie Statement, para 7.235

¹¹⁴ CEC01546728

¹¹⁵ Lindsay Transcript, pages 84, lines 2 - 7 & 95, lines 9 - 10

¹¹⁶ MacKenzie Transcript, page 64, line 11 to 19

¹¹⁷ CEC01400987

¹¹⁸ Lindsay Transcript, page 97, lines 8 - 10

surrounding SDS and that they were not being taken on by BBS. They were remaining with tie and tie had made an allowance (albeit one that Ms Lindsay thought too low) for that risk becoming a reality. In his evidence, Mr MacKenzie was entirely candid that he had read and fully understood the risks associated with Schedule Part 4 and the pricing assumptions¹¹⁹. If, as Ms Lindsay claimed¹²⁰, he failed to communicate those to her in terms that she could understand, that is clearly an internal management failing within CEC legal. The evidence of Mr Smith, Mr MacKenzie and Ms Lindsay painted a picture of a dysfunctional department riven with political in-fighting and subordination. It was obvious from the evidence that Messrs Smith and MacKenzie disagreed with Ms Lindsay's decision not to appoint an independent legal review of the contract. Whether or not they were correct, their dissatisfaction with that decision may have informed their future conduct and led to an unwillingness by them to properly consider the contract, when Ms Lindsay may have assumed they would. Mr Smith refused a direct instruction to review the contract and Mr MacKenzie was unable to confirm whether or not he had even communicated that refusal to Ms Lindsay¹²¹. In her evidence, Ms Lindsay claimed that she was unaware of Mr Smith's position and suggests that was inconsistent with further discussions she had with him in respect of the tram project and the contribution he made to discussions with colleagues¹²².

¹¹⁹ MacKenzie Transcript, page 46, line 12 to 17; page 89, line 24 to page 90, line 3; page 92, line 13; MacKenzie Statement para 195

¹²⁰ Lindsay Transcript, page 194, line 15 to page 195, line 14

¹²¹ MacKenzie Transcript, page 45, line 2; page 94, lines 6 - 9

¹²² Lindsay Transcript, page 53, lines 9 to page 54, line 6; page 192, line 25 to page 196, line 3

83. A further draft of the schedule was issued by Bob Dawson on 6 March 2008 and it seems that a telephone conference occurred thereafter during which further wording for Schedule Part 4 was agreed between Mr Gilbert and BBS¹²³. This was wording concerning the deemed notified departures following on any base case assumptions falling. On 11 March 2008 Mr Fitchie met with Mr Gilbert and he made it clear that risk of the base case assumptions falling lay entirely with tie and also that tie had no visibility of the state of the design, but that the SDS had clear problems. Mr Gilbert must have already been fully aware of these issues but Mr Fitchie put them beyond doubt¹²⁴.

84. On 9 April 2008 Mr Fitchie met with senior tie officials. His file note of that meeting is at DLA00006319. He explained in paragraph 7.320 of his statement why the file note contains a date error and blanks¹²⁵. It is obvious from the terms of the file note that the date must be pre-Close and must be 9 April 2008. The file note accords with the advice that Mr Fitchie had undoubtedly given by email on 31 March 2008 to many of the same senior tie representatives¹²⁶. In short, he was making plain that which they already knew, namely that BBS saw Schedule Part 4 as non-negotiable, that it contained numerous risks and that BBS might seek to exploit it. Mr McEwan's noted response accords with his email of 31 March 2008.

¹²³ CEC01450544

¹²⁴ See file note attached to these submissions. It was previously believed this file note had been provided to the Inquiry as part of DLA's electronic disclosure, however access to the IT platform used in that document production process has now been restored and it would appear this file note was not included in the original documentation provided to the Inquiry. The file note was among the batch of attendance notes typed on 23 February 2011 referred to at paragraph 20 above.

¹²⁵ See also above at paragraph 20

¹²⁶ CEC01465933

85. Mr Fitchie's statement sets out his evidence concerning the development of Schedule Part 4 and the other contract negotiations during the period from December 2007 to financial close. Reference is made to paragraphs 7.233 – 7.281 which are adopted *brevitatis causa*. Mr Fitchie's evidence specifically in relation to what tie knew about Schedule Part 4 and Pricing Assumption 1 is set out in paragraphs 7.282 – 7.374. That evidence is adopted *brevitatis causa*.

86. Mr Bell's evidence in relation to what tie did, and knew, in the period between Wiesbaden and Close is also extremely important. He was Tram Project Director from January 2008 to October 2011. He was quite clear that Schedule Part 4 was drafted and controlled by Mr Gilbert and himself¹²⁷. His evidence to the effect that Mr Fitchie was in attendance at the vast majority of meetings dealing with Schedule Part 4¹²⁸ was not supported by the contemporaneous evidence and seems to be contradicted by the emails and other documents mentioned above. His refusal to accept what Mr Fitchie says in his statement at para 7.290 in relation to Mr Fitchie advising that Pricing Assumption 1 was a blunt transfer of risk to tie is contradicted by what Mr Bell says later in his evidence¹²⁹.

87. Mr Bell was taken to CEC01465908¹³⁰. That is an email chain starting with Mr Laing's repeat of an earlier warning¹³¹ that an immediate notified departure could be expected in light of the fact that the design programme at Close was to be v28, not v26. Mr Bell was taken to Mr Fitchie's email responding to Mr McEwan's request for advice on an appropriate reply to Mr Laing. He was then taken to Mr

¹²⁷ Bell transcript, day 1, page 35 to page 41, line 5

¹²⁸ Bell Transcript, day 1, page 50, line 22 to page 51, line 2

¹²⁹ Bell Transcript, day 1, page 91, line 22 to page 92, line 8, compared to page 52, line 5 to page 53, line 2

¹³⁰ Bell Transcript, day 1, page 87, lines 12 - 13

¹³¹ CEC01451185

McEwan's email to Mr Bell (alone) in which Mr McEwan referred to opening a 'whole can of worms' if tie followed Mr Fitchie's steer.

88. Mr Bell accepted that Mr Fitchie was making a general point, not just a point concerning the specific notified departure mentioned by Mr Laing¹³². What comes across in Mr Bell's evidence is that tie was well aware of the risks associated with Schedule Part 4 and the inevitable Notified Departures that were bound to occur¹³³. He confirmed that tie had assessed these risks and whether or not the risk allowance was adequate in light of the anticipated Notified Departures¹³⁴.

89. In answer to a question by Lord Hardie, Mr Bell appeared to accept that Mr Fitchie had issued a clear warning to tie that BBS's claims for Notified Departures would be all encompassing and conservative¹³⁵. Mr Bell confirmed that he understood there would likely be a number of Notified Departures and he lists some of these on page 95 of the transcript of day 1 of his evidence. They included MUDFA and SDS design development. It is submitted that these ended up being responsible for the majority of the price increases that later occurred.

90. Critically, Mr Bell accepted that it was for tie to assess these risks and to quantify them in the risk allowance. He was clearly correct in that concession. Having warned tie that the pricing assumptions were a blunt tool that transferred risk to tie and that BBS would submit all-encompassing and conservative claims to tie for any consequent notified departures, it was certainly not DLA's job to assess

¹³² Bell Transcript, Day 1, page 91, lines 11 - 16

¹³³ Bell, Witness Statement pages 71 to 73, Transcript Day 1, Page 95, line 24 to Page 97, line 24 and Page 109 line 1 to Page 112, line 12

¹³⁴ Bell Transcript, day 2, page 4, line 18 – page 6 line 22

¹³⁵ Bell Transcript, day 1, page 92, lines 9 - 23

the commercial consequences of that. Mr Bell accepted that it was tie that assessed the risk allowance¹³⁶. Mr Bell did not provide direct answers to Lord Hardie's questions concerning whether or not tie had adopted Mr Fitchie's advice to negotiate the specifics of what was, or was not, to be permitted as a variation to the contract or concerning what controls were put in place¹³⁷. It is submitted that the Inquiry has heard nothing to suggest that Mr Fitchie's advice was followed, although it was clearly given and understood. Instead, Mr Bell appears to have proceeded on a vague assumption that there might be 60 – 100 Notified Departures, the costs of which he could not quantify¹³⁸.

91. In essence, tie seems to have adopted Mr Gallagher's approach of signing the contract and then fighting the inevitable Notified Departures tooth and nail.

Clause 80 of the Infraco Contract

92. As originally drafted for the purposes of the ITN documents, clause 76 dealt with tie changes and was a standard clause based on standard form contracts¹³⁹. Clause 76.10 empowered tie to force the contractor to proceed with a tie change. Prior to February 2008, that term (which had become relocated as clause 80) had been the subject of negotiation. However, that draft still contained a provision (clause 80.10) which, in the case of a failure of the parties to agree a price for any change, permitted tie to force BBS to proceed on the basis of a provisional

¹³⁶ Bell Transcript, day 1, page 99 line 16 to page 100, line 13

¹³⁷ Bell Transcript, day 1, page 100, line 17 to page 104, line 7

¹³⁸ Bell Transcript, day 1, page 108, line 11 to page 111 line 17

¹³⁹ Fitchie Statement para 7.521; See also Infraco contract version dated 3 October 2006 as issued with the ITN. It is understood this was previously provided to the Inquiry in DLA's electronic disclosure but does not appear to be available on Haymarket and no Inquiry reference is available.

estimate prepared by tie¹⁴⁰. This change was not agreed by DLA, the clause was re-drafted during commercial negotiation between tie and BBS and Mr Fitchie advised against it.

93. The Inquiry solicitor has questioned the existence of documentary evidence to support Mr Fitchie's recollections of this late re-draft of Clause 80 as set out in paragraphs 7.517 to 7.536 of his statement. DLA submits there is ample contemporaneous evidence to support Mr Fitchie's evidence. However, it is possible that he has partially misremembered elements of the timeline: contrary to Mr Fitchie's statement (which suggests a later date), it was on 5th February 2008 that Suzanne Moir, of Pinsent Masons, suggested a re-draft of the provision¹⁴¹. That re-draft deleted the entirety of clause 80.10.

94. Email correspondence¹⁴² suggests that the final wording of clause 80 was largely agreed at a meeting between tie and BBS on 28 February 2008. This final wording was agreed by tie during commercial negotiations without reference to DLA. This is supported by a spreadsheet, as issued at 28 February 2008, which shows attendees at meetings from 18 February 2008 to 14 March 2008 and

¹⁴⁰ Draft version of contract dated 21 January 2008 provided to Inquiry in DLA's electronic disclosure. See also the emails dated 21 January and 4 February 2008. It is understood these were previously provided within DLA's electronic disclosure but they are attached herewith for the avoidance of doubt.

¹⁴¹ Email from Moir to Fitchie and others dated 5 February 2008 with attached mark-up of Clause 80 – It is understood this was previously provided within DLA's electronic disclosure but it does not appear on Haymarket. It is attached herewith for the avoidance of doubt.

¹⁴² See email from Phil Hecht to Suzanne Moir and others dated 28 February 2008. – It is understood this was previously provided within DLA's electronic disclosure but it does not appear on Haymarket. It is attached herewith for the avoidance of doubt.

discloses that no-one from DLA was present, albeit the meeting utilised DLA's office facilities.¹⁴³ This is consistent with Mr Fitchie's statement¹⁴⁴.

95. Mr Gilbert's meeting notes dated 6 March 2008¹⁴⁵ demonstrate that he was continuing to discuss the application and drafting of clause 80 with Suzanne Moir into at least mid-March 2008. It would appear to be at this meeting, not attended by any representative from DLA, that Mr Gilbert agreed on behalf of tie to include a new Clause 80.24 in order to dis-apply Clause 80.19, thereby removing BBS's duty to mitigate the effect of Notified Departures.

96. The point being made in paragraph 7.523 of Mr Fitchie's statement is that in the final days prior to Infraco Contract Close proper time was needed to prepare, quality check and engross the extensive contract suite. In his statement Mr Fitchie was referring to the agreed "stop and freeze" on all contract negotiations to facilitate that quality check and practical work assembling not only the final agreed Infraco Contract and its Schedules but also many important third party documents (e.g. performance bonds and German, American and Spanish parent company guarantees) meaning no new terms or issues would be negotiated or introduced, from around 28 April 2008, nine working days before tie's then proposed close date. The general email traffic around this period is clearly aimed at finalising the Infraco contract and its 43 schedules. Mr Fitchie's email to Graeme Bissett of 24 April 2008¹⁴⁶ states *'From now on in, all work product production needs to be driven by the central premise that DLA Piper has to be in*

¹⁴³ See spreadsheet attached to email from Susan Clark of Tie. – It is understood this was previously provided within DLA's electronic disclosure but it does not appear on Haymarket. It is attached herewith for the avoidance of doubt.

¹⁴⁴ Fitchie Statement, para 7.523 – 7.528; and 5.115

¹⁴⁵ CEC02084776

¹⁴⁶ It is understood this was previously provided within DLA's electronic disclosure but it does not appear on Haymarket. It is attached herewith for the avoidance of doubt.

a position to commence documentation runs on Wednesday, 29th April noon at the latest.' This freeze on commercial negotiations is also consistent with the terms of the Rutland Square Agreement¹⁴⁷ which provides, at Clause 6, for a nine working day freeze following the close of the Infracore Contract Suite. It also provides at paragraph 1.1 of its Schedule for the commercial principles to be agreed by commercial representatives before instructions are passed to each party's respective lawyers.

97. A file note by Mr Fitchie records the advice referred to by him in his statement¹⁴⁸. This file note, as with others, incorrectly bears to be dated "[23 February 2011]". This was one of a batch of attendance notes which were typed up by Mr Fitchie's secretary on 23 February 2011 as explained at paragraph 20 above. DLA has been unable to locate the original handwritten note, but it is clear that the discussion it narrates between Mr Fitchie and Mr Gilbert was not taking place on 23 February 2011, three years after Mr Gilbert had left TIE; this was simply the provisional date entered by the secretary pending, and in anticipation of, review by Mr Fitchie. The file note strongly suggests the advice being given was in the run up to contract close while the revisions to Clause 80 were being negotiated between Mr Gilbert and Mr Walker of Bilfinger Berger, as set out in Mr Fitchie's statement. The advice by Mr Fitchie and the instructions of Mr Gilbert recorded in these documents support Mr Fitchie's witness statement. In evidence, Mr Gilbert stated that he could not recall drafting the wording for clause 80 or having

¹⁴⁷ CEC01284179

¹⁴⁸ Fitchie Statement, para 7.533 and see file note attached to these submission incorrectly dated "[23 February 2011]". It was previously believed this file note had been provided within DLA's electronic disclosure. However access to the IT platform used in that document production process has now been restored and it would appear this file note was not included in the original documentation provided to the Inquiry.

particular concerns about the change mechanism¹⁴⁹. It is submitted that Mr Fitchie's clear recollection, supported by documents, should be preferred over Mr Gilbert's rather vague evidence¹⁵⁰.

98. In conclusion, clause 80 was re-drafted by BBS and agreed to by Mr Gilbert. Mr Fitchie received express instructions to proceed on the basis of Mr Gilbert's agreement.

QRA & Risk Allowance

99. The content of Mr Fitchie's statement at paragraphs 7.299-7.314 is adopted. As legal advisers DLA provided detailed and comprehensive advice as to which risks lay with the public sector. This advice and the specific content of the risk matrix was considered by tie when undertaking its QRA.¹⁵¹ Beyond this, the undertaking of a QRA and provision of adequate risk allowances to account for the impact of these risks on the project budget and programme were technical and commercial matters for tie. DLA had no role in assessing the likelihood of a risk occurring or quantifying the financial consequences of that occurrence.

100. It is also apparent that tie understood which risks were retained by the public sector. This includes the retained design risk, and programme risk. In respect of the latter, tie circulated a spreadsheet identifying 78 potential Notified Departures which were known to be likely to arise from the change from v26 to v31 of the

¹⁴⁹ Gilbert Transcript, page 206, line 2 to line 25.

¹⁵⁰ Mr Gilbert's recollections of key events were extremely limited and unimpressive, see for example his transcript page 152, line 15 to page 154, line 3.

¹⁵¹ CEC01474538

design.¹⁵² It is submitted that the supplementary statements of Susan Clark and Steven Bell¹⁵³ are not credible insofar as they state this was a list of components of a single Notified Departure. Mr Hickman's email¹⁵⁴ clearly referred to it at the time as a list of potential Notified Departures (i.e. plural), as does his supplementary witness statement¹⁵⁵. As tie was clearly aware that changes in design scope, shape and principle were a publicly held risk, it is submitted that tie could and should have performed a similar exercise to identify the potential Notified Departures arising out of this risk. In any event, predicting the likely changes which would arise as the design was moved from the Base Date Design Information to its Issued For Construction state was another technical exercise to be undertaken by tie.

101. It has become clear through the course of the public hearings that tie's QRA process and the consequent allowances made for risk were wholly inadequate¹⁵⁶. Where tie agreed price increases with BBS, they appear to have kept the project within budget by making corresponding reductions to the QRA. The justification for these reductions in the QRA, from £49m at the point of the Final Business Case to £31.2m at Close appears to have been questionable¹⁵⁷

¹⁵² CEC01294478; CEC01294479;

¹⁵³ TRI00000258, TRI00000257

¹⁵⁴ TIE00246433

¹⁵⁵ TRI00000255

¹⁵⁶ As was its approach to adjusting for optimism bias, TRI00000265. The potential inadequacy of the QRA appears to have been known to CEC before Close: CEC01400987; Lindsay transcript, page 96, line 20 – page 98, line 12; CEC01222041.

¹⁵⁷ CEC01489953; TIE00351419; CEC01245223; CEC01247693; CEC00906940; CEC01338847

K - May 08 – Decision to enter into the INFRACO Contract

102. In this section of this submission DLA will focus on the Close Reports and the information that was provided by DLA to CEC. It will be submitted that, when viewed properly, as a whole and in context, DLA's advice was full, accurate and appropriate. DLA reasonably proceeded on the basis of its instructions and on the express agreement that it had relative to the extension of a duty of care to CEC. DLA also reasonably proceeded on the basis of what it knew was already within the direct knowledge of those within CEC to whom DLA reported (i.e. the legal department, not Councillors). DLA reasonably assumed that Gill Lindsay and her team would take steps to read the contract, in particular the key provisions on pricing and QRA, and raise any questions she or they had. Ms Lindsay did of course accept that it was important that she understood the contract¹⁵⁸ and that her team was capable of doing that by seeking assistance on questions from DLA¹⁵⁹. She said her main focus was always on the price and the QRA¹⁶⁰. That is as it should have been. However, that requires, at least, reading and understanding Schedule Part 4 and the QRA, and asking for clarification of anything that she or her team did not understand. DLA reasonably assumed that the senior lawyers in CEC who were involved would do that. If, as may be the case, Mr Smith and/or Mr MacKenzie refused to do as Ms Lindsay had instructed them, then that is a matter for CEC, not DLA. If Ms Lindsay elected not to even read Schedule Part 4, or any of its drafts¹⁶¹, prior to Close¹⁶² then, again, that is not something that DLA could have anticipated. This is particularly so given it was

¹⁵⁸ Lindsay Transcript, page 10, line 23

¹⁵⁹ Lindsay Transcript, page 21, line 9 – page 23, line 13

¹⁶⁰ Lindsay Transcript, page 95, line 18

¹⁶¹ Lindsay Transcript, page 130, lines 2 - 4

¹⁶² Lindsay Transcript, page 137, lines 11 - 15

clearly stated in DLA's advice letters that they, and the associated risk matrix were "*not a substitute for study of the Contract Suite*".¹⁶³

103. Undoubtedly, Mr MacKenzie read and understood Schedule Part 4¹⁶⁴ and he was also well aware (as already discussed) about the state of the SDS design and the incomplete nature of the MUDFA works. Mr MacKenzie accepted that Schedule Part 4 was probably the most important part of the contract as far as CEC was concerned¹⁶⁵.

104. DLA had no reporting line to Councillors. DLA's sole reporting line was to Ms Lindsay and the CEC legal department. It was Ms Lindsay's team's role to report to her and it was Ms Lindsay's role to report to the Chief Executive and to Councillors.

DLA Advice & Set Piece Letters

105. DLA issued a letter to CEC on 12 March 2008 entitled "Draft Contract Suite as at 12 March 2008"¹⁶⁶. This clearly told CEC what, in DLA's view, required to be done to allow tie to issue a notification of intent to award. The letter listed a number of tasks that required immediate attention including: removal of remaining major issues; completion of pricing negotiation; production of a master programme; finalisation of the ERs; and receipt of final Infraco Proposals. It could

¹⁶³ See DLA letter to CEC dated 28 April 2008 (CEC01312368) and 12 May 2008 (CEC01372309) to which the full Infraco Contract Suite was attached and Gill Lindsay Transcript, page 188, line 15 to page 192, line 16

¹⁶⁴ MacKenzie Transcript, page 96, line 11 to page 97, line 25

¹⁶⁵ MacKenzie Transcript, page 95, line 4

¹⁶⁶ CEC01347797

hardly have been clearer to CEC from that letter that the price had not been finally agreed, nor “fixed” in any material sense.

106. Accompanying DLA’s letters to CEC was a Risk Matrix which stated that the risk associated with the fall of any Pricing Assumption was retained by the public sector¹⁶⁷ as were the consequences of any Notified Departures.¹⁶⁸

107. In their note to CEC in March 2008¹⁶⁹ the three most senior CEC officials reported to CEC that the risks associated with delay to SDS remained a public sector risk. Indeed, they observed that as the most important additional risk being passed to the public sector. They were clearly aware of this risk and its significance.

108. DLA issued a further letter on 20 March 2008 discussing the state of the suite of contracts as at 13 March 2008¹⁷⁰.

109. Ms Lindsay accepted that, if she had read Schedule Part 4 of the contract it would have been obvious that the Infraco Contract was not a fixed price contract¹⁷¹. However, it seems she chose not to read it, despite being sent a draft at least a month before Close.

110. DLA issued a further letter to tie and CEC on 28 April 2008¹⁷². This letter requires to be read in context, in particular, in light of what both tie and CEC

¹⁶⁷ CEC01347795_22

¹⁶⁸ CEC01347795_26

¹⁶⁹ CEC02086755

¹⁷⁰ CEC01544970

¹⁷¹ Lindsay Transcript, page 139, line 22 to page 140, line 4

¹⁷² CEC01312368

already knew and had seen. As already submitted in this submission, both tie and CEC were well aware of the state of the SDS design and the fact that BBS would not be taking on that risk which remained a public sector risk. Further, both tie and CEC were well aware of the risks associated with ongoing MUDFA works. Both tie and CEC were, or ought to have been, well aware of the terms of Schedule Part 4 and the pricing assumptions in it. In the case of tie, it had agreed and drafted the schedule and in the case of CEC legal, it had been sent them and would be assumed to have at least read them and raised any questions about what they meant. However, notwithstanding the foregoing, and the fact that both tie and CEC had all of that knowledge, the letter still makes clear and express reference to the fact that BBS has required contractual protection and a set of assumptions surrounding programme and pricing in relation to the delay caused by the production of the SDS design. It also alerts the reader to the fact that tie is prepared for an “immediate” contractual variation and Notified Departures.

111. Despite Ms Lindsay’s attempt to minimise the obvious significance of this¹⁷³, it is submitted that anyone who had read the contract, or even just the core provisions on price, who read this letter would have fully understood its significance, and the fact that it was referring to the risk of multiple notified departures.

112. Paragraph 11.3 of the letter refers to the Pricing Schedule Part 4 and the assumptions. It says that tie has assessed the likely impact of those assumptions not holding true and triggering changes. Again, this leaves no room for doubt in the mind of an informed reader, as CEC and tie surely were, or ought to have

¹⁷³ Lindsay Transcript, page 147, line 7 to page 148, line 4

been. Again, Ms Lindsay seemed to accept that reading the relevant provisions of the contract together with the letter would have been enough to alert her, or her team of lawyers, that there was a risk of multiple Notified Departures¹⁷⁴.

113. Mr MacKenzie read the suite of DLA letters and understood what was being said in them. He understood that SDS design delays were a real risk and that it lay with tie and CEC¹⁷⁵. He was fully aware of the pricing assumptions and the expectation that there would be change and Notified Departures¹⁷⁶. Mr Nick Smith's position that he had not even read Schedule Part 4 or the DLA letter of 28 April 2008¹⁷⁷ seems incredible for the reasons discussed with, and accepted by, Mr MacKenzie¹⁷⁸. In particular, Mr Smith was a joint signatory to the email of 30 April 2008 which, as Mr MacKenzie accepted, was drafted at the same time as the B-team briefing¹⁷⁹ and after consideration of Schedule Part 4. It is submitted that Mr Smith's extreme position is simply incredible and should be rejected. Despite clear questions on the issue of Schedule Part 4, Mr Smith was reluctant to give a straightforward answer. Upon being pressed several times, both by Inquiry Counsel and the Chairman, he did eventually accept that one did not have to even be a lawyer to understand that the contract price was not fixed and that there would be Notified Departures¹⁸⁰. His evidence may be coloured by his stated concern not to prejudice CEC's litigation against DLA.¹⁸¹

¹⁷⁴ Lindsay Transcript, page 148, line 23 to page 149, line 10

¹⁷⁵ MacKenzie Transcript, page 112, line 22; page 113, lines 5 - 19 ; page 114, line 5 to line 19; page 115, line 3 to page 117, line 9

¹⁷⁶ MacKenzie Transcript, page 134, line 4 to page 135, line 13; MacKenzie Statement para 199

¹⁷⁷ Smith Transcript, page 157, line 10 to page 162, line 19

¹⁷⁸ MacKenzie Transcript, page 155, line 2 to page 158, line 14

¹⁷⁹ CEC01222467

¹⁸⁰ Smith Transcript, Day 2, page 18, line 4 to page 20, line 3.

¹⁸¹ Smith Transcript, day 2, page 10, line 9 to line 24

114. CEC officials, and the legal department in particular, had DLA's letter in advance of the Council meeting on 30 April 2008. Ms Lindsay attended that meeting and confirmed that she had seen the report to Council¹⁸² signed by Mr Inch on behalf of Mr Aitchison in advance of the meeting¹⁸³. Ms Lindsay gave evidence that she even intended to flag up the emerging risk of the SDS design delay in that report¹⁸⁴. She was very clearly aware of it. It was her job, not DLA's to communicate that risk (which DLA had certainly made her aware of) to Councillors. If her attempt to do that in the Council Report failed (as it seems to have done) then that is not DLA's fault. Ms Lindsay was also clearly aware of a risk during construction relating to incomplete MUDFA works¹⁸⁵. Again, communicating these matters to Councillors was the job of CEC officials, not DLA.

115. DLA's final letter before Close was issued on 12 May 2008¹⁸⁶. In relation to the important warnings discussed above, it is in the same terms as the 28 April 2008 letter.

116. Accordingly, by 12 May, tie and CEC had several letters from DLA which drew attention to the various risks and assumptions of which both tie and CEC were already aware. On 13 May Ms Lindsay, Mr Anderson and Mr McGougan all signed CEC01244245 recommending that the Infraco contract be entered into. Ms Lindsay gave evidence that she had also had the 'B-team' briefing¹⁸⁷ prior to

¹⁸² CEC00906940

¹⁸³ Lindsay Transcript, page 159, line 4 – line 16

¹⁸⁴ Lindsay Transcript, page 161, line 2 to page 162, line 17

¹⁸⁵ Lindsay Transcript, page 163, line 4 to line 21

¹⁸⁶ CEC01372309

¹⁸⁷ CEC01222467

that date, albeit she could not remember if she had been satisfied that all of the issues raised in that had been closed out¹⁸⁸.

117. It is submitted that CEC officials, and Ms Lindsay and her team of lawyers in particular, were well aware of the issues surrounding Schedule Part 4, Pricing Assumption 1 and the risks surrounding SDS design and potential MUDFA delay¹⁸⁹. Those were the issues that later gave rise to the vast majority of the BBS claims and the disputes which followed. Not only were those officials well aware of these issues from various other sources, they were also made aware of them expressly and clearly in the DLA letters. It seems remarkable if some within CEC legal took a conscious decision not to read the critically important Schedule Part 4, or to raise any queries that they might have had. However, it is simply not credible for them to suggest that they did not fully understand the issues.

The Close Report

118. The DLA letters discussed above contain the core advice by DLA to CEC and were obviously well known to, and understood by, tie. There were however several other relevant documents, in the form of the Close Reports and the QRA which went into the body of material that was available to CEC officials and CEC Councillors.

¹⁸⁸ Lindsay Transcript, page 174, lines 20 - 23

¹⁸⁹ Note that para 3.6 of the report to Council dated 1 May 2008 (CEC00906940) suggested that MUDFA was back on time and budget, however this was clearly an area of risk of which CEC and tie were well aware. See MacKenzie Transcript, page 121, lines 13 - 17

119. The Close Reports were broadly tie documents, albeit DLA was asked to, and did, have some input into certain elements of these documents. On 11 March 2008, Mr Bissett emailed *inter alia* Mr Fitchie seeking his input on the draft reports on the issue of procurement challenge in particular¹⁹⁰. Mr Fitchie accepted that he understood that he was to read the draft documents, not just provide procurement challenge advice. As Inquiry Counsel observed¹⁹¹, in the draft, DLA is referred to in the third person. This is entirely supportive of Mr Fitchie's position that it was a tie document, badged as being a DLA document for the sake of FOISA exemption¹⁹². Graeme Bissett confirmed that the 'Report on Infraco Contract Suite' was principally drafted within tie.¹⁹³ Stewart McGarrity also confirmed that he drafted the chapter of the Close Report reporting on risk.¹⁹⁴

120. The 11 March 2008 draft¹⁹⁵ refers to the 'principal pillars of the contract suite'. This is clearly a reference to the entire suite, not just the Infraco Contract. The passage contains wording making clear that where risk allocation has altered, that has been adequately reflected in suitable commercial compromises. This is a clear implication that there has been some alteration to the risk allocation, but it is telling the reader that, where that has occurred, there have been commercial compromises. The commercial compromises were of course a matter for tie, who had negotiated them.

¹⁹⁰ CEC01428730; Fitchie Transcript, day 1, page 174, line 23 to page 176, line 6

¹⁹¹ Fitchie Transcript, day 1, page 177, line 2

¹⁹² Fitchie Statement, para 2.222 and 11.158

¹⁹³ Bissett Transcript, page 151, line 6

¹⁹⁴ McGarrity Transcript, page 16, line 23

¹⁹⁵ CEC01428734

121. In his evidence, Mr Fitchie sought to put the Close Reports, and DLA's involvement in them, into context, in particular by reference to the fact that DLA's letters to CEC were part of the picture. It must also be kept in mind that CEC officers, in particular the legal department, had knowledge of the emergence of design risks and pricing assumptions, and were reasonably assumed to have read the critical part of the contract dealing with Price. Despite the tenor of Inquiry Counsel's cross examination of Mr Fitchie, the Inquiry should not assume that CEC, including its legal department, were merely interested bystanders who read the Close Report and the DLA advice letters with no background knowledge or understanding. Mr Fitchie tried to make that point in his evidence¹⁹⁶. Lord Hardie put a hypothetical scenario to Mr Fitchie, concerning what options would have been open to him if, as a partner of a law firm, he realised a client is misleading a third party with whom he had no contractual relationship. Mr Fitchie said he could have spoken to a colleague and accepted that he did not do that in this case. However, that answer must be seen in context of the hypothetical question put and the fact that Mr Fitchie's evidence was to the effect that CEC already had information on risk transfer (as was demonstrably the case) and that the Close Report was not sent in isolation.

122. Inquiry Counsel put it to Mr Fitchie that it was misleading to say that tie had "substantially" achieved the level of risk transfer anticipated by the procurement strategy and Mr Fitchie accepted that the word "substantially" went too far and was misleading. He explained that he may not have read that word at the time. He explained that the documents were produced under time constraint as, at that

¹⁹⁶ Fitchie Transcript, day 1, page 187, lines 1 – 10 (again)

stage, financial close was intended to take place in March 2008¹⁹⁷. Further parts of the draft report were put to Mr Fitchie and he accepted that there was no specific mention, in those parts, of the risks associated with Schedule Part 4. However, again, he tried to put that in the context of the full picture, including the DLA advice letters – which if read made this all quite plain¹⁹⁸. That was accepted by Ms Lindsay and Mr MacKenzie. Indeed, Mr MacKenzie had read, and fully understood, Schedule Part 4 and its significance.

123. It is potentially misleading to look at the Close Reports, which are tie documents, in isolation from the DLA advice letters and indeed the Risk Matrix. In an exchange between Mr Fitchie and Inquiry Counsel, Mr Fitchie was read selected passages from the DLA letters and then asked to agree that, in isolation, those passages might lead a ‘reasonable reader’ to understand certain facts. He tried to answer that proposition but was interrupted¹⁹⁹. It may be that he was about to explain that the ‘reasonable reader’ of these letters had a much wider background knowledge, was a lawyer and had read and fully understood the terms of Schedule Part 4 and the pricing assumptions. However, he was not allowed to do so. Be that as it may, whether or not Mr Fitchie was permitted to make that point, it is undeniably true.

124. It is true that, after a rigorous and, at times, heated cross examination, Mr Fitchie appeared to accept that there was a lack of adequate clarity in tie’s reporting to CEC through the Close Report – which he accepted was misleading

¹⁹⁷ Fitchie Transcript, day 1, page 189, lines 1 - 6; page 190, lines 22 – page 191, line 4

¹⁹⁸ Fitchie Transcript, day 1, page 195, line 25 to page 196, line 2; Lindsay Transcript, page 140, line 1;

MacKenzie Transcript, page 134, line 4 to page 135, line 13; MacKenzie Statement para 199

¹⁹⁹ Fitchie Transcript, day 2, page 30, line 9

and false²⁰⁰. He accepted he had let that reporting go to CEC, although he qualified that as having been sent with the DLA advice letters²⁰¹.

125. However, even if he was correct to make that admission (which he withdrew when he had the full picture presented to him) the fact remains that CEC officials, in particular Mr MacKenzie, did understand the meaning and effect of Schedule Part 4. The B-team issued their 30 April 2008 briefing note²⁰² which demonstrated that officials within other client departments of CEC were also suitably aware. In essence, both Mr MacKenzie and Ms Lindsay accepted that, whatever might have been the inadequacies in the letters and the Close Report that Inquiry Counsel was able to convince Mr Fitchie existed, if they had read the DLA letters, they would have had no doubt about what Mr Fitchie was saying.

126. CEC was, or ought to have been, an informed reader of the Close Report and the DLA letters. DLA cannot know exactly what CEC's officers within the City Development and Finance Departments knew from a technical and commercial perspective. It was obviously a matter for CEC to manage its own internal information sharing procedures. However, it is contended by DLA that a reasonable public sector client, with its own in-house legal, technical and commercial departments should have been reading the full suite of documentation and advice and raising any areas where clarification was needed. Had CEC officials done that, it is submitted that they should have been perfectly well informed about the state of the design, the state of MUDFA, the amount of contingency allowed in the financial model for risk and the nature of the make-up

²⁰⁰ Fitchie Transcript, day 2, page 86, line 2

²⁰¹ Fitchie Transcript, day 2, page 87, lines 8 - 10

²⁰² CEC01222467

of the price – with particular regard to the pricing assumptions which meant that the price might go up or down if those did not hold good. They would have known (as in fact they did) that the price was only fixed and firm if the assumptions held good. If CEC's officers in City Development or Finance did not feel that they had been given a complete picture on the technical or commercial issues (including risks and adequacy of contingency) it was for them to raise that with tie. DLA's responsibility was to brief Ms Lindsay's team and it was reasonable for DLA to assume that those lawyers would have read the advice given and the contract to which that advice related. It was certainly made clear in DLA's letters that they were no substitute for reading the contract. Ms Lindsay must have understood that, even if she might not be expected to read the technical parts of the contract, that would, at the very least, involve reading and understanding (or querying) the express terms of the Conditions of Contract and Schedule Part 4. It is submitted that, when approached from the perspective of a reasonable client, assumed to have taken reasonable steps to inform itself (including reading what his lawyer has told him to read), there is nothing at all misleading or unclear about the Close Reports and the DLA advice letters.

L - Events after contract close (May to Dec 08)

127. As Mr Fitchie explains in more detail in section 8 of his statement, post-contract Close BBS adopted a highly contractual approach. Tie was faced with an "avalanche" of Notified Departures with some lacking in essential information. TIE lacked adequate expertise and resources to cope with this strategy. Mr

Fitchie's evidence²⁰³ was that he had not anticipated that BBS would seek to use Clause 80 in the way that it did because he had not had an exact understanding of the status of the design at contract award. However, as is clear Mr Fitchie had, pre-Close, warned TIE that BBS's claims for Notified Departures would be "*all-encompassing and conservative*"²⁰⁴. Mr Fitchie's assumption as discussed in paragraph 8.27 – 8.29 was entirely reasonable. Furthermore, it was not Mr Fitchie's role to involve himself in the assessment of appropriate risk allowances.²⁰⁵

M – Princes Street Dispute

128. DLA refers to and adopts the evidence of Mr Fitchie in his statement (TRI00000102) at paras 8.109 – 8.141

N – Events in 2009 following PSSA

129. Whilst the heading in Lord Hardie's note refers only to the events of 2009, in this section, DLA's submissions will focus on the issue of the interpretation of Pricing Assumption 1 and its relevance to the DRPs and other events which took place in 2009 and 2010.

²⁰³ Fitchie Statement paragraph 8.16

²⁰⁴ CEC01465933

²⁰⁵ See above at paras. 99 - 100

130. The Inquiry has heard a significant body of evidence in relation to the correct interpretation of the wording of Pricing Assumption 1. It appears to DLA that Inquiry Counsel has indicated that he considers there to be a circularity in the language used, which renders the concept of 'normal design development' otiose: In summary, his position with various witnesses has been that any change whatsoever to the BDDI will result in a Notified Departure²⁰⁶. Ian Laing of Pinsent Masons disputed Inquiry Counsel's interpretation²⁰⁷. It is submitted that he was correct so to do. Furthermore, it is submitted that Inquiry Counsel's suggested interpretation was not the interpretation that was advanced by either side during the DRPs, or that was accepted by the adjudicators and is not one which gives rise to a commercially sensible interpretation of the contract.

131. DLA contends that what was drafted in the Infraco Contract reflected the commercial intentions of the Wiesbaden Agreement. The Wiesbaden Agreement sought to transfer the risk of normal design development to BBS but to leave the risk of more significant change with tie. The wording used clarified the meaning of normal design development so that changes in design principle, shape etc were not included, i.e. these would be paid for by tie. Essentially parties were attempting to agree that changes in design which do not go as far as changes in principle, scope etc are BBS risks, and any more significant changes, which go into principle, scope etc are tie risks. This is supported by Richard Walker's email of 20 December 2007²⁰⁸ in which he can be seen to be saying that BBS would not accept any risk beyond minor tweaking around the details. It was also

²⁰⁶Fitchie Transcript, day 1, page 143 to page 145, line 23

²⁰⁷ Laing Transcript, pages 31-36

²⁰⁸ CEC00573351

supported by the testimony of Geoff Gilbert²⁰⁹ who said of the wording agreed at Wiesbaden: *“it was trying to give some definition to width to protect BBS, because I think this was their issue at the time, against what would colloquially be called scope creep.”*

132. It can be seen from the adjudication decisions, discussed in detail below, that Infraco never contended that the reference in PA1 to normal design development was otiose, as now suggested by Inquiry Counsel. BBS argued that there were two types of change: first, normal design development; second, changes in scope etc. It was BBS’s position in the DRPs that the INTCs all fell into the latter class of change and so gave rise to an entitlement to payment. In essence, BBS argued that these were a tie risk as they went beyond mere normal design development. Ian Laing’s evidence also reflects this²¹⁰.

133. Much of the dispute between TIE and Infraco which went to DRP centred on whether the Employer’s Requirements had been priced by BBS in addition to the BDDI. This was where TIE was unsuccessful: it being found that parts of the Employer’s Requirements which had not been included in the BDDI at all were nevertheless Notified Departures. Richard Keen QC disagreed with that outcome²¹¹. In any event, that is a different point to the argument that Inquiry Counsel has advanced relative to the drafting of Pricing Assumption 1 and the supposed circularity of the wording used.

²⁰⁹ Gilbert Transcript, page 111, lines 11 – 20

²¹⁰ Laing Transcript, page 31-36

²¹¹ CEC00356397

134. Calum MacNeill QC issued an opinion on the interpretation of Pricing Assumption 1²¹². On page 5 of that opinion, he opined that Infracore was wrong to maintain that any change from BDDI constitutes a Notified Departure. He also opined *“What constitutes “normal development and completion of design” as opposed to alterations in “design principle, shape, form and/or specification” which do not arise from the normal development and completion of design would require to be a matter of professional opinion and, inevitably, judgement. That opinion clearly chimes with Mr Fitchie’s evidence.*

135. The following paragraphs from the decision of John Hunter dated 16 November 2009²¹³ are noteworthy:

- Para. 1.1 - BBS’s position is that Pricing Assumption 1 *‘assumes that the IFC drawings do not differ from the base date assumptions drawings of 25 November 2007 other than design development’.*
- Para. 6.23 – BBS was accepting that Notified Departures are changes in design principles, shape and/or form or specification.
- Para. 7.15 - both parties agree Schedule Part 4 was included because the design was not complete enough to allow a full unqualified price to be agreed.
- Para. 7.18 – *“The parties are at one that the risk for normal development to completion of design lies with [BBS]”*
- Para. 7.20 & 21 – Mr Hunter finds the meaning of Pricing Assumption 1 is that matters outwith normal design development become Notified Departures.
- Para. 7.28 – Tie says BBS must show any changes exceed normal design development; BBS say that any change to design principle, shape, form or

²¹² CEC00901460

²¹³ CEC00479431

outline specification is automatically outwith the bounds of normal design development.

- Para. 7.38 – 39 – Mr Hunter finds that to be a Notified Departure the changes must be: 1) changes in design principle etc; and 2) *not* normal design development.

136. The point which went against TIE was that parts of the Employer's Requirements which had not been designed at BDDI were found not to be included as normal design development. On the facts most of the actual changes notified were found to be Notified Departures. (This is summed up at paragraph 3.3 of the DLA review of the decision²¹⁴). However, what Mr Hunter's decision makes clear is that BBS accepted that 'normal design development' meant something and that it, BBS, had taken on the risks associated with changes that fell within that definition.

137. What is said by Mr Hunter in para 7.38-7.39 is essentially what DLA contend was the clear intent of the Wiesbaden Agreement as noted above, albeit Mr Hunter left open the possibility of a change in principle etc. which is also normal design development being a BBS risk. This is actually a more favourable interpretation for tie.

138. The following paragraphs from the decision of Mr Wilson dated 4 January 2010²¹⁵ are also noteworthy:

²¹⁴ CEC00479430

²¹⁵ CEC00034842

- Para. 46 – Infraco accepts that tie is not responsible for every change between BDDI and IFC. The alternative to agreeing Schedule Part 4 would have been a higher contract price.
- Para. 47 – Tie argues that the Price is not just for BDDI but also for delivering the Employer's Requirements.
- Para. 65 – Mr Wilson agrees that the Price includes for delivering the Employer's Requirements, not just what is shown in the BDDI (i.e. he agrees with tie).
- Para. 81 provides a definition of normal design development. The experts for both parties then disagree about where the line is, but they both agree that the parties could not have intended for minor changes to be Notified Departures.
- Para. 85 – Infraco's position is that anything not shown on BDDI is a change save for 'reasonable' changes.
- Para. 102 – Mr Wilson agrees with tie that 'amendment' only applies to something included in the BDDI, not the general Employer's Requirements.
- Para. 103 – Mr Wilson does not agree with Infraco's interpretation.
- Para. 100 and 127 – Mr Wilson sets out what he thinks Pricing Assumption 1 intended to say – essentially that Infraco is liable for normal design development which does not stray into changes of design principle etc.

139. On the facts of the INTCs most were Notified Departures. However, the important point is that BBS, and indeed its expert, again accepted that BBS carried the risk of 'normal design development', being minor changes.

140. Mr Laing, a highly experienced non-contentious construction lawyer with years of experience drafting contracts such as the Infaco Contract gave clear evidence of how he had understood, and still understands, Pricing Assumption 1 when he said *"I still read the document, rightly or wrongly, as indicating that there are -- there is the possibility of a development of design which is not a change in the design principle, shape, form and/or specification that would not be caught by this Pricing Assumption"*²¹⁶. That remains his view even now, years after the disputes between tie and BBS and even after a contrary interpretation was put to him by Inquiry Counsel.

141. DLA issued a paper summarising parties' positions on the interpretation of Schedule Part 4 on 26 November 2009²¹⁷. It is submitted that this report correctly summarised the arguments, and correctly noted which arguments were supported by Mr Keen, DLA and McGrigors. Again, it can be seen that no-one was arguing that the words 'normal design development' were devoid of meaning or content, as has been suggested by Inquiry Counsel. Not even BBS sought such an extreme position²¹⁸.

142. In conclusion, it is submitted that the extreme interpretation of Pricing Assumption 1 asserted by Inquiry Counsel was a novel one. If it were correct, it would render the words 'normal design development' otiose. It is submitted that that is not a commercially sensible construction of the parties' agreement and is not one that would find favour with a court. Indeed, it is not one that even BBS

²¹⁶ Laing Transcript, page 36, lines 3-13

²¹⁷ CEC00651408

²¹⁸ See para 2.5 of DLA's paper

was willing to advance and it is not an interpretation that BBS's lawyer, Mr Laing accepted.

O - Events in 2010

143. DLA refers to and adopts the evidence of Mr Fitchie in his statement (TRI00000102) at paras 8.142 – 8.223.

P – DECISION TO SEEK MEDIATION

144. DLA has no comments

Q – MEDIATION

145. DLA has no comments

R – IMPLEMENTATION POST-SETTLEMENT AGREEMENT

146. DLA has no comments

S – COSTS INCURRED FOR VARIOUS PARTS OF THE WORKS

147. DLA has no comments

T – THE MAIN REASONS WHY THE PROJECT INCURRED DELAYS, COST MORE THAN ORIGINALLY BUDGETED AND THROUGH REDUCTIONS IN SCOPE DELIVERED SIGNIFICANTLY LESS THAN PROJECTED

148. Please see the overview given at paragraphs 3 - 14.

PART III – RESPONSE TO SUBMISSIONS BY OTHER CORE PARTICIPANTS

149. In this Part of these submissions DLA will respond briefly to the written submissions lodged on behalf of the other Core Participants on 27 April 2018. For the avoidance of doubt, DLA adheres to the position that it adopted in its own written submissions, without amendment, save in the one respect shown in tracked changes to paragraph 100 above.

Submissions for City of Edinburgh Council (“CEC”).

150. As might have been expected, the submission for CEC seeks to minimise blame on its part, and to heap responsibility for the failures of the project on DLA. The CEC submission is neither balanced nor justified by the evidence. Particular reference is made to the following points (adopting, for ease of reference, the paragraph numbering used in the CEC submission).

3.2 – 3.3: An attempt is made to minimise the involvement of the legal department of CEC in the Infraco Contract. This ignores large sections of the evidence, including the rather inconvenient truth that Mr MacKenzie read and understood Schedule Part 4²¹⁹. Even if it is true that CEC legal did not carry out a “review” of the contract (whatever that term is intended to mean), it was entirely reasonable for DLA, and indeed the Councillors, to expect CEC legal to read the contract, particularly the obviously critical Schedule Part 4, alongside the Close Report and the DLA letters issued at and around close. It was reasonable for DLA, and the Councillors, to expect CEC legal to properly inform

²¹⁹ MacKenzie Transcript, page 96, line 11 to page 97, line 25

itself of the terms of the contract and raise any queries it might have had with DLA.

3.5: CEC contend that the terms of the Wiesbaden Agreement were not non-negotiable. This is, with respect, wishful thinking. The evidence shows that Mr Walker of BBS simply was not prepared to accept any movement of risk, post-Wiesbaden, beyond “minor tweaking”²²⁰.

3.6 – 3.7: It is asserted that the risk profile changed from Wiesbaden to close. There is, however, no explanation of why there is any *material* difference between what was agreed (by persons other than DLA) at Wiesbaden and what was ultimately put into place in Schedule Part 4. From the very outset, the risk of changes from BDDI to IFC sat with tie. Changes that went beyond ‘normal design development’ were always, and remained, a tie risk.

3.8: It is asserted that Mr Fitchie gave evidence that he “gave no advice whatsoever to the Council on” SP4 or PA1. That was not Mr Fitchie’s evidence²²¹ and it is not understood where this assertion comes from.

3.11: This is a selective reading of Mr Fitchie’s evidence, which requires to be taken as a whole. Mr Fitchie, when shown the whole terms of the document, did not accept that he allowed an inaccurate version to be put forward²²².

²²⁰ See the evidence discussed at para 131 of DLA’s original submission; also Transcript of Ian Laing, page 51, lines 2-18

²²¹ See e.g. Fitchie Transcript, Day 1 pages 34 - 35

²²² See para. 18 above

3.12: Reference is made to the evidence of unspecified “tie witnesses”. The contention here is again inconsistent with the evidence. In particular, it rather ignores Mr Bell’s evidence that tie was well aware of the risks associated with Schedule Part 4 and the inevitable Notified Departures that were bound to occur²²³; and that tie had assessed these risks and whether or not the risk allowance was adequate in light of the anticipated Notified Departures²²⁴.

3.13: Here there is similar reliance on unspecified “witnesses on behalf of the Council”, with no acknowledgment whatsoever of the clear evidence of Mr MacKenzie that he knew exactly where the risks lay or the evidence of Ms Lindsay that, had she read Schedule Part 4, she too would have understood this.

3.19: There is here, again, an entirely selective reading of Mr Fitchie’s evidence. Plainly, in certain respects he was giving information rather than advice: as he explained²²⁵, on certain aspects such as finances he could not advise, and could merely inform. But as has already been noted, it is not a fair reading of his position to say that he claimed to have provided no advice.

3.23 – 3.38: DLA does not demur from the proposition that both tie and CEC were entitled to, and did, rely on DLA’s advice (as long as that acceptance equally involves recognition of: (i) the contractual stipulation that advice to tie would equate to advice to CEC; and (ii) the involvement of CEC’s own legal department). That having been recognised, DLA agrees that there was no need

²²³ Bell, Witness Statement pages 71 to 73, Transcript Day 1, Page 95, line 24 to Page 97, line 24 and Page 109 line 1 to Page 112, line 12

²²⁴ Bell Transcript, Day 2, page 4, line 18 to page 6 line 22

²²⁵ Fitchie Transcript page 75, line 12 – page 75, line 3

for a separate firm to advise CEC. DLA does, however, draw attention to the further attempt by CEC to minimise the involvement of its legal team²²⁶, in plain conflict with the evidence given by the members thereof²²⁷.

3.50.3: The quotes from Ms Lindsay are incomplete and thus misleading. If one reads on, one sees that:

- Ms Lindsay accepted that the letter advised as to the risk of more than one Notified Departure²²⁸.
- Ms Lindsay accepted that the purpose of the risk matrix was not to advise on the “value of risk”²²⁹, that not being something which, in any event, a solicitor would be qualified to advise upon.
- Ms Lindsay indicated that she expected her solicitors to have read and understood the contract²³⁰.

3.51.7 - 10: CEC here engages in linguistic quibbles with advice which was plainly accurate.

3.51.11: CEC ignores the fact that it is not for a solicitor to quantify risk – as was uniformly accepted in the evidence, that is a job for others.

3.57: Reference is again made to the evidence²³¹ of full awareness on the part of tie officials and the CEC legal team, as well as the contractual stipulation that

²²⁶ See 3.38

²²⁷ Mr MacKenzie, in particular

²²⁸ Read on from the end of the passage quoted by CEC at its footnote 74 to page 147, line 12

²²⁹ Read on from the end of the passage quoted by CEC at its footnote 76 to line 19

²³⁰ Read on from the end of the passage quoted by CEC at its footnote 77 to page 193, line 3

advice to (and thus knowledge of) tie was to equate to advice to (and thus knowledge of) CEC. There is no warrant in the evidence for a finding that DLA were not entitled to rely on that contractual stipulation.

3.59: Reliance is placed on the fact that Mr Fitchie did not say, in the course of the DRP, “I told you so”. But CEC’s submission ignores the simple fact that Mr Fitchie explained that he did not tend to follow an approach of saying, *ex post facto*, “I told you so”.²³²

3.63 – 3.68: CEC has ignored Mr Fitchie’s explanation and clarification, once he had been shown the whole of the documents, under questions from counsel for DLA.

3.69 – 3.89: The Chairman will of course read the evidence as a whole. It is submitted that the preferable reading thereof is that already advanced by DLA: CEC and tie both knew perfectly well, before Close, that this was not a fixed price contract, with a serious and unquantified (and probably unquantifiable) risk arising from the incomplete design.

3.90 – 3.94: Reference is made to the point already addressed above regarding BSC’s approach to Wiesbaden.

²³¹ Mr Bell; Mr MacKenzie; CEC01448356

²³² As can be readily identified by continuing the quote selected by CEC at its footnote 87 to page 168, line 16.

3.95 – 3.103: CEC ignores the fact that Mr Walker himself indicated that he would have mentioned an extra £80m to Mr Fitchie, pre-close – albeit the two men differ as to when and where that conversation took place.

3.106: DLA agrees with CEC that “that it is obvious that the progressing of designs from BDDI to IFC was inevitably going to lead to disputes and claims by Infracore for additional payments, and that at the stage of entering into the Infracore Contract, that was or ought to have been obvious”. More than that: this was not only obvious, but known to CEC and tie, for the reasons already discussed; and adverted to by Mr Fitchie.

3.108: Plainly, there was (and is) a dispute as to what content one ought to give, in the context of this contract, to the phrase “normal development and completion of designs”. The evidence does not warrant any criticism of Mr Fitchie, however, for the introduction (not by him) of that phrase, or for his advice as to the risks engendered thereby. Furthermore, even if Inquiry Counsel’s assertion that the phrase is otiose were to be accepted by a court (which it is contended is highly unlikely), for the purposes of the present Inquiry, that is not significant. Given that BBS did not ever contend for such an interpretation, it cannot be suggested that that interpretation played any part in the matters into which this Inquiry is charged with investigating. None of the cost increases or programme over-runs that bedevilled this project can be attributed to an interpretation that neither party to the contract actually advanced.

151. As a general observation, two points seem to be entirely ignored by CEC. First, the fact that it was agreed that advice to tie would be deemed as advice to CEC. Second, the fact that (at the very least) Mr MacKenzie had a full understanding of the contract that was being signed up to. The failure to address these points demonstrates the lack of balance in the submission.

Submissions for SETE

152. The following comments are made under reference to the pages of SETE's submission. SETE's submission is not presented in numbered paragraphs. However, the context should allow for identification of the relevant passages in SETE's submission:

Page 10: DLA agrees that the decision to stand down DLA is significant as indicating tie's approach to the negotiation of the Infraco Contract and the project as a whole. It is symptomatic of tie's corporate view that it, not DLA, was the owner of the procurement process. This is evident in the fact that tie not only negotiated the deal but also drafted key components of the contract, such as clause 80 and Schedule Part 4. Rightly or wrongly, tie clearly saw itself as a highly sophisticated client which did not require legal advice during a critical stage of the negotiation of the Infraco Contract.

Pages 15-16: Mr Fitchie's evidence in relation to his role in interfacing with CEC is contained in his statement and in a reasonably long passage in his examination. The short passage cited by SETE requires to be read in context.

Advice was given by DLA to CEC in accordance with the agreed scope of DLA's duty as set out in the express terms of the various duty of care letters that were issued to CEC by DLA. Tie, as a recipient of those letters, was well aware of how DLA had undertaken to interface with CEC. Mr Fitchie was clear that all contacts he had with CEC were "first cleared with tie"²³³.

Pages 44 - 46: DLA agrees that pausing the procurement process pre-Close was a matter that was raised with tie and CEC on several occasions and by several individuals. However, it was not considered to be a realistic option by tie/CEC.

Page 64: SETE asserts that the Close Report was "approved" by DLA. SETE offers no basis for that assertion. None exists.

Page 65: SETE asserts that CEC legal apparently did not consider the terms of Schedule Part 4. That is incorrect. Mr MacKenzie clearly accepted that he had read and understood Schedule Part 4 before contract Close²³⁴. SETE's submissions at page 76 seem to accept that proposition.

Page 70: SETE's attack on Mr Fitchie's credibility is both unfounded and surprising, particularly given the evidence of Mr Bell, who is himself a member of the SETE group. Reference is made to paras 84– 90 above and to the footnotes relative thereto. In short, Mr Bell testified that Mr Fitchie warned tie about the meaning and effect of Schedule Part 4. SETE now seek to ignore the fact that tie

²³³ Fitchie Transcript, Day 1, page 46, line 6

²³⁴ MacKenzie Transcript, page 46, lines 12 to 17; page 89, line 24 to page 90, line 3; page 92, line 13; MacKenzie Statement para 195

understood perfectly well what Schedule Part 4 did, and why it had been agreed to by tie during tie's negotiations with BBS. The "potential dangers" arising from this schedule are plain from its terms. That Mr Fitchie made tie aware of those dangers (which tie was of course already well aware of) is vouched by the documents referred to above and by the clear and unequivocal admissions of Mr Bell himself. Mr Fitchie was clearly uncomfortable about giving a view on the significance of changes between various drafts of Pricing Assumption 1 "on the hoof"²³⁵. However, it is submitted that his considered evidence was consistently to the effect that the risk of 'normal design development' was always a BBS risk.

Page 77: SETE seems to be suggesting that Mr Fitchie no longer adheres to his earlier interpretation of Pricing Assumption 1. If that is SETE's position, it is wrong. However, whatever Mr Fitchie's position might be, DLA's position remains that, properly construed, Pricing Assumption 1 places the risk of 'normal design development' with BBS. The term 'normal design development' is not redundant or otiose. Even BBS did not read the term as being redundant or otiose when it was pressing its case at adjudication. Even it accepted (and Mr Laing still contends) that normal design development was indeed a BBS risk. What amounts to normal design development is a technical issue which, as Senior Counsel²³⁶ and McGrigors both opined, required expert engineering advice²³⁷.

Page 82: SETE accepts that all parties (both before and after Close) understood that 'normal design development' was a BBS risk. SETE accepts that it was for

²³⁵ Fitchie Transcript, Day 1, page 135, line 23 to page 135, line 2

²³⁶ Calum MacNeill QC

²³⁷ CEC00797337

tie to assess the risk of changes that went beyond 'normal design development' and to make adequate provision for that risk. It is correct to make both of these concessions.

Page 88: On page 88 SETE accepts that it was warned by Mr Fitchie of the impact of Notified Departures following upon the pricing assumptions in Schedule Part 4 falling. It also seems to accept that it was for tie to assess the risk of that happening and its financial consequences. This seems to contradict what is asserted by SETE on page 70.

Page 104: The letter by Fenella Mason dated 11 May 2006 provides a snapshot of her advice at that time. Her advice was that, at that time, or "at present", serving a RTN on SDS would have been counter-productive. However, that was at a time when SDS performance had improved and contrasts with the clear intention to serve such a notice earlier.

Page 108: SETE refer to Mr Keen QC's advice in which he disagrees with Lord Dervaird's interpretation of clause 80. SETE also refer to CEC00098393 (McGrigors' file note of a discussion with Mr Keen QC) and suggest that it contains a note of advice given by Mr Keen QC to the effect that a challenge to Lord Dervaird's interpretation had "limited prospects". The file note cited by SETE simply does not say that.

153. On the whole, many of the points made by SETE are aligned with DLA's position. In particular, SETE accepts that delaying the signing of the Infraco

Contract was not an option which tie or CEC would have accepted²³⁸. SETE accepts that tie negotiated the commercial deal that was reached with BBS and that the Weisbaden Agreement set the tone for Schedule Part 4 and the various pricing assumptions which tie agreed with BBS. SETE accept that it was entirely for tie to assess the likelihood of the pricing assumptions falling and what contingency should be allowed for that risk eventuating. SETE accepts that Mr Fitchie warned tie that, in the event of the pricing assumptions falling, BBS's claims would be conservative and all encompassing. SETE accepts that it understood that the risks associated with changes that went beyond normal design development were tie risks.

154. SETE's criticisms of CEC are well founded and supported by the documents. They also chime with DLA's position. In particular, SETE is correct to contend that CEC legal read and understood (or should have understood) the contract and that it was not a fixed price contract. CEC legal knew or ought to have known that the price was based on pricing assumptions which CEC knew or ought to have known were incorrect (in certain cases) or at least might not prove to be correct (in the rest). At contract close, CEC legal knew that the SDS design was late and incomplete and that MUDFA was incomplete.

²³⁸ This also seems to be a matter of concession by CEC in its submission, para 23.1; 23.17.

Submissions for The Scottish Ministers (“TSM”)

155. DLA will respond to the TSM submission adopting the paragraph numbering in TSM’s submission. However, as TSM has re-commenced paragraph numbering at 1 in each chapter, chapter numbers will also be given:

Chapter 2, para 32: TSM suggest that the outcome of one or more of the DRP’s resulted in an interpretation which meant that any design development gave rise to a ND. The submission does not vouch that assertion. In fact, that extreme position was not adopted by any of the adjudicators, nor was it adopted by BBS. BBS’s lawyer, Mr Laing, eschewed the idea that that was how Pricing Assumption 1 worked, or was intended to work²³⁹.

Chapter 5, para 14: DLA agrees that when the Dundas & Wilson comments are read properly they do not say that the Infraco Contract is not fit for purpose.

Chapter 7, paras 3 and 4: DLA agrees with TSM that the risks noted by TSM were all well known and understood. The contract was not ‘disadvantageous’ to CEC. Rather, it was the product of the deal that had been done by tie fully aware of said risks and fully aware of the fact that, in relation to SDS, the procurement strategy had changed. Tie was equally aware that, in relation to MUDFA, the strategy might change if MUDFA was delayed²⁴⁰. Tie’s job, once it decided to accept the risks associated with delayed and incomplete SDS design and

²³⁹ See para. 130 above

²⁴⁰ At Close, tie was reporting that MUDFA was back on programme however there always remained an obvious risk that MUDFA might slip and that the programme allowed insufficient float for that. See paras. 56 - 58 above.

potential MUDFA delay, was to make adequate provision for those risks. CEC's job was to ensure that it was satisfied with tie's risk allowance. Standing the evidence heard by the Inquiry, what cannot now be in any doubt is that both tie and CEC legal (and indeed both of the other relevant departments and their officers) realised that these risks existed, understood them and knew that they had to be provided for.

Chapter 7, para 12: TSM's suggestion that an unamended standard form of contract could have been used for a project which, TSM themselves accept was highly complex and novel, is naïve. That was not suggested by Counsel for TSM to either Mr Laing or Mr Fitchie. A bespoke contract, or at least a very heavily amended standard form of contract, was inevitable, particularly in the circumstances that pertained at contract close. Mr Fitchie was not challenged by TSM's counsel in relation to his evidence that, as drafted by DLA at ITN, the contracts (including the Infraco contract) were "*in very great part standard form and therefore market tested*"²⁴¹. Nor was he challenged in relation to his evidence that clause 80, as originally drafted by DLA, was based on the Leeds Supertram draft EPC Contract and the approach taken in the standard form contract published by the ICE known as ICE 6th & 7th Editions²⁴². As was its prerogative, as client, tie moved away from that form of wording when Mr Gilbert agreed alternative wording with BBS²⁴³. Similarly, Schedule Part 4 could never have been taken from a standard form contract as it was a bespoke solution to a particular problem – namely that BBS was naturally unwilling to take on the risks

²⁴¹ Fitchie Statement para 2.32, 4.114

²⁴² Fitchie Statement para 7.521 – 7.524

²⁴³ See paras. 92 - 98 above

associated with *inter alios* incomplete SDS design and potential MUDFA delays, which were entirely outside its control. Accordingly, a standard form contract had been adopted as the basis for the Infraco Contract, but that was never going to avoid the need for bespoke drafting and, in the circumstances, it made no difference in relation to clause 80 or Schedule Part 4.

Submissions for Billfinger Construction UK Limited (“BCU”)

156. DLA will respond to the BCU submission adopting the paragraph numbering in BCU’s submission.

Para 7: It is noteworthy that BCU maintains the position that, had tie wished to obtain a fixed priced contract the price would have been £1bn. Clearly, CEC has acquired a profitable tram system for significantly less than that.

Para 9: BCU suggests that tie mis-reported the meaning and effect of the contract that it had agreed with BBS to CEC officials. That is not accepted. As the evidence has clearly demonstrated, CEC officials were well aware of the meaning and effect of the contract²⁴⁴. With particular reference to CEC legal, it is now beyond doubt that it’s officers were clear as to about the nature and extent of the risks that tie had assumed.

²⁴⁴ See paras. 76 - 79; 81 - 82; and 103 - 117 above

Para 12: BCU appears to be attempting to paint itself as a virtuous, misunderstood and often hard done-by contractor. That is something of a theme that runs through BCU's submission generally. DLA does not take issue with a party asserting its rights under a contract where to do so is necessary. That is, after all, the function of a contract. However, any contract requires co-operation and a willingness to make it work and to be a success. BCU's stance of denying that BBS's approach was contentious and claims driven is difficult to credit, standing the evidence which the Inquiry has heard. That evidence demonstrates that BBS adopted more than just a "commercially robust" approach²⁴⁵. DLA broadly adopts SETE's submissions in its sections 8A and 8B. Tie may well have been naïve and under-resourced. Tie may well have elected to adopt an approach of fighting BBS 'tooth and nail'²⁴⁶. However, BBS's aggressive attitude, as vouched by the evidence summarised by SETE, played a major part in the problems encountered on the project. DLA does not know why BBS adopted such a strategy, although tie was clearly warned by Mr Fitchie that it might well do exactly that²⁴⁷. However predictable the BBS approach might have been, it is disingenuous for BCU to try to re-write history in the manner evident in its submissions. At the time of writing this part of these submissions DLA has not had sight of the records that BCU has sought, unsuccessfully, to interdict Lord Hardie from publishing²⁴⁸. In the event of those being published it may be that they shed light on the reasons why BBS adopted the approach it did.

²⁴⁵ BCU submissions para 486

²⁴⁶ See paras. 89 - 91 above

²⁴⁷ As already discussed, Mr Fitchie warned tie that BBS's claims would be conservative and all encompassing; CEC01465933

²⁴⁸ *Bilfinger Construction UK Limited, Petitioner* [2018] CSOH 46

Para 45: It is self-evident that the Wiesbaden Agreement was not ‘the final deal’ and it is equally self-evident that it was a step in the negotiating process. However, BCU’s submission appears to seek to play down the significance of that step. Obviously neither party was bound by what had been agreed at Wiesbaden. Ultimately, either could have refused to proceed further, and have walked away from the project altogether if it had decided to depart from what had been agreed at Wiesbaden. However, it cannot credibly be suggested that Wiesbaden was not an extremely important step in the negotiation which, in a real sense shaped the negotiation going forward. At a practical level, Wiesbaden did bind the parties. It would have been a remarkable and serious change of position had either side sought to depart from what was agreed at Wiesbaden to any material extent. Doing so would have undermined trust and jeopardised the negotiator’s credibility. To suggest otherwise is frankly fanciful and ignores the fact that Wiesbaden involved the most senior people from within the respective organisations. What happened at Wiesbaden was clearly intended to be, and was, a serious and momentous stage in the negotiations. Nothing said by Mr Laing in his evidence suggests otherwise. It is of course very telling that what ended up in the final contract mirrors closely what was ‘agreed’ at Wiesbaden. None of the fundamentals concerning risk allocation changed between Wiesbaden and Close.

Para 79: For the avoidance of doubt, it is not suggested by DLA that it, or Mr Fitchie, did not understand the “*effect of Schedule Part 4*”. On the contrary, the effect of Schedule Part 4 is obvious. DLA’s point is simply that Schedule Part 4

was agreed between clients as the deal they had struck. Both tie and CEC fully understood that.

Para 129: As Mr Laing's oral testimony post-dated Mr Fitchie's the content of this conversation and the manner of Mr Fitchie's alleged reaction was not put to him for comment. However, whatever the style of Mr Fitchie's response, it is noted that Mr Laing took from this conversation '*confidence that he understood, and in turn that CEC understood the effect* [of Schedule Part 4]'.²⁴⁹ Mr Laing's confidence was, as the evidence has shown, well placed. CEC was fully aware of Schedule Part 4.

Para 134: DLA agree with BCU's point that it is clear to anyone who reads Schedule Part 4 (as it is contended CEC legal did) that the Infraco Contract was not a fixed price contract (in so far as that term might be intended to convey that the price could not go up or down). DLA contends that, not only is that clear from reading the schedule, but it was also made clear to CEC legal by DLA on more than one occasion, including in the advice letters provided by DLA to CEC legal. CEC legal did not need to be told this but were anyway.

Para 139: BCU's suggestion of tie 'ignoring' the consequences of Schedule Part 4 is not in line with the evidence. Far from ignoring it, the evidence was to the effect that tie was aware of the risks and attributed what it believed were sufficient sums for it in the risk allowance²⁵⁰. That those sums proved inadequate

²⁴⁹ Laing Transcript, page 46, line 25 to page 47, line 3

²⁵⁰ See Bell Transcript, Day 2, page 4, line 18 to page 6, line 2

is due to a combination of factors, including tie not attributing enough to the risks and BBS's aggressive approach as discussed above.

Para 266 et seq: BCU focusses considerable attention on seeking to demonstrate that BBS 'won' more adjudications than tie. DLA agrees that, in the sense that litigators might understand the term, BBS did 'win' more adjudications than tie did. However, that should not detract from the fact that BBS's financial claims were held to be significantly inflated and that tie 'won' a share of the points of principle too. Adjudication is an interim binding dispute resolution procedure which, in this case, the parties had agreed to in their contract²⁵¹. It would be dangerous for the Inquiry to assume, just because one or more of the nominated adjudicators reached a particular view on the interpretation of the contract within the context of a 'crude' truncated adjudication procedure, that a court would have reached the same conclusion in a litigation²⁵². It should not be forgotten that neither Mr Hunter nor Mr Wilson is a judge or lawyer²⁵³. Furthermore, there were different approaches taken by different adjudicators to the question of interpretation. The correct interpretation of the contract was never tested in a fully argued court process. The difficulty that tie faced throughout the project was rooted in the fact that it had assumed the risk of changes being required that went beyond 'normal design development' and it turned out that there were far more of these, and that they were far more extensive (and expensive), than tie

²⁵¹ Had they not, a right to refer any disputes to adjudication would have been imposed on them by the Housing Grants, Construction & Regeneration Act 1996 s108.

²⁵² Adjudication has been repeatedly described as 'rough justice' and 'crude' (for example see *Gipping Construction Limited -v- Eaves Limited* [2008] EWHC 3134 (TCC) per Aitkenhead J; *Carillion Utility Services -v- SP Power Systems Limited* 2012 SLT 119 per Lord Hodge at para [18] and the case cited in that paragraph) It involves an adjudicator, who is usually not a trained lawyer or judge, making a decision within a constrained timescale (usually 28 days) (*Gipping sup cit*; *Carillion sup cit*).

²⁵³ Mr Wilson has an LLB but has never practiced as a lawyer. He is an engineer.

had assumed they would be. The adjudicators largely found that the Notified Departures did relate to changes that went beyond 'normal design development'. That was a technical matter, which turned on the particular facts of the individual disputes. Once it was demonstrated that a required change went beyond 'normal design development' the question became one of *quantum*, wherein the adjudicator had to assess what sum BBS was entitled to (+/-) for that change. Pre-Close, it was for tie to assess how likely it was that changes would be required which would go beyond 'normal design development' and how expensive they would be. Tie appears to have significantly underestimated these issues. As was recognised in the evidence, quantifying in advance the risk posed by those issues was a matter for others, and not something on which DLA as lawyers could properly opine.

Submissions for Siemens Plc

157. DLA will respond to the Siemens submission adopting the paragraph numbering in those submissions.

Para 71: DLA agrees that it was self-evident that, if the pricing assumptions set out in Schedule Part 4 fell, that the price would change. Clause 3.2.1 is also clear in its terms, meaning and effect.

Para 86: Whilst there is clearly force to the point made by Siemens relative to tie having under-provided for risk in its contingency, DLA submits that it is an over-

simplification to blame all of the problems encountered by the project on tie's inadequate risk contingency allowance.

Submissions for Parsons Brinckerhoff Limited (“PB”)

158. DLA has no additional submissions to make in response to the PB submission.

APPENDIX 1: ATTACHMENTS

1. Footnote 124: DLA File Note dated 11 March [2008]
2. Footnote 140: Email from Andrew Fitchie to Steve Reynolds dated 21 January 2008
3. Footnote 140: Email from Andrew Fitchie to Geoff Gilbert dated 4 February 2008
4. Footnote 141: Email from Suzanne Moir to Andrew Fitchie and Philip Hecht dated 5 February 2008 with attached Pinsent Masons mark-up of TIE Changes clause
5. Footnote 142: Email from Philip Hecht to Suzanne Moir dated 28 February 2008
6. Footnote 143: Email from Susan Clark to various with attached spreadsheet title 'Contract Close Meeting Schedule'
7. Footnote 146: Email from Andrew Fitchie to Graeme Bissett dated 24 April 2008
8. Footnote 148: DLA File Note incorrectly dated [23 February 2011]