STATEMENT OF ANDREW SUTHERLAND FITCHIE

FOR THE EDINBURGH TRAM INQUIRY

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1 INTRODUCTION & BACKGROUND

1.1 My full name is Andrew Sutherland Fitchie. I was born and educated in Edinburgh. I qualified as a solicitor at Allen & Overy in 1980 and began my career as a commercial litigator. I moved to non-contentious construction and projects work when I left that firm in early 1984 to take up a job with a French construction company in Paris which was active on large infrastructure projects in the Middle East.

1.2 Prior to joining DLA Piper, my roles included: working as a partner at Masons in Hong Kong for five years, during which time I advised contractors on the HK$128 billion Chep Lap Kok Hong Kong international airport; working in Frankfurt for a large German international construction company; and six years working at the International Bank of Reconstruction and Development (the World Bank) in Washington DC, dealing with project finance, predominantly large infrastructure projects being built under Build-Operate-Transfer (BOT) concessions and using commercial financing, both lending and capital markets instruments. A copy of my CV is attached as Appendix 1.

1.3 I joined DLA Piper in August 2001 and was based in London. I moved permanently to Edinburgh in January 2003. That career move was directly linked to DLA Piper winning the legal advisory

mandate for the Edinburgh Tram Project ("the **Project**"). The firm was already involved advising the public sector side in all the other contemporary UK Tram and light rail projects, that is to say: Leeds Supertram, South Hampshire LRT, Merseytram in Liverpool and NET in Nottingham. Many of these trams projects were in live procurement or construction and initial operational phases when DLA Piper were tendering for the Project legal mandate in late 2002.

1.4 Until moving to Edinburgh, I was the lead DLA Piper partner for South Hampshire Light Rail PFI project. I was also involved in the Leeds and Nottingham projects. Subject to client confidentiality constraints, I had access to DLA Piper's know-how and legal precedents for the procurement processes, contract structures and documentation for these projects. Within the Transport Group at DLA Piper, we discussed many common issues arising for us as public sector advisers and surrounding these light rail projects: for example the procurement models, contractual frameworks, the difficulties surrounding utilities diversions and the contracting and supply industry and financial markets' views generally on tram projects. I had close contact with DLA Piper's UK Head of Transport and the Leeds-based partner in charge of Merseytram, and other DLA Piper personnel also in Leeds who acted on the Nottingham tram project.

1.5 This statement has been compiled by me using my best recollection of events that took place over a nine year period from 2002 to 2011 regarding the Project. In preparing this statement I have had access to certain Project documentation from DLA Piper and the Edinburgh Tram Inquiry (the "**Inquiry**"). I have used that documentation to prompt and support my recollections where necessary. I have also studied publicly available records.

1.6 I have set out my evidence on the key issues as they appear to me, using the headings from the Inquiry's Issues List as my structure.[1] I consider certain key issues in more detail and have inserted appropriate explanations where I believe what I can say - even if brief - has direct relevance to items specifically of interest to the Inquiry. I have also received 153 multi-limbed questions from the Inquiry – included as Appendix 2 – along with reference to a substantial number of documents which I have been asked to review and provide comment on. I was also asked a further 90 queries within a draft document first produced and given to me by the Inquiry in early January this year, following my oral testimony in July 2016. In order to assist the Inquiry I have included as Appendix 3 a table corresponding to the questions and identifying where those questions have been addressed in this statement. However, this statement should be read as a whole. Appendix 4 contains a list of abbreviations which are used within this statement.

1.7 Many of the Inquiry's questions, which span the entire period from late 2002 to early 2011, lie well outside DLA Piper's mandate as TIE's legal adviser. My answers to such questions are based on facts as I observed them and my opinions as an informed member of the overall Project team. They cannot be taken as views or opinions that DLA Piper ought to advised TIE on or should have insisted that TIE or CEC paid attention to. Where the Inquiry's questions fit in with the natural flow and content of my evidence I have not referred to them in the body of the statement. However, in

[1] Edinburgh Tram Inquiry, "Issues being considered", October 2015

places it has been necessary to refer to the questions in the body of the statement in order to explain why my evidence is addressing certain points or documents.

1.8 The Project occupied the majority of my professional life for approximately eight years. It was all-consuming. I was involved closely in the DLA Piper tender to TIE for the legal mandate – down to personally attending TIE's first offices in Coburn Street on a September morning in 2002 to obtain the tender package from Andrew Hudson, probably TIE's first Project employee. I talked with him about the preliminary parliamentary plans which had been prepared by the engineering consultancies Faber Maunsell and Mott MacDonald, showing the projected limits of deviation for the tram scheme. Over a decade later, my recollections about the Project remain strong and my memories of key interactions and meetings to a very large part undiminished. I had returned to the city where I was born and grew up to contribute to a major project which I firmly believed would support the city's growth and future economic wellbeing. I was and am dismayed that the Project became so troubled.

1.9 I would like my evidence about the promotion, procurement and contract implementation phases of the tram scheme to be on public record as a clear counter to ill-informed speculation I have read in the past about the reasons for sub-optimal project outcome. I return to discuss the issues which in my view lie behind that outcome in more detail throughout my statement.

1.10 Due to the volume of issues, documents, and the time period which I have addressed at the invitation of the Inquiry, the statement which follows is lengthy and far ranging. I have included an executive summary in section 2. It should not be considered an alternative to reading the full detail provided in the sections of my statement which follow it.

2 EXECUTIVE SUMMARY

2.1 Introduction

2.2 The aim of this executive summary is to highlight the key themes and issues which, from my perspective as a project lawyer, I consider to be particularly important for the Inquiry to consider when determining the issues the Project encountered.

2.3 I have summarised these key issues under the same headings used later in this statement (i.e. those in the Inquiry's 'Issues Being Considered' document published in October 2015).

2.4 Initial Proposals

2.5 The major scope of DLA Piper's appointment concerned preparation for the Project's procurement phase, that phase itself and then project implementation.

2.6 Two pieces of enabling legislation required to be passed through the Scottish Parliament in order to implement the Project. These tram Bills achieved Royal Assent and came into force in 2006.

2.7 From 2003 to 2008 the Scottish Executive was implementing an ambitious infrastructure investment plan which created competition for government funding among numerous large projects for which the estimated combined capital expenditure was well over £1billion. The competition between projects, and the political aspects of this within CEC and the Scottish Executive became increasingly relevant to how TIE attempted to close out the Infraco Contract award in 2008. CEC and TIE finally secured Transport Scotland grant funding of £500 million in late December 2007.

2.8 TIE was a wholly owned subsidiary of City of Edinburgh Council ("**CEC**") set up as an arm's length company to handle the procurement and development of the Edinburgh Tram Network and some other Scottish transportation projects. TIE ultimately became a single purpose vehicle for the Project.

2.9 **Procurement**

The Creation of TIE to manage and deliver the Project

2.10 CEC created TIE with the objective of assembling the expertise to manage the Project and began delegating responsibility for the Project's delivery to TIE without any advertised competitive tender. This had happened before DLA Piper's appointment.

2.11 The rationale for CEC appointing TIE as its project delivery agent rested on TIE being a single purpose wholly owned public sector entity acting on CEC's behalf and in its interests to carry out a single undertaking. For this, TIE's interests were accepted as derivative of and synonymous with those of CEC. CEC could therefore avoid the strict legal requirement for a formal tender process.

2.12 The detailed Operating Agreement agreed between TIE and CEC stated that "*tie will enter into (...) contracts in its own name but will be acting on behalf of the Council*". It is difficult to conceive of a clearer expression by the two parties themselves of the congruity of interests between TIE and its 100% legal parent.

DLA Piper's Appointment

2.13 Following a formal competitive tender process DLA Piper was appointed by TIE on 19 November 2002 (ADS00001). DLA Piper tendered for and was initially appointed by TIE as its sole legal advisor for the bill promotion and parliamentary process as well as procurement strategy. CEC played no role in this appointment process. However, shortly after DLA Piper's appointment DLA Piper were told that there would be a joint appointment with Bircham Dyson Bell and Dundas & Wilson advising on bill promotion and parliamentary process.

2.14 DLA Piper was not procured or appointed by CEC and did not provide advice to it unless specifically instructed to do so by TIE. We raised the question of reporting lines with TIE at the tender process interview in November 2002. TIE explained to us that it had autonomy to appoint and manage its advisers in its capacity as CEC's project delivery agent. We were told again at appointment date in early January 2003 that TIE was our client and it would be instructing us

direct. On the limited occasions where DLA Piper was instructed by TIE to provide advice to CEC this was done under and in terms of DLA Piper's appointment by TIE.

2.15 DLA Piper's primary role at the start of the Project was to advise TIE on various procurement issues (including TIE's own appointment by CEC as project delivery agent) and to produce an initial report outlining the critical issues within an overall procurement strategy that would deliver the Project into an integrated City of Edinburgh public transportation system.

2.16 I was the lead partner on the DLA Piper team which also included Dr Sharon Fitzgerald, a senior associate and then partner, who was my principal assistant. Sharon was heavily involved in the procurement (planning and execution) stage and remained centrally involved in MUDFA.

DLA Piper's Duty of Care to CEC

2.17 DLA Piper was not retained to and did not provide advice direct to CEC in relation to the Project procurement strategy or the choice of contracts and was not at any point instructed to do so by TIE.

2.18 In 2005 DLA Piper accepted a request from TIE to confirm that it owed an ancillary duty of care to CEC, despite it not being DLA Piper's client. DLA Piper's letter of 23 June 2005 (DLA00006301) set out the basis upon which DLA Piper was willing to agree to assume this ancillary duty of care (the "**Duty of Care Letter**").

2.19 DLA Piper's Duty of Care Letter confirmed that we would owe CEC the same contractual duty of care as was owed to TIE subject to various conditions, including:

2.19.1 DLA Piper's primary responsibility was to advise TIE and DLA Piper could at all times rely on TIE's instructions as being identical to CEC's instructions, as if emanating from CEC itself and taking account of CEC's best interests; and

2.19.2 DLA Piper remained expressly authorised to seek all instructions from TIE as project manager and agent for CEC and was not obliged to provide CEC with direct advice unless instructed to by TIE.

2.20 In short, TIE, CEC and DLA Piper all proceeded on the basis that DLA Piper's duty to CEC was to be discharged by DLA Piper advising and taking instructions from TIE alone. DLA Piper was entitled to rely on TIE reporting matters fully to CEC, which TIE was obliged to do in terms of its formal Operating Agreement. It was not DLA Piper's responsibility to police TIE's interaction with and reporting to CEC.

2.21 TIE asked me to re-issue the duty of care letter in August 2007 following a request by Gill Lindsay, Council Solicitor. At that time I made it clear to Gill that DLA Piper would not advise CEC unless specifically instructed to do so by TIE. I also wrote in an email to her that *"I do not envisage any conflict of interest here; to the contrary - in closing the required supply contracts as part of the procurement process, there needs to be complete commonality of interests and objectives among*

the Council, TIE and TEL". I was later asked to, and did, re-issue the letter to CEC in October 2007 as they no longer had a copy of it.

2.22 DLA Piper was stood down by TIE from advising on the Project procurement between April 2007 and late August/early September 2007. After DLA Piper was re-instructed, I joined TIE on secondment from October 2007 to June 2008. The primary purpose of my secondment was to provide TIE with almost exclusive access to my time and regulate how DLA Piper would be recompensed for that. The secondment did not alter the duties of care owed by DLA Piper in any respect and nobody suggested that it did.

Tie's Procurement Strategy

2.23 The conventional way in the UK of approaching procurement for a tram project had been to invite the market to tender and see what potential tenderers came up with in terms of a consortium: suppliers would form their own grouping and then tell you what their methodologies and pricing would be. This approach often resulted in consortia coming together in a rather haphazard manner, e.g. one might get a consortium comprising an excellent civils company, a dominant tram supplier and a rather indifferent systems company.

2.24 TIE's procurement strategy on the Project was designed to overcome this and assemble the best qualified parties who would deliver the best price and the best value. To achieve this TIE opted for a disaggregated DBM procurement model which comprised of the following major contracts: an early operator engagement contract (Development Partnering Operating Franchise Agreement: "**DPOFA**"); a design mandate ("**SDS**"); an on-street works and utilities diversion contract ("**MUDFA**"); a specialised tram vehicle supply and maintenance contract ("**Tramco**"); and a multi-part tram scheme civil engineering and tram operation control systems installation contract with long-term infrastructure maintenance obligations ("**Infraco**").

2.25 The core of TIE's chosen procurement strategy was:

2.25.1 early involvement of a tram operator party as a consultant to assist the public sector client in preparing the overall scheme concept that matched the best commercial and operational aspects for a tram scheme. This appointment (DPOFA) could be legally transformed into a full operator contract without the need for a fresh procurement competition;

2.25.2 completion of a scheme design to be included in the ITN for the Infraco Contract, so that tenderers would be pricing scoped infrastructure with matching Employer's Requirements ("**ERs**") and would be able to shorten their implementation programme with either no or limited design phase; and

2.25.3 utilities diversion to be substantially complete before the tram civils works (Infraco) commenced so as to provide the Infraco contractor with a clear site on which to work and programme towards testing regimes and public service commencement.

2.26 The central idea was that the scheme design and utilities diversions would all be substantially complete before the Infraco Contract entered execution phase so there was a clear sequential construction programme and a clean start on site for the main civils/systems installation contractor. This 'Infraco' would have submitted its bid and entered into a contract with TIE on the basis of a substantially complete scheme design and been progressively supplied with site-suitable 'Issued for Construction' drawings when it mobilised.

2.27 The MUDFA and SDS procurements and appointments were absolutely programme and cost critical for the Project. Competitively priced, technically clear, unqualified bid returns in the Infraco Contract procurement were deeply dependent upon MUDFA and SDS progress and quality in performance.

2.28 These core principles were designed to remove the largest time and cost variables from consideration by tenderers at Infraco ITN in turn reducing the risk premium incorporated into the bids received and achieving a clear, agreed construction and installation programme and more transparent pricing.

2.29 TIE chose this procurement model, with novation of the designer to the Infraco at main infrastructure contract award, after various detailed ranking and comparison exercises, both at workshops and in internal sessions. CEC staff were present at some of these sessions. Ian Kendall, TIE's first Project Director appointed in May 2004, strongly favoured this approach.

2.30 For a considerable period of time, the personnel at TIE were neither experienced in dealing with contractors and large engineering and design consultancies nor well-versed in tram projects. However, in my view, Ian Kendall was a very competent, resourceful and energetic Project Director and TIE was confident that it could manage the different major contracts involved. Ian was well aware of the need for firm, knowledgeable management of the proposed MUDFA and SDS contracts and, above all, the need to launch these critical early procurements. He knew, and advised TIE management, that TIE needed to recruit appropriately skilled personnel to achieve this and manage the contracts.

2.31 The SDS and MUDFA procurements took place in 2005 and 2006 respectively, followed by the Technical Services Support ("**TSS**") contract and the preparation and then issue of the Infraco ITN in late September/early October 2006.

TIE's choice of contracts

2.32 The procurement strategy meant DLA Piper had to produce separate contracts for the ITN of each of the major works packages, with provisions to deal with novation of the designer to the main contractor. This required sections of bespoke drafting, but the contracts were in very great part standard form and therefore market-tested.

2.33 Elements of the proposed Leeds Supertram, SHRT and actual NET and Croydon light rail scheme contracts were used, as well as elements of standard forms for major project turnkey Engineering and Procurement ("**EPC**") contracts. I also discussed the suitability of various FIDIC forms of

standardised contract with TIE. The Infraco Contract drafting for the document released with the ITN also relied considerably on HM Treasury SoPC3 (2004) model language and the relevant guidance.

2.34 In my experience as a lawyer advising in the civil engineering sector, any engineering proposition of this scale would require provisions that are bespoke drafted to reflect the commercial position and technical agreements between the parties. The level of bespoke drafting contained in the Infraco Contract issued at ITN – and when it was signed after a prolonged period of bidder and preferred bidder negotiations that lasted from April 2007 until May 2008 – was normal for a project of this nature and its underlying procurement plan.

2.35 The Infraco Contract suite issued with the ITN was prepared on the basis that the MUDFA works would be, at the very least, sufficiently advanced to permit the Infraco to mobilise and have proper meaningful sequential access to site. The idea of producing utilities diversions in a sequential, connected manner was extremely important to get the Infraco to produce a construction programme and to identify the critical path activities. The strategy needed to deliver a utilities-free on street site where the Infraco would be able to mobilise and work. When the ITNs were issued by TIE, the bidders were instructed that the MUDFA works would be "substantially complete" by the time that Infraco would be mobilising.

2.36 **Scheme Design**

DLA Piper's Role

2.37 DLA Piper prepared the full ITN suite and draft contractual documentation for the SDS procurement under instruction from Ian Kendall and with technical and commercial input from his team. This documentation was then populated by TIE with the scope of the mandate and all financial, technical and commercial requirements against which bidders would tender. My own role in this task was largely supervisory and consultative. Sharon Fitzgerald prepared the documentation under close instruction from Ian Kendall.

SDS Contract

2.38 The SDS consultancy contract provided TIE with all the contractual and commercial levers that were standard practice to have for client-side control to manage SDS design production. This included:

2.38.1 The Duty of Care provisions (see CEC00839054). Clauses 3.1 through 3.15 were all embracing and reflected industry standard language for a major design consultancy. The Scope of Services alone runs to approximately 30 pages;

2.38.2 TIE's absolute discretion as to completion of milestones for the purposes of SDS entitlement to submit milestone payment applications (Clause 11);

2.38.3 Clause 7.3 - establishing four stages of scheme design: (i) Requirements Definition Stage, (ii) System Wide Preliminary Design Requirements, (iii) Preliminary Design and (iv) Detailed Design. Each stage had a "Gateway" requiring notification of completion by SDS Provider and TIE's express approval before the SDS Provider commenced the next stage of design;

2.38.4 Linked to Clause 3, the detailed Scope of Services providing for a variety of time, critical path activity, spend and resource reports to permit TIE complete oversight of what the SDS Provider was doing (or not doing), using a snapshot of its Work Breakdown Structure;

2.38.5 Clause 11 (Methods of Payment) - dictating the timing and limiting the amounts of the SDS Provider's design stage payment applications;

2.38.6 Clause 29.1 – permitting TIE to reduce the SDS contract scope. This was an unusual and powerful provision, structured with specific input from the responsible T personnel at the time;

2.38.7 Pervading requirements to update design delivery projections and to provide costed programming revisions at intervals and whenever TIE instructed;

2.38.8 Clause 3.21 - requiring the SDS Provider to give its full support to Infraco Contract bidders; and

2.38.9 The contractual requirement to novate and to provide a continuing collateral warranty to TIE at novation.

Design Delay & Impact

2.39 The SDS design contract was awarded to Parsons Brinckerhoff ("**PB**") in September 2005. At ITN, the design was anticipated to be substantially complete by second quarter 2007.

2.40 In my opinion, and from what I could observe between October 2005 and October 2007, the performance of PB under the SDS contract was at times poor and erratic. The relationship appeared to start badly. By the time novation neared in 2008, PB were defensive and argumentative and had made two very substantial contractual claims in the background.

2.41 There were substantial delays in progressing the design spanning the entirety of the SDS contract period, which stretched from September 2005 to October 2010 (when I left my function) and well beyond that date. The scheme design, as far as I understand it, was never complete throughout this whole period.

2.42 These design production and approval delays had the following effects on MUDFA and on Infraco bidder negotiations:

2.42.1 occasioned significant prolongation and extension of time claims against TIE from the MUDFA contractor who was not able to execute works to programme;

2.42.2 resulted in: neither bidder for the Infraco Contract providing an initial bid capable of proper technical, commercial, legal, financial and programme evaluations at bid return date in summer 2007; and both bidders submitting heavily qualified and materially incomplete bids at BAFO in mid-October 2007;

2.42.3 directly resulted in the Wiesbaden Agreement and the full range of Schedule Part 4 Assumptions[2];

2.42.4 caused considerable difficulty with PB and BBS on novation;

2.42.5 absorbed significant and disproportionate advisory cost and TIE management time including lengthy design workshops post Infraco Contract signature; and

2.42.6 resulted in TIE paying SDS a £1 million incentivisation payment at novation and a further additional £1.5million, separate from the contractual stage payments.

2.43 The SDS design delivery programme was amended 28 times between SDS contract award in autumn 2005 and Infraco Contract award in May 2008. There was a serious lack of consented and/or detailed SDS design to inform the Infraco bidders about the Project's scope and major tram infrastructure requiring civil engineering works (beyond the ERs). Instead of providing Infraco bidders with a substantially complete scheme design, in January 2007 TIE needed to notify the two bidders, BBS and Tramlines, that the SDS design would be released to them as and when it was produced by SDS, often only at preliminary stage. This meant the initial bid returns were very immature and did not contain any pricing for their proposals that could be evaluated by TIE.

2.44 TIE and CEC knew about the state of the design: TIE was feeding SDS design piecemeal to the two bidders all through 2007 after the October 2006 issue of the Infraco ITN; and CEC was not only advised about it in project progress meetings in 2007 and early 2008 but was also fully involved in the delays on planning approval and design submission processing.

2.45 I did not know at the time exactly why PB was late in producing key tram infrastructure designs or what sanctions TIE applied to this failing. I asked TIE for this information, but received no detail. I do not consider that TIE briefed DLA Piper transparently on these issues and there were certainly major defaults on the part of TIE and CEC Planning which contributed to a large extent to the delays.

[2] This section of the Infraco Contract included 43 technical and commercial assumptions which acted as qualifications to the contract price whereby the price would increase should any of the assumptions fail. This led to considerable conflict between TIE and the Infraco provider during the implementation phase of the Project. See paragraphs 7.318et seq.

TIE's Management of SDS

2.46 DLA Piper advised consistently that TIE needed to take far firmer action to use the SDS contract to control PB's performance. That advice was given by me to senior TIE managers on several occasions during 2006, 2007 and early 2008. As early as mid-2006, I had been advising Ian Kendall and his team that PB's performance was going to affect TIE's ability to novate the design and that it would affect procurement of Infraco. I involved colleagues in DLA Piper's contentious construction team where appropriate.

2.47 TIE never used the contractual instruments to coerce SDS: such as the Parent Company Guarantee or on-demand bond, despite my advice to do so. I was not aware until late-August 2007, essentially two years into the SDS design mandate, just how complicit and responsible TIE and CEC Planning were for the chronic delay.

CEC Planning

2.48 CEC Planning acted as the design Approvals Body under the SDS contract. SDS would present design to CEC's approval authority and then they would decide whether to provide consent and approval for that design. If CEC had a problem with the design, then the design would be returned and SDS would have to go away and address the questions/issues and resubmit the design.

2.49 The approvals process fell into considerable delay with CEC Planning requiring extensive iterative changes to the designs and taking long periods to respond and provide approvals. One of the reasons for this appears to have been a serious lack of resourcing at CEC Planning. CEC Planning requested an additional £633,000 in funding in January 2008, in part to try and address these failings.

SDS Claims against TIE & Novation

2.50 PB ultimately asserted itself contractually when it sought additional time and money for dealing with the many client variations and serious client defaults. PB lodged two claims in the spring 2007 for approximately £2.8m.

2.51 I have now seen documents, which I was not aware of at the time, which show PB asserted that several batches of designs for central sections of the Infraco installation works had been delayed in production ranging from 205 to 370 days, due to many alleged TIE (and CEC Planning) contractual defaults. The claims also state that the MUDFA related SDS design was in serious delay due to a further list of different TIE/CEC Planning contractual defaults.

2.52 By January 2008, PB was asserting that it was not willing to novate to Infraco unless all its claims against tie were settled. PB also asserted that it had been retained on the basis that its design would be substantially complete at novation, and that the fact that it was not meant its consultancy relationship with BSC post-novation would be very different to what it had envisaged and priced.

2.53 PB also stated that because TIE had revised the ERs post BAFO and preferred bidder appointment, they would not warrant that construction by BSC using SDS design available as at 25th November 2007 and then on into early 2008 would deliver the revised ERs.

2.54 During March/April 2008 there were tripartite amendments to the SDS contract to get the novation signed. These were very difficult negotiations as there had been a breakdown in personal relations between the relevant senior personnel and it was clear to me that BBS and SDS had discussed their concern about TIE and CEC management of this aspect of the Project.

2.55 As part of these negotiations TIE and CEC essentially agreed to pay PB £2.24 million for the cost of delay and disruption and £609,207 for additional services. These facts show that CEC Planning and TIE knew perfectly well how delinquent the SDS design delivery had been and that they had significant responsibility for this themselves. Acceptance of this claim suggests that TIE and CEC Planning defaults had caused 40 weeks of cumulative delays to the design delivery programme and additional costs of over 10% of the original design mandate bid price. These payments were in addition to SDS contractual payment entitlements for continuing design production.

2.56 **Utilities**

DLA Piper's Role

2.57 As instructed by TIE (Ian Kendall) DLA Piper managed production of the MUDFA ITN and prepared the draft MUDFA contract to go with it.

2.58 A reluctance within TIE to commit to procurement preparation whilst tram scheme legislation was still in promotion meant the MUDFA ITN was held back to mid-autumn 2006. In my view, this was suggestive of a lack of understanding within TIE of how long a £500m DBM infrastructure procurement would take to progress through its various stages.

2.59 Once the MUDFA ITN was issued, TIE instructed us to administer the bidder clarifications during the negotiated procedure under the EU Directives on public procurement. Putting this utilities work all into one contract put a lot of onus on solid performance by the selected contractor and required firm, knowledgeable management by TIE. The procurement process to achieve a solid appointment and strong contract was rigorous. The bidders were pre-qualified as regards their experience and skills on utilities diversions and installation.

2.60 Alfred McAlpine was appointed as MUDFA contractor in October 2006 after which our role was to provide TIE with support in administering the contract when requested. The MUDFA contract was later assigned to Carillion in around February 2008 when that company acquired Alfred McAlpine.

2.61 Sharon Fitzgerald was the principal fee earner on these tasks. I supported her as required and remained the supervising partner.

MUDFA Contract Scope

2.62 The core works under MUDFA were: the construction and engineering planning and activities for identifying and locating utilities equipment apparatus, using information provided by the affected utilities companies (and in some limited cases by CEC); the diversion of that utilities equipment and apparatus (with the engagement of the utilities in question); and the reinstatement of the streets and areas where diversions had taken place. The programme was to service Infraco's need for on-street sites.

TIE's Management of MUDFA

2.63 In my opinion, TIE struggled to administer and manage the MUDFA contract. DLA Piper was involved frequently to try and manage crises on contractual points. Sharon would report getting numerous queries from TIE on a reactive basis.

2.64 There were periodic changes of TIE's MUDFA project manager and TIE was being drawn into the contractor's claims and arguments, as opposed to using the contract and its client-oriented control levers to manage performance. Sometimes TIE staff would leave, causing a contract management void with limited hand-over and institutional memory.

2.65 Turner & Townsend (as project management consultants) were involved by TIE in the Project on a case by case basis. They worked on claims, but were not managing the MUDFA contract on TIE's behalf.

2.66 The main commercial challenge of using the MUDFA approach was that it required the full engineering co-operation of all affected utilities companies in identifying and locating their underground equipment and planning diversions, in some cases involving replacement of elderly or underperforming materials and assets.

2.67 The fundamental problem for this, and any utilities diversions contract in an ancient city, is that nobody has a complete picture of where exactly the underground apparatus is located.

2.68 We drafted specific language in the ITN to indicate that TIE was providing as much advance information on utilities mapping as it could, without any warranty as to accuracy. Bidders were instructed that they should satisfy themselves independently on this. I believe some major utilities information was provided to the bidders with the ITN, but how much and how up-to-date and useful to bidders this information was I do not know. This was within TIE's engineering and commercial remit.

2.69 Some utilities companies were very reluctant to release their information about the extent and location of their apparatus, in particular the water and gas companies, who had rolling statutory obligations to renew and refurbish their underground networks. Even after TIE secured third party agreements with each utility company, I became aware that TIE had difficulty in its dealings with the utilities' cooperation within MUDFA.

2.70 The SDS provider was responsible for the design of all utilities diversionary works. By 23 March 2007, TIE had asked Sharon for advice (and received this in detail: CEC01621726) in relation to how to deal with the fact that the SDS design relevant to the MUDFA works was not available at MUDFA contract signature or immediately after it. Consequently, pre-construction activity under the MUDFA contract to identify and set out programme for the critical MUDFA works had not taken place. The MUDFA contractor was complaining to TIE that it had not been able to plan efficiently and was looking at its contractual ability to seek prolongation and disruption costs.

2.71 By early 2008, after 16 months, MUDFA was very late and TIE faced a substantial contractual claim.

MUDFA Claim

2.72 Carillion brought a multi-million pound prolongation and variation claim against TIE. I was aware that this had been signalled before Infraco Contract award in May 2008. I believe that Turner & Townsend and possibly other consultants assisted TIE in assessing and ultimately settling the Carillion claim. DLA Piper was not instructed on this though I recall attending one meeting in which a consultant presented their view to TIE on the Carillion claim.

2.73 I have no recollection of being informed directly how much TIE paid Carillion for this claim in the end. I believe it may have been around £12 million, and part of it, the prolongation and standby claims, had been caused by SDS MUDFA design delay.

MUDFA Delay & Impact

2.74 As with SDS, TIE was well aware from top to bottom in their Project team how far MUDFA was in delay against the works programme required to de-risk the Infraco Contract. The strategy had been to get MUDFA works substantially completed before Infraco Contract was let and Infraco works mobilisation was imminent. Both TIE and CEC had on-going knowledge of the programme impact of MUDFA delay and the failure to accelerate progress.

2.75 The MUDFA delay, together with the SDS delay, had a considerable impact on Infraco negotiations. In particular, it gave the Infraco Contractor further justification for claiming on-going inability to commit to: (i) a fixed price; (ii) a master construction programme; or (iii) a Planned Service Commencement Date ("**PSCD**").

2.76 **Infraco**

DLA Piper's Role

2.77 My role as lead partner on the Infraco Contract procurement was at the centre of DLA Piper's mandate for TIE.

2.78 Our role began with: (i) explaining from a legal standpoint how the Infraco procurement would require to be run as a formal negotiated procedure under the EU directives applicable to TIE as a

public sector entity; (ii) explaining how the contract suite would need to be designed to match the procurement strategy TIE had chosen; and (iii) drafting the contractual provisions to reflect the public-private risk allocation model which TIE believed it could achieve using Infraco, Tramco, MUDFA, SDS, TSS and DPOFA.

2.79 DLA Piper's work on the Infraco ITN and the draft contract (and full ancillary documentation) began in earnest in 2005 in order to be ready for the proposed autumn 2006 ITN issue date. Both Sharon Fitzgerald and I worked on this assignment, instructed by Ian Kendall at TIE. CEC were not involved and I do not recall any contact with CEC staff at this stage.

2.80 DLA Piper's aim was to produce a clear, legally compliant and efficient set of ITN bidder instructions and participation rules accompanied by a robust all-embracing contract suite. Looking back, I believe with complete conviction that we accomplished this at appropriate cost and well within the deadline set by TIE.

ITN Stage

2.81 The Infraco ITN was issued by TIE to the market in autumn 2006, preceded slightly by the Tramco ITN. The driver for the timing of the ITN issue at this stage was political: TIE was very conscious that the national election in Scotland was approaching in May 2007. It was widely speculated that the SNP might well move to cancel either the Project or EARL, or at least place a hold on these projects.

2.82 I recall there were three bidders who formally expressed interest, but one group did not coalesce so there were two serious bidders: BBS and Tramlines. This was despite very earnest work in which we were involved to make sure the Project was well profiled by use of PIN notices and informal presentations to likely interested parties.

2.83 The BBS consortium comprised Bilfinger Berger ("**BB**") and Siemens. BB was the general contractor which would manage the track laying and installation of the main tram infrastructure. BB was a managing contractor and not a major civils player in the UK market. This meant they would be using prime subcontractors for bid pricing and execution.

2.84 BB as a group had never constructed a complete light rail scheme. BB UK Limited itself had been in existence for around 10 years with a limited track record;

2.85 Siemens was supplying the "brains" behind the tram system and its operation; it would deal with all the systems which would allow the trams to operate and integrate with transportation in the city.

2.86 The ITN contained a clear representation by TIE to the interested bidders that the early design and utilities diversions contracts were already underway. The bidders were instructed in the ITN to assume that: the SDS scheme design would be substantially complete prior to the call for BAFO bids; there would be novation of the SDS provider to the Infraco provider at contract award; and the utilities diversions would be substantially complete when the Infraco mobilised.

2.87 TIE and CEC knew SDS scheme design was nowhere near an appropriate state, either at the date of Infraco ITN issue or at Infraco Contract signature in May 2008, despite over two years of design mandate production and several million pounds of extra SDS incentivisation payments and settled claims.

2.88 TIE was forced throughout 2007 to issue designs to bidders on a piecemeal basis due to the delays in design production and CEC Planning approvals.

DLA Piper Stood Down

2.89 After the issue of the Infraco ITN in October 2006, I was expecting that DLA Piper's role would evolve as it had on the other three main procurements, that is: policing and managing the bidders' clarification process up to initial bid returns followed by a period of direct engagement with bidders on their responses to contractual terms and related matters prior to BAFO submissions.

2.90 Instead, after Matthew Crosse's appointment as Project Director, TIE instructed me they wanted to deal with all Infraco procurement matters (and all related issues) themselves, including Infraco Contract negotiations with bidders.

2.91 DLA Piper was accordingly stood down from its role on Infraco procurement from April 2007 until the end of August 2007.

2.92 This was precisely when our main advisory function within the pre-BAFO procurement timetable should have begun following bid returns. DLA Piper should have been involved in engagement with the bidders and their lawyers to shepherd the draft Infraco Contract through to BAFO in the conventional way, so that a strong contractual platform existed for TIE, with as much information to evaluate bids as possible.

Initial Bids & Negotiation

2.93 I learnt from Stewart McGarrity at TIE that the two initial bids TIE received in early summer 2007, while DLA Piper was stood down, were very heavily qualified in terms of their technical, financial and commercial responses – so much so that they were being referred by TIE as "indicative" or "preliminary". This was due to the absence of any SDS design for major parts of the scheme and the lack of definitive commitment from TIE regarding MUDFA completion and dates for release of sequential sites. These bids had not been capable of either proper conventional evaluation or comparison in terms of response on contract terms

2.94 The detailed terms matrix which had gone with the ITN instructed bidders that certain terms were non-negotiable and recognised that dialogue on other terms could be necessary. This was a tool which DLA Piper found very useful for clients to inject discipline and competitive tension during bid preparation and subsequent parallel contract negotiations. The original aim agreed with Ian Kendall was to have 60% or 70% of the Infraco contract's provisions fixed and non-negotiable under ITN rules. Despite this, when TIE itself began direct engagement on draft Infraco Contract

terms, it allowed the bidders to negotiate on terms where TIE had obvious grounds to take firmer positions.

DLA Piper Reappointed & My Secondment

2.95 Willie Gallagher, the CEO of TIE, came to me personally in late August 2007 saying that TIE needed DLA Piper back on the job because they were not managing to handle matters themselves. After making some changes, they were having real trouble with resourcing the procurements adequately and were struggling to land a preferred bidder. Willie Gallagher said that TIE's control of the Infraco Contract negotiations with the bidders was not working and TIE corporate management had lost track of what was being done.

2.96 Willie wanted a senior Edinburgh-based person to join TIE on secondment to provide the legal resource they were lacking. After seeking approval from my Group Head at DLA Piper I advised Willie a few days later that I would join TIE on secondment.

2.97 My secondment at TIE formally commenced at the end of October 2007 once a secondment agreement had been arranged which gave TIE 90% exclusivity on my time. I took on responsibility for the full management of the legal and contractual aspects of the Infraco procurement.

2.98 I went on secondment under a fee charging arrangement. I was not a TIE employee or director and I had no title within TIE. My secondment did not alter the duties owed by DLA Piper.

2.99 DLA Piper was accordingly instructed to resume conduct of the main legal negotiations on the Infraco Contract, as well as related contractual issues such as SDS novation, MUDFA and Tramco. There was no formal written instruction to this effect. We simply began working as we had been before under the terms of our existing appointment.

2.100 Once re-instructed I observed a lack of clarity in communications between TIE's Project Director (Matthew Crosse), Commercial Director (Geoff Gilbert), Finance Director (Stewart McGarrity) and Engineering Director (Steven Bell). This lack of communication was mentioned by TIE manage privately to me and on several occasions in TIE project management meetings during January, February and March 2008 and also on several occasions by Willie Gallagher.

2.101 I do not believe that Geoff Gilbert or Matthew Crosse as TIE's new project directorate had paid much attention to the draft Infraco Contract itself until DLA Piper re-appeared in September 2007. Geoff then engaged on this with me. Once DLA Piper was re-engaged, I had instructions from TIE to use a one month period before BAFO in October 2007 to kill as many issues as possible to get the Infraco Contract commercially advanced, e.g. insurance, bonding arrangements, indemnities, maintenance period, limitation period, liability caps and liquidated and ascertained damages.

2.102 The structure of the Infraco Contract was the same when DLA Piper was re-appointed in September 2007 as it had been in the draft issued with the ITN, but there had been numerous individual changes inserted. Pinsent Masons and Tramlines (who negotiated in autumn 2007 with in-house legal support from Bombardier only) complained (when we were re-instructed) that DLA

Piper were reneging on points that TIE itself had already conceded. I explained to TIE that some of the changes that had been allowed just could not be accepted, partly because of the need for a coherent suite of documents.

2.103 What was apparent to me by mid-October 2007 was that neither bidder had been made to engage on key Infraco Contract terms in a systematic manner in order to expose clear outstanding commercial points and evaluation differentiators. Rather, the bidders had sensed an opportunity to override the ITN rules. Those rules had been written to exclude negotiations of certain important risk transfer provisions and to shepherd bidders into positions on the draft Infraco terms that could be evaluated objectively. By contrast, TIE's approach had permitted different draft Infraco Contracts to evolve with each bidder.

2.104 Many of the two bidders' technical solutions were indicative only since very significant parts of the scheme were not designed at all, many designs were outline stage only and no design had been done by SDS at all for the systems installation.

2.105 Both bidders told me during contract negotiations that that their BAFOs would be technically very significantly incomplete and heavily qualified as to price, scope and construction programme. BBS's eventual BAFO bid was seriously deficient in these areas and contained a fully reserved position as to the production of a master programme for construction, systems installation and vehicle testing.

2.106 I understood that the immature state of the BBS BAFO bid was the direct result of the lateness, poor quality and unavailability of SDS design, as well as the MUDFA works situation, which itself was compounded by missing SDS design.

2.107 Apart from the obvious risks caused by the state of the design and the MUDFA works, it is also worth noting that all BB's tram civil engineering works were going to be done by UK based subcontractors, none of which had signed a proper subcontract at this point. BBS's key subcontractor pricing was therefore heavily qualified and largely indicative only, due to the limited number of mature (detailed design) and approved design drawings.

2.108 While the BAFO submission evaluations were on-going in October 2007, I suggested to Geoff Gilbert that TIE could call a moratorium on Infraco procurement, while PB were instructed to retrieve delay by accelerating their design drawings production to achieve planning approvals. Geoff said that the political imperative for progress towards contract award was too great to allow this delay.

2.109 I believe that for political and public perception reasons, TIE viewed it as essential to obtain CEC's approval at the last full council meeting of 2007. This pushed TIE to down-select Tramlines too early and removed important competitive tension. BBS was confirmed as Preferred Bidder in October 2007 following BAFO bid evaluation and TIE board approval.

2.110 In negotiations in autumn 2007 through spring 2008, BBS did not really operate as a consortium; Pinsent Masons acted for BB and Biggart Baillie acted for Siemens. That made negotiating with

them very difficult. The consortium members often took differing or reserved positions or sought to re-negotiate positions TIE had agreed with the other.

2.111 As preferred bidder, BBS just dug in more behind its qualified bid and indicative pricing and began to resist and exert control on TIE's programme to Infraco Contract award. BBS continued to exploit its increasingly secure position in order to extract more money and improved contractual positions from TIE.

BBS Price Demands

2.112 In an EU regulated 'negotiated' procurement procedure, a certain level of negotiation is recognised as permissible after submission of a final offer. However, price is an area in which significant increases are both unusual and unadvisable.

2.113 During the intense negotiations between BAFO and Infraco Contract close on 14th May 2008, BBS made four separate construction price increase demands. The following figures all come from TIE's contemporary Project papers:

2.113.1 BBS BAFO indicative construction price October 2007: £208.7 million

2.113.2 BBS Wiesbaden construction price 20th December 2007: £218.3 million

2.113.3 Increase One 7th February 2008: between £1.6 and £3.2 million (Rutland Square)[3]

2.113.4 Increase Two: 7th March 2008: £8.6million (Citypoint)

2.113.5 Increase Three: 9th May 2008: £9 million (Kingdom Room, Citypoint)

These figures do not include certain other meaningful price increases that TIE agreed to insert in the Infraco Contract.

2.114 On 20 December 2007 after Wiesbaden, BBS's still heavily qualified construction price had risen from the BAFO price of £208.7million by just under £10 million pounds to £218.2 million. By 14 May 2008, the BSC price had risen by a further £21 million to £240.6 million. This amount does not include the £3.2million TIE agreed to pay BSC for Phase 1b.

2.115 In December 2007 Richard Walker of BB told me the job would cost a lot more than TIE expected because BB was not willing to take on the risk of the SDS design being late and inadequate and MUDFA being in obvious delay. The rough figure he quoted was £80 million. I made sure TIE was immediately advised of this conversation.

[3] It is unclear to me whether this amount was in fact subsumed in the £8.6million Citypoint Agreement, but I believe TIE agreed a further £2.7 million for ERs version 3.02

Wiesbaden Agreement

2.116 TIE needed to report to CEC and to gain Transport Scotland's approval of the Final Business Case ahead of the final City Council meeting on 20 December 2007. Those reports had to verify that TIE had firm agreement from BBS on pricing and programme, in order to ensure that the Project could be delivered within budget and by a committed end date.

2.117 The fact that TIE and BBS had been unable to agree a fixed price or a construction programme and the heavily qualified BAFO bid led to a meeting of senior TIE and BB personnel at BB's head office in Wiesbaden, Germany in December 2007.

2.118 I was not consulted about the Wiesbaden visit by TIE. None of my colleagues at DLA Piper were consulted about this either. I was neither informed about the meeting in advance nor asked to input into the drafting of the agreement reached at that meeting which became known as the "**Wiesbaden Agreement**".

2.119 I do not know why DLA Piper was not instructed to assist with the Wiesbaden negotiations and the agreement in December 2007, given our central involvement in TIE's procurement strategy.

2.120 I understand Willie Gallagher and Matthew Crosse attended Wiesbaden on TIE's behalf and Geoff Gilbert drafted parts of the Wiesbaden Agreement, including the wording of Pricing Assumption 1 which is discussed below.

2.121 I was sent an incomplete version of what had been agreed at Wiesbaden on 18 December 2007 by Alastair Richards of TEL, the day before I was due to go on annual leave to the Far East. I was unable to offer any legal advice on this draft agreement which I had no prior knowledge of. I told TIE this by email at the time.

2.122 What I saw on 18 December 2007 contained a price cloaked with detailed qualifications, exclusions, assumptions and reservations and seemed to present three different Infraco works completion dates, all subject to price qualifications. On 20th December 2007, in an email exchange regarding the terms of the Wiesbaden Agreement, Richard Walker wrote to Geoff Gilbert:

> "...we still have issues accepting design risk. We have not priced this contract on a design and build basis, always believing until very recently that design would be complete upon novation. With the exception of the items marked as provisional which we have now fixed by way of the 8 million we cannot accept more [design] development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution."

Here was BBS making its position utterly clear to TIE and reinforcing its need for what was accepted by TIE in the final Wiesbaden Agreement and which ultimately became PA1 in SP4.

2.123 This situation is what TIE presented to CEC officials at the Tram Project Board meeting on 19 December 2007 as encapsulating and securing a fixed BBS construction price. In one of the

appendices to the actual Wiesbaden Agreement there is reference to the price being '*95% fixed*'. I was not present at this Board meeting which took place while I was on holiday.

2.124 On a simple, proper reading, no one could reasonably conclude from the Wiesbaden Agreement that BBS had agreed to a fixed construction price or a committed programme.

2.125 I do not believe I ever saw at the time the final version signed by the parties on 20 December 2007. The draft agreement I saw quoted a construction price for Phase 1a of £218,262,426. This was explicitly qualified by the 'Basis of the Price' which was conditional upon:

2.125.1 Listed provisional sums;

2.125.2 Value engineering - The total figure eventually reported by TIE at Infraco Contract close relied upon achieving £13.8 million "savings" through value engineering. TIE knew that none of this value engineering was supported by contractual obligations enforceable on BBS;

2.125.3 Base Date Design Information ("**BDDI**") which was defined as the state of the SDS design as at 25 November 2007. Any changes to the BDDI which were not normal design development were not included in the price;

2.125.4 A completion date of 11 August 2011, but with an agreement to try and bring this forward to 11 February 2011. BBS's price did not include for any works extending beyond March 2011;

2.125.5 A list of important engineering works which were excluded from pricing;

2.125.6 The exclusion of works due to unforeseeable ground conditions; and

2.125.7 Two express works scope exclusions (including reference to Princes Street if the SDS design changed).

2.126 The result was most definitely not a fixed price and TIE representing that as '95% fixed' was, in my view, meaningless without considering the extensive qualifications set out above.

2.127 Following the Wiesbaden Agreement, there was an intense period of negotiation through to eventual Infraco Contract close.

Schedule Part 4

2.128 The Wiesbaden Agreement translated directly into Schedule Part 4 ("**SP4**") of the Infraco Contract, including Pricing Assumption 1 ("**PA1**") which dealt with design production and development time and cost responsibility post-BDDI.

2.129 SP4 essentially provided that TIE would bear responsibility for the time and cost consequences of SDS design development post-BDDI and the entire consequences of MUDFA delay. That there

would be such time and cost consequences was not a 'risk' in that the occurrence of design development beyond BDDI was known and acknowledged by TIE prior to signature of the Infraco Contract. This also applied to several other Pricing Assumptions. SP4 was not shown to DLA Piper at any point before TIE had agreed its core principles and language (first in the Weisbaden Agreement and then in discussions with BBS in relation to its draft SP4). This is very clear from contemporary documents.

2.130 When I saw it in early February 2008, my initial reaction was to reject the draft SP4 document entirely because it had not been in the ITN procurement package, nor had it been evaluated when BBS were selected as preferred bidder using their BAFO.

2.131 I did not like any of SP4, but particularly PA1 and the wording: "*For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.*" I made my views on this and what it had done to risk allocation clear to relevant TIE senior management on numerous occasions.

2.132 TIE wanted to and did take control of the discussions on SP4. Numerous communications on this subject were not copied to DLA Piper, nor was I asked for advice. That drafting was debated and reviewed by Geoff Gilbert (and other personnel at TIE) at the time of Wiesbaden in December 2007 and discussed and fixed in the e-mail exchanges between TIE and BBS in January 2008 before the issue of SP4 as a working draft by BBS in early February 2008. I did not see these email exchanges at the time.

2.133 The basic principles set by the Wiesbaden meeting and the documents that came from it never changed and sit within SP4, including the language for PA1. At the core of SP4 was the position on SDS design development, which was the basis for adjudication losses subsequently. As regards SP4 discussions from February to mid-March 2008, this proposition was non-negotiable from the outset having been agreed by TIE at Wiesbaden.

2.134 The final version of SP4 had 43 Pricing Assumptions. BBS took little or no SDS design production or development time and cost responsibility post-BDDI and held, inter alia, the entitlement to apply for the additional cost of constructing any SDS design which evolved from BDDI (i.e. where it stood at 25th November 2007), as well as being paid for the time and cost impact of any one of the 43 Pricing Assumptions not holding true post-contract signature ("**Notified Departures**").

2.135 TIE and BBS knew many of the assumptions would prove untrue. The wording of SP4 acknowledged this and explicitly stated that there would be Notified Departures immediately after Infraco Contract signature. It was expressly accepted by TIE that in some cases the Pricing Assumptions represented facts and circumstances which were already not consistent with reality and/or which it was known would not hold true.

BDDI

2.136 The BDDI was defined in para. 2.3 of SP4 as being *"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H"*. Appendix H did not contain any list of drawings, but instead referred to *"All of the drawings available to Infraco up to and including 25th November 2007"*.

2.137 This wording was specifically given to me, by Dennis Murray of TIE, as the only practical way to deal with the complete absence of any agreed physical record of what design drawings the Infraco proposals at BAFO had been based upon.

2.138 By late April 2008, DLA Piper had been asking TIE at intervals for at least two months for the three parties' agreed and complete BDDI list of drawings so that Appendix H could be populated. However, at Infraco Contract close, no-one held such a complete list.

Employers Requirements & Rutland Square Agreement

2.139 At some point in 2007 Matthew Crosse at TIE began to overhaul the ERs which had been issued with the ITN. This was done in isolation without reference to DLA Piper and, as I learnt later from Steven Bell, without consultation within TIE. It continued into Q1 2008.

2.140 Revising the ERs post BAFO would inevitably mean subsequent changes to Infraco proposals. The revisal allowed both BBS and the SDS provider to revisit their prices.

2.141 I do not know why the ERs were revised or what potential benefit was derived from it. It led to a further agreement between BBS and TIE to increase the price on 7 February 2008. This became known as the **"Rutland Square Agreement"**.

2.142 The Rutland Square Agreement followed three days of negotiations at DLA Piper's offices in Rutland Square. These meetings dealt with issues over SP4 and demands for increased contract prices submitted by Siemens. Siemens demanded an additional sum of £8.5 million in part due to the revised ERs. Siemens also said they had a serious issue with SDS design availability and quality and that they required money to be added as a contingency for this.

2.143 On 7 February 2008 the Rutland Square Agreement was signed. TIE and BBS recorded their agreement to settle on a payment by TIE of between £1.6 and £3.2million. This was later settled at £2.7 million

2.144 The Rutland Square Agreement was drafted to be a 'line in the sand' preventing any further concessions on contract terms or price. However, against my advice, the terms of this protocol were largely ignored by TIE in subsequent negotiations.

Further Negotiations to Close

2.145 On 7 March 2008 TIE agreed a further price increase of £8.6m in negotiations (to which DLA Piper was not a party) at its offices at Citypoint. I had no prior knowledge about or involvement in this meeting.

2.146 TIE was keen to issue a formal Notice of Intent to Award the Infraco Contract to BBS early in 2008. They initially wanted to do this by the end of January, but too many issues were unresolved. I explained to TIE that issuing the formal notice would strengthen BBS's hand in negotiating price increases and risk concessions as it would remove TIE's ability to withdraw BBS's preferred bidder status. My advice influenced TIE to wait until 18 March 2008 before issuing the Notice.

2.147 In my experience, it is entirely outwith normal procurement management practice for the procuring party to issue a Notification of Intention to Award when the parties are still in negotiation over central contractual documentation, as was still the case on 18 March 2008. For example there was: no agreed contract price; no milestone payment schedule; no bills of quantity; no agreed master construction programme with critical path to PSCD; and no agreed post-novation design delivery programme.

2.148 Negotiations with BBS then continued with TIE clearly under considerable pressure to reach contract close. On 9 April 2008 BBS submitted a further price grab seeking around £17m, due in part to a miscalculation of their contract price.

2.149 TIE's recommendation to CEC was essentially to agree this price increase demand, provided it could be contained within a £12 million ceiling. I had no input or knowledge of why this number was acceptable. I recommended that TIE refuse any further concession to BBS.

2.150 I advised that unless TIE could show some value was being obtained in exchange for any price increase there was significant vulnerability to procurement challenge and it was yet another concession to BBS's ambush tactics.

2.151 I also reminded TIE that SP4 already contained numerous risk re-allocation benefits for BBS and BBS was seeking another increase to its headline construction price despite these strong protections.

2.152 Jim McEwan's response was that this was the "last chance saloon" to close the Project. He was concerned that there had been too many occasions where TIE had announced a date for contract signature and then not achieved it and political will could be wearing very thin.

2.153 In a meeting in the Kingdom Room at TIE's Citypoint offices on 9th May 2008 TIE agreed to pay another £9m to BBS on the construction contract price.

Clause 80

2.154 At around the same time as these pricing negotiations, in mid-April 2008, BBS sought a wholesale re-write of Clause 80, the Infraco Contract Change provision. The original Clause 80 had been drafted by DLA Piper with input from other consultants and reflected standard clauses in the industry. I do not recall it having been the subject of negotiation by BBS under this point. Re-negotiating about it at this late stage was also a breach of the Rutland Square Agreement. I said so. Despite this, Geoff Gilbert agreed and drafted a revised wording which he instructed me to place in the Infraco Contract.

2.155 This revised draft removed the ability to instruct works under a Notified Departure to proceed until BBS's estimate of the fees had been agreed or, if not agreed, referred to the Dispute Resolution Procedure ("**DRP**").

2.156 I advised Geoff that the way the clause was drafted could result in BBS abusing it and submitting their estimates in the knowledge they were not obliged to continue work until the estimates were agreed. However, this was exactly what Geoff wanted: he wanted TIE to be able to exercise full control over any changes so BBS did not do any work until TIE had agreed the estimated fee.

Close

2.157 The Infraco Contract was signed on 14 May 2008.

2.158 My secondment was for an agreed fixed term which came to an end at the end of June 2008.

2.159 **Post-Infraco Close Events**

DLA Piper's Role from May 2008 onwards

2.160 DLA Piper's role as regards the Infraco Contract dropped off for around three months post Infraco close. Then queries came in from TIE about Notified Departures.

Notified Departures

2.161 Clause 80 required the Infraco to submit an estimate with any application for a Notified Departure, but the contract also allowed for the Infraco to provide that estimate within a reasonable period of time. Initially TIE wanted advice on how to proceed in circumstances where BSC (as it now was following the novation of CAF to the BBS consortium) had claimed Notified Departures, but not provided the required estimate.

2.162 TIE reported a large quantity of Notified Departures; I believe near 900 by early 2009. They were being claimed by BSC on trivial matters as well as more significant items.

2.163 BSC was extremely aggressive with their use of the contract by exploiting the standard language in the clauses surrounding providing reasonable estimates of cost and time within a certain period of time. If BSC needed more time to provide an estimate, and some of these Notified Departures

were massive claims, they requested it but then did nothing for long periods of time. They also put in what appeared to me to be grossly inflated estimates.

2.164 Any change provision in any contract would have struggled to handle the contractor attempting to block contract administration and claims processing, unless the client was prepared to go to DRP, and TIE were not.

2.165 I advised that the impasse should be taken to DRP and/or TIE should consider applying to court for specific implement to force BSC to provide the estimates within a reasonable period of time. I know that Steven Bell considered this advice, but TIE did not act on it until well into 2009, preferring to try and talk things through with BSC. With Tony Rush's arrival in late 2009/early 2010, TIE began to deploy the contractual levers available to it.

2.166 No adjudications were launched until over a year following Infraco Contract close by which time relations with BSC's management had broken down and there was a very significant logjam of outstanding Notified Departures.

2.167 While these disputes were ongoing, it remained the case that SDS designs and approvals were late and the MUDFA works were seriously delayed. This meant that BSC could still assert that it could not progress the works as planned.

Princes Street

2.168 One of the key locations where BSC mobilisation delay resulted in serious disputes was Princes Street. The result was the parties agreeing the Princes Street Supplemental Agreement ("**PSSA**") on 13 March 2009. The PSSA confirms a Notified Departure entitling payment for the additional engineering works required to execute the SDS design produced and/or revised post-BDDI and deal with subsurface obstructions, with price to be determined on a demonstrable cost basis. This outcome is in fact predicted by the Wiesbaden Agreement in a specific exclusion from price.

Projects Pitchfork, Challenge & Carlisle

2.169 In 2009 TIE initiated a concerted strategy to investigate contractual and commercial means to resolve the BSC entrenched position with Notified Departures. They referred to this initiative as "**Project Pitchfork**").

2.170 In parallel with this TIE initiated a review of the formation of the Infraco Contract which it referred to as "**Project Challenge**"). Part of this was to revisit TIE's understanding of the Wiesbaden Agreement and SP4. As there was nobody left at this point who had attended Wiesbaden I was asked to contact Willie Gallagher to obtain his recollections. He did not remember the meeting very well and had no recollection of discussing the specific terms of what had been agreed. He said he did not remember being advised as to what SP4 meant and he had left this to Matthew Crosse and Geoff Gilbert. Stewart McGarrity contacted Geoff Gilbert who also had very little recollection of events leading up to Wiesbaden and how the Wiesbaden Agreement itself had evolved. I do not know if TIE managed to contact Matthew Crosse to obtain his recollections.

2.171 Following a consultation with senior counsel on 1 June 2009, TIE identified appropriate Notified Departures to refer to DRP in order to test their position on factual and engineering arguments at adjudication. DLA Piper also became increasingly involved in supporting TIE with every day contractual correspondence. The referral of various Notified Departures to DRP resulted in several adjudications during this period, including disputes over SP4 and clause 80 language.

2.172 DLA Piper, including my colleagues from the contentious construction department, assisted TIE with these dispute and TIE or CEC also instructed McGrigors (now Pinsent Masons). I was never clear exactly what their remit was, but they did handle adjudications for TIE (including a key dispute over the interpretation of clause 80 and SP4 which resulted in an adverse decision from Lord Dervaird in August 2010).

2.173 In around late 2009/early 2010 TIE appointed Tony Rush as a consultant with the remit of trying to resolve the dispute with BSC. Tony headed up a strategy TIE referred to as **"Project Carlisle"** which was aimed at trying to negotiate a commercial resolution to the impasse between the parties.

2.174 During all of this period. DLA Piper's focus was on advising TIE how to use all its contractual rights to its fullest advantage, which, in my opinion then and now, TIE had not done on any of the three central contracts (Infraco, MUDFA and SDS).

2.175 Over a four month period in mid-2010 I provided Tony Rush and his team with intensive legal support on Project Carlisle with the aim of gathering information on Notified Departures and requiring BSC's proper and technically substantiated estimate, failing which they would be in contractual default. The object was to build up evidence of enough material breaches to turn BSC's actions into a massive continuous material breach. TIE would then issue BSC with Remediable Termination Notices (**"RTNs"**) and undermine their negotiating position.

2.176 Tony Rush's strategy for Project Carlisle was to look at the idea of truncating the scope of the Project and drive a price out of BSC for something that TIE might be able to afford. I provided legal support to Tony in this process and I also had some practical use as a point of informati because I had been with the Project for a long period of time.

2.177 I am aware that TIE and BSC had engaged in a mediation in July 2009, but I played no role in this.

2.178 In October 2010 I fell ill and took a one month leave of absence on medical advice. I handed in my notice at DLA Piper at the end of November 2010 and left on 6th June 2011. I therefore cannot speak to anything beyond that point.

2.179 **Tram Vehicles**

2.180 The tram supply and maintenance contracts, also prepared by DLA Piper alongside the three other significant implementation contracts, delivered precisely what was contracted for, on time and on budget.

2.181 Following CAF's selection as preferred bidder, the tram supply contract was dealt with relatively quickly. A few central technical commercial points were debated, price was fixed and then it was initialled as ready for signature at the main Infraco Contract close.

2.182 In contrast, there were significant difficulties with BB and Siemens on the tram maintenance contract and the maintenance provisions in the Infraco Contract.

2.183 The tram maintenance contract was negotiated in great depth with Siemens. DLA Piper had very close instruction and interaction on that from Alastair Richards at TIE. Alastair also managed the tram vehicle supply contract and dealt with CAF on all commercial aspects including their joining the BBS consortium instead of their contract with TIE being novated to BBS, which had been the original intention.

2.184 Alastair used the DLA Piper drafted contract for these negotiations and protected it vigorously from interference by Siemens, who asserted that it was misaligned and sought various spurious risk premia and contractual shields. In the main, we told them that tram maintenance was non-negotiable.

2.185 **Management**

2.186 I was involved in the Project for nine years. I dealt with a great number of people in various organisations at various stages of the Project. My working relationships with the TIE Chairman, Chief Executive and down to Project Directorate level were, without exception, professional, open and cordial. DLA Piper also had good positive working relationships with TIE's consultants at various points in the promotion, procurement and implementation phases.

2.187 However, it is my opinion that continuity of management within TIE was a significant negative issue. The Project Director role changed four times in the space of less than two years meaning that during my time on DLA Piper's mandate there were several different Project Directors, both before and after the award of the SDS, MUDFA and Infraco Contracts. There were also frequent changes at lower management levels (and a discernible associated lack of project management continuity) while TIE's Infraco and Tramco procurements were in the market and MUDFA and SDS works were under way.

2.188 One significant frustration and inefficiency DLA Piper experienced was how frequent changes within TIE's Project staff required us to act repeatedly in order to support TIE as an impromptu knowledge gap filler/contract management hand-over assistant.

2.189 When the Infraco and Tramco tenders were invited, the TIE procurement unit comprised Ian Kendall and his team. By the time the bids were submitted, Ian Kendall had left with most of his recruited staff. One or two of his team remained but, from memory, soon they also left. Ian Kendall's view prior to his departure was that TIE did not yet possess the right skills to engineer the SDS and MUDFA contracts, both of which were substantial in their own right and crucial to the overall procurement strategy.

2.190 The lack of continuity within TIE damaged their mid-level personnel's capacity to learn in the roles they had been given. Issues with financial implications (e.g. claims or delays) appeared to be left for considerable periods of time and became intractable or more expensive because they were not addressed. The design delay and TIE approval problems explained above are a prime example of this. My perception was that below the senior management of TIE, actual manpower, quality and depth of experience was a continuing serious issue for a Project of this size.

2.191 There were issues at project direction level as well. I recall that when Matthew Crosse arrived in, I believe, late 2006, I was never invited as a member of TIE's immediate Project team to meet him before being told DLA Piper was being stood down in April 2007.

2.192 It is my opinion that TIE never managed to exert the requisite client control over the MUDFA, SDS or Infraco Contracts. It was TIE's responsibility to manage these large, complex contracts from invitation to tender through to completion. Each was very different and required different technical disciplines to understand and control.

2.193 In the case of Infraco, this lack of control extended well back into the pre-contract award phases in 2007 and contributed in major part to the contractual disputes that later erupted.

2.194 As part of its procurement strategy, TIE appointed Scott Wilson as TSS to support them in the management of the MUDFA and SDS contracts and to replace the SDS provider as TIE's specialist engineering design consultant after the SDS provider was novated to Infraco. However, as far as I was aware, TIE did not seem to be deploying TSS in these roles.

2.195 I never understood the reason for this reluctance, save possibly on grounds of expense. If TSS had been deployed to support MUDFA and SDS management, I consider this would have considerably improved TIE's early control over these two crucial contracts and helped to protect the procurement strategy.

2.196 During the early stages of DLA Piper's involvement in 2003 and 2004, TIE had its own lengthy high level risk matrix, which sought to show risks to successful bill promotion and to some extent h(risks in later stages might be allocated between public sector and private sector. This client-side tool would have been developed in a standard way in a PPP/PFI project to also identify procurement and implementation phase risks.

2.197 This risk register document, or its successor, might have been used by TIE as the basis of its Quantitative Risk Assessment ("**QRA**"). I do not know. During the Infraco procurement, I was never asked for input on this tool and have never seen it. It was not within DLA Piper's remit as legal adviser to assess financial, commercial or engineering risks or give advice about apportionment of financial contingency to different risk or assumption outcomes. I made this abundantly clear to CEC Legal on several occasions when they raised general queries over 'key risks' and how they would be managed or mitigated.

2.198 **Local Governance**

2.199 As discussed above, CEC appointed TIE and the delivery agent for the Project. Conceptually, CEC appeared to want to treat the tram as a third party's project, not theirs, with TIE as a kind of corporate buffer. Indeed, at the onset, CEC Planning asserted that they were a legally separate body from CEC itself and seemed to me to have a curiously adversarial approach.

2.200 CEC had the opportunity on a weekly basis at the Legal Affairs Committee ("**LAC**") meeting to hear DLA Piper's views on the progress on contract negotiations. Often CEC did not attend these sessions.

2.201 TIE had reporting obligations under its Operating Agreement with CEC (CEC01351476). This included reporting on a four weekly basis to the Tram Monitoring Officer (Director of City Development).

2.202 From my perspective, TIE's reporting process to CEC occurred on various levels sitting in the governance structure and through different, sometimes informal, means. For example:

2.202.1 periodic formal meetings of the TIE Board (which included CEC officers and elected members);

2.202.2 periodic formal meetings of the Tram Project Board (a subset/mix of TIE's executive officers, TEL's officers and CEC officials, plus other CEC officers/managers not members the TIE's board);

2.202.3 periodic meetings of another tram sub-committee at CEC. (It took me some time to understand what these three bodies did that was different. In some cases, the same individuals attended the meetings in slightly different capacities and the meetings were often scheduled back-to-back on the same day);

2.202.4 periodic meetings of Transport Edinburgh Ltd ("**TEL**") and its board – attended by TIE and Lothian Buses corporate officers;

2.202.5 *ad hoc* meetings and telephone calls between CEC officers or staff and TIE direct;

2.202.6 budget meetings between Stewart McGarrity of TIE and Rebecca Andrews and Alan Coyle of CEC;

2.202.7 the on-going presence of CEC Planners at TIE in the context of SDS tram design production and CEC Planning's responsibility for all SDS design approvals;

2.202.8 CEC secondees/presence at TIE (such as Andy Conway, Duncan Fraser and Nick Smith); and

2.202.9 CEC's own strategic work programme under which designated responsible CEC personnel reported on the Project through the Director of Corporate Services to a body called the CEC Policy and Strategy Committee.

2.203 DLA Piper received no specific guidance on who at CEC had Project responsibility. My instruction from TIE was that DLA Piper's contact point was CEC Legal and we adhered to that instruction.

2.204 CEC did not require any distinct reporting line from DLA Piper. They were entirely content that TIE continued to be advised by DLA Piper direct.

2.205 From 2003 to 2006 I had very little direct contact with CEC. Such interaction as I had with CEC was on specific points where the bill promotion activity intersected with procurement and, in isolated cases, on competition law. On 30 August 2007, when DLA Piper was reinstructed following the period of being stood down on Infraco negotiations, TIE asked us, at extremely short notice, to conduct a workshop on the Infraco procurement. This was attended by CEC legal and finance staff.

2.206 Following this workshop I agreed with TIE that I would offer Gill Lindsay, the Council Solicitor at CEC Legal, informal updates on an ad hoc basis. I gave Gill information, not advice, and I was completely clear about this.

2.207 In October 2007 DLA Piper was instructed by TIE to provide a letter to CEC Legal which would form part of a CEC report ahead of a full council vote on Project approval. I specifically agreed what this letter would cover with Gill Lindsay who advised that her internal reporting processes required a contractual risk matrix to accompany the letter. No detailed clause by clause analysis of risk transfer was ever required by CEC or instructed by TIE.

2.208 My letter, dated 22 October 2007, said, among other things, that TIE's planned timetable to close in January 2008 would require an intense work programme and the detailed Infraco negotiations still to come would determine the technical and commercial approach on risk apportionment.

2.209 From early February 2008 to Infraco Contract close in mid-May 2008, I was aware that CEC were being briefed by TIE senior executives regarding BBS' price increase demands. CEC seem to have simply accepted as inevitable what TIE told them about the need to concede these price increases despite them coming after TIE had informed CEC the construction price was "95% fixed" in December 2007. I am not aware of any CEC personnel having attended any of these price negotiations with BSC.

2.210 Between March and May 2008 I was instructed by TIE to provide CEC with a series of further DLA Piper letters advising on the legal status of the Infraco Contract negotiations. During this period DLA Piper provided five versions of this advice letter, each coinciding with TIE announcing an imminent date for Infraco Contract close, urgently instructing DLA Piper to provide a letter, then repeatedly failing to achieve the intended Close date. In each case, I provided a draft letter to TIE and to CEC Legal before the letter was issued by DLA Piper

2.211 I provided a letter in similar form to that of 17 December 2007, on 12 March 2008 after having received details from CEC of the matters they wished to be addressed in the letters. I met with Gill Lindsay the day before issuing the letter to discuss the required text and scope of a draft version and had several discussions with her and Graeme Bissett of TIE to ensure the letter met CEC's reporting requirements.

2.212 I made it clear that DLA Piper could not express a view on whether TIE had achieved the best deal possible, as that was not the role of a lawyer. I was asked to provide views on contractual documentation and commercial terms that were still being negotiated and did so, making it clear that the situation was still fluid.

2.213 The complete set of legal/contractual issues that I summarised as outstanding would have been shown in the Issues List and the travelling draft Infraco Contract, both of which were circulated by DLA Piper immediately after every negotiating session. CEC Legal received copies of these and was able to ask about them at LAC meetings.

2.214 The next such letter issued by DLA Piper to CEC was dated 18 March 2008 ahead of a new targeted Infraco Contract close date of 31 March 2008. This letter informed CEC that DLA Piper considered TIE could issue the formal OJEU notice of intent to award the Infraco Contract (something that I had cautioned against TIE doing prematurely in January and February 2008). It also described the principal actions in that short period since the 12 March 2008 letter.

2.215 DLA Piper produced another letter to CEC on 28 April 2008, ahead of a new Infraco close deadline. This letter stated: "*As they stand, the terms and conditions represent a clear reflection of the positions which have been negotiated by TIE and are competent to protect and enforce those positions.*" I would highlight that it says *"negotiated by tie"*.

2.216 It also informs CEC that: "*delay caused by SDS Design production and CEC consenting process has resulted in BBS requiring contractual protection and a set of assumptions surrounding programme and pricing*".

2.217 At paragraph 11.3 the letter refers to TIE's negotiations over SP4 which it states *"is now settled as are its key assumptions, value engineering items, provisional sums and fixed prices. TIE has assessed the likely financial impact of the assumptions not holding true and triggering changes."* The letter also refers to the fact that BBS will seek an immediate significant contractual variation.

2.218 A contractual risk matrix was attached to the letter which stated that it "*is not a substitute for study of the Contract Suite and is intended as an aide to the main components of risk allocation. It does not reproduce the commercial detail in the Contract Suite on which TIE has reported separately*". I wrote this specifically to make it clear that TIE was responsible for explaining technical, commercial and financial outcomes and positions.

2.219 Prior to Infraco Contract close TIE produced a 'Close Report' for CEC. In early March 2008 I had started to receive requests to review discrete parts of this report, that is those parts that discussed

three areas: (i) the scheme of the contracts; (ii) contractual mechanics and structure; and (iii) procurement risk. Beyond these specific areas, DLA Piper did not provide any input into this report.

2.220 Having negotiated SP4 themselves, TIE management described the document, its purpose, mechanics and financial, commercial and technical effect as they wished to in their Close Report. That was not DLA Piper's role as legal advisor.

2.221 Under the heading 'Price Certainty Achieved', the Close Report describes the Infraco price as having £228.3m of 'firm' costs. The BBS construction price was "firm" to the extent of the price given for the scope of the Project identified by the Infraco Proposals and BDDI dating from October and November 2007. However, beyond that, it was very obviously not firm because of the clear and extensive express qualifications which had been agreed in SP4. BDDI was 25th November 2007, nearly 6 months prior to 14th May 2008 when the Infraco contract was signed.

2.222 Alongside this report and the DLA Piper letters, TIE produced a document called 'Report on Infraco Contract Suite'. There were concerns that BBS might use requests under the Freedom of Information (Scotland) Act 2002 to obtain copies of some of these documents so this report was produced to CEC in the name of DLA Piper to make it subject to legal privilege. This report stated that the exposure caused by BBS seeking an immediate Notified Departure had "*been assessed in detail by TIE and confirmed as acceptably within the risk contingency*". TIE's assessment of this exposure was a matter for them to advise CEC on. It was also up to TIE to determine the level of prominence which this report gave to SP4.

2.223 On 12 May 2008, two days before the Infraco Contract was signed, DLA Piper issued a further letter to CEC. Again, this letter included a clear reference to the fact the contracts reflected what TIE had negotiated. TIE produced its own report on the Infraco Contract suite, as I say above.

2.224 The revision of the letter repeats the statement about SP4 negotiations and TIE having assessed the financial impact of the assumptions not holding true. In my opinion, CEC Legal could not possibly have understood from the commentary in these DLA Piper letters that TIE had agreed an entirely fixed price contract.

2.225 The risk matrices which accompanied these letters are a standard project management tool intended for a project management overview. They described where risks should lie if the Infraco Contract was operated sensibly by the client. When and whether those responsibilities carried money behind them and, if so, how much money, was the client and its technical/financial advisers' job to analyse.

2.226 Even a broad level scan of the risk matrices reveals that considerable risks lay with the public sector for events (not, in fact, unknown possibilities) that were already predicted or provided for under the contract.

2.227 Through 2009 and 2010 I was instructed by TIE to have more direct contact with CEC Legal to brief them on the Infraco DRP process and adjudications. I was asked by TIE to provide CEC with copies of our reports and instructions to Counsel and did so.

2.228 **National Governance**

2.229 As far as I was aware, Transport Scotland was TIE's reporting point for the Tram Business Case. TIE required Transport Scotland to approve the Business Case in order for the grant funding release to CEC. DLA Piper played no role in this part of the Project's procurement.

2.230 **Project Cost**

2.231 I have summarised what I know about the history of the Infraco Contract price increases and negotiations.

2.232 Clause 85.1 of the Infraco Contract was adjusted by TIE in early May 2008 so as to provide for BSC to be paid £3.2m in the event that Phase 1b (the Roseburn to Granton loop) of the Project did not go ahead. It was well known at BAFO and certainly by December 2007 (and at Infraco Contract award) that Phase1b was highly unlikely to be implemented. DLA Piper played no part in TIE reaching this agreement.

2.233 As legal adviser DLA Piper had neither visibility into nor advisory responsibility for:

2.233.1 how TIE evaluated BBS's technical, financial and commercial BAFO as the preferred tender;

2.233.2 why TIE appears to have made an agreement with BBS in August 2007 during the pre-BAFO phase regarding payment for Phase 1b tender preparation costs in the event that this part of the Project did not proceed;

2.233.3 why TIE agreed at some point in the ITN phase that BBS would receive an unsecured advance mobilisation payment of £42milion;

2.233.4 why after Wiesbaden, TIE was continuing to agree price increases with BBS;

2.233.5 how TIE chose to present its decisions to CEC; or

2.233.6 how TIE assessed and provided for the cost and time impact of serious MUDFA delay and continuing SDS design and planning approval delays, design production and development post-BDDI and the impacts of the 43 Base Case Assumptions listed in SP4.

3 INITIAL PROPOSALS

3.1 Summary

3.2 The major scope of DLA's appointment concerned preparation for the Project's procurement phase, that phase itself and then project implementation, all of which are discussed in later sections. I can however offer brief comment from my perspective on various discrete matters within the Initial Proposals section of the Inquiry's issues list.

3.3 **Initial Proposals, Estimates and Appraisals**

3.4 DLA Piper's full scale involvement as an adviser to TIE began after the work and analysis under the first three headings in the Inquiry's Initial Proposals section were already well under way.

3.5 At the time of DLA Piper's appointment by TIE in late 2002, there was still considerable public focus on how much Transport Scotland was prepared to commit to the Project. The figure discussed publicly at that time was, from memory, £350 million. A debate immediately evolved about indexation for this preliminary commitment. I do not now recall at what point CEC and TIE lobbied successfully for an increase in the then Labour administration's funding commitment, though this would be easily tracked in publicly available documentation.

3.6 During a roughly four year timespan from 2003 to 2007, I believe the Stirling-Alloa-Kincardine ("**SAK**") heavy rail refurbishment, the Borders Railway, as well as Edinburgh Airport Rail Link ("**EARL**") and Glasgow Airport Rail Link heavy rail airport link projects and the M80 Stepps to Haggs upgrade were variously in their promotion/planning/procurement phases as part of the Scottish Executive's infrastructure investment plan. DLA Piper was directly involved in two of these projects: EARL and the M80. We were also instructed by TIE (not CEC) to advise them, regarding TIE's somewhat unusual appointments as agent for Transport Scotland on SAK and on EARL.

3.7 This ambitious Scottish infrastructure plan created competition for prioritisation and government funding among these large projects for which the estimated combined capital expenditure was well over £1billion. In 2002/3, there were obvious light rail projects in England comparable with the Project; these were not necessarily faring well as a result of central government spending reviews and the customary socio-economic benefit analyses. It was, in fact, not until December 2007 that the Transport Scotland grant funding was finally secured by CEC and TIE at £500 million (through an approved business case). The competition between projects (and the political aspects of this within CEC and the Scottish Executive and at parliamentary level) became increasingly relevant to how TIE attempted to close out the Infraco Contract award in 2008. I discuss this further below.

3.8 During the Bill promotion phase, from January 2003 to April 2006, TIE was supported first by Grant Thornton (partner John Watt) and then by Price Waterhouse Coopers ("**PWC**") as its retained financial advisers. PWC (Tony Rose was the senior manager) did a considerable amount of work on financial projections and appraisals needed to underpin the Promoters' (CEC/TIE) case for the Tram Line One and Tram Line Two enabling legislation – with focus on the tram scheme ridership potential, fare levels and revenue generation and whether it might be possible to attract commercial financing.

3.9 How much detailed and complete work had been done prior to DLA Piper's appointment in November 2002 on planning the programme and estimating the cost to the public sector for the implementation phase of the Project I do not know. What was widely known, however, was that the light rail schemes in England had generally been criticised for underestimation of outturn cost. By 2006, TIE had terminated PWC's mandate and thereafter went forward with no independent financial adviser for the Project procurement and implementation phases.

3.10 CEC and TIE themselves had various initial ideas as regards raising part of CEC's funding contribution to the Project through real estate developer and commercial party funding contributions, linked to the positioning of tram stops/line routes. In the end, as far as I am aware, these ideas came to nothing and it was not an area of involvement for DLA Piper.

3.11 **Parliamentary Process**

3.12 I discuss DLA Piper's appointment in further detail below[4]. For present purposes, it is sufficient to note that initially, in mid-November 2002, DLA Piper was appointed by TIE after a full publicly advertised competition involving detailed written submissions, which I prepared, and a formal interview with the CEO (Michael Howell) and Chairman (Ewan Brown, ex-Noble Grossart) for the bill promotion, parliamentary process and procurement preparation. CEC was neither present at nor involved in the interview process. There was then a short letter of appointment to DLA Piper (ADS00001 and CEC00031181) signed by Michael Howell, in his capacity as the CEO of TIE and on authority of the TIE Board.

3.13 Michael Howell confirmed our appointment to TIE and retained us to deliver the full range of legal services to TIE for the Project. There was a contemporaneous TIE press release about the appointment.

3.14 However, we were told by TIE that CEC had intervened and insisted that TIE also appoint Dundas & Wilson ("D&W") as legal advisers to the Project. Mark Swindell (the leader of the DLA Piper bid team for TIE's legal advisory mandate, and then Group Head of Commercial & Projects UK and Europe) spoke at length with Michael Howell about this situation, which we regarded as a breach of EU procurement regulations, since CEC had played no part in the tender process and was not the procuring party. We considered that TIE was the procuring party and that DLA Piper had been formally appointed. We understood from Michael Howell that TIE's decision had been overruled because D&W had essentially complained to CEC's Head of Corporate Services, Jim Inch.

3.15 We were told there was to be a joint appointment, with Westminster-based parliamentary agents Bircham Dyson Bell ("**Bircham**") and D&W promoting the legislation and DLA Piper acting on discrete commercial issues and thereafter on procurement matters. This removed the responsibility for bill promotion and parliamentary aspects of the Project from our scope of work. I recall preparing and agreeing, with Alex Macaulay of TIE, a document in the appointment documentation which shows what the agreed scope for those two other law firms was.

3.16 This created tensions initially and I insisted on negotiating and settling clear scopes of work to avoid overlap and the potential for confusion on responsibilities. I agreed the distinct DLA Piper / D&W scopes of work quickly with Alex Macaulay, TIE's first Project Director. He took a practical view of the appointments. There was no contact or involvement with CEC on this, just as there had been none on our appointment. Alex had excused himself from the TIE management team at our tender interview because he was married to the D&W partner who had led their initially unsuccessful tender to TIE for the legal mandate.

[4] See paragraphs 4.7 *et seq.*

3.17 TIE made it very clear to us that the appointment was theirs to make without any reference to CEC. It was absolutely clear that our appointment had been made by TIE and that they were our client. No one from DLA Piper had either met or had any communication with CEC as part of the tender process or the interview and I do not recall any mention in the tender instructions about any role for CEC in the appointment process.

3.18 Bircham (lead partner Ian McCullough) was mandated to draft and support the promotion of the two Tram Bills through the Scottish Parliament, using the then applicable Westminster-cloned process. Bircham's brief was ultimately terminated by TIE after Alex Macaulay made it plain that Bircham's lack of proper Edinburgh presence was causing delay. Once the detailed bill drafting had been completed and vetted by the Holyrood parliamentary clerks, Bircham were replaced by D&W.

3.19 There were two Acts put through the Scottish Parliament because technically there were two distinct routes being discussed, one of which included a Roseburn – Granton foreshore loop. There were some specific clauses that needed to be in the legislation and DLA Piper had relev(experience from dealing with legislation and objectors on the other UK tram projects. And so, where instructed to do so by TIE, we liaised frequently with Bircham and D&W and supported the legislative, administrative and legal processes required for Bill promotion.

3.20 By way of example: we advised Bircham (as the draftsman) on various tram scheme-specific issues with potential to add risk and/or cost to the Project, if not safeguarded in the legislation. I had debriefed with English colleagues extensively to learn about a number of the relatively technical points from other tram and light rail projects. These had arisen because draftsmen had been using very old model legislative provisions to do with early city tramways.

3.21 We also advised TIE on the impact of third party agreements e.g. Forth Ports and Edinburgh Airport Ltd (being settled by D&W) required to address potential objections, to ensure that these obligations could be smoothly passed down to the main infrastructure contractor through the Infraco Contract.

3.22 There also needed to be clear provision in the enabling legislation for CEC, as the authorised promoter, to delegate its powers regarding management, procurement, construction and operation of the tram scheme. Bircham Dyson overlooked this and I advised TIE it required reference and inclusion.

3.23 The two tram Bills achieved Royal Assent and came into legislation in 2006. Post Royal Assent for the two tram Acts in 2006, I have no personal knowledge as to when D&W ceased acting for TIE .

4 PROCUREMENT

4.1 The Creation of TIE to Manage and Deliver the Project

4.2 My understanding is that, in essence, CEC had taken the decision to create TIE with the objective of assembling the expertise to manage: the promotion of enabling legislation, preparation of the

Business Case required for central funding grant and the full procurement and implementation of the tram project under one roof. DLA Piper had no involvement with the Project at that stage.

4.3 At the point when DLA Piper became TIE's legal adviser for procurement, TIE had a one-room office on Hanover Street as well as, I recall, access to a parliamentary stage documents room within CEC offices on Coburn Street. Our interview with TIE at tender stage in 2002 had in fact been held at CEC premises on Coburn Street. TIE's personnel (excluding its Board and Chairman Ewan Brown) comprised at that time: Michael Howell as CEO, Alex Macaulay as Project Director, Graeme Bissett as a consultant, I believe, Andrew Callander (Bill promotion manager), Andrew Hudson (temporary procurement manager) and a secretary, Janet Moise. Geoff Duke joined at some point to assist Andrew Callander as the Line Two Bill promotion manager.

4.4 Some initial meetings were held at Alex Macaulay's house in Glencairn Crescent and so TIE was very far indeed from being a fully resourced project management company at this stage. As I began to become more involved, I understood at the time that one reason for TIE's creation had been that CEC's own transport department (headed by Keith Rimmer) did not consider that it had the requisite experience to manage an infrastructure project of this size and complexity from inception through execution. In recent memory (2001), there had been the unfortunate collapse of CEC's West Edinburgh guided bus way project at preferred bidder stage. Balfour Beattie were the bidder involved in that project.

4.5 Before considering DLA Piper's role in the procurement phase of the Project, I believe it would assist if I make introductory comment on the following issues for context: DLA Piper's appointment; DLA Piper's Project team; delivery of legal advice to TIE; and DLA Piper's relationship with CEC.

4.6 **DLA Piper's Appointment**

4.7 I have discussed this briefly above.[5] The leader of the DLA Piper bid team for TIE's legal advisory mandate was Mark Swindell. He was the Group Head of Commercial & Projects UK and Europe (based in London) and my then line manager. Once the pitch document was ready, Mark came to Edinburgh to present our submissions to TIE with me.

4.8 Mark Swindell took the decision that I should lead the DLA Edinburgh Tram team due to his views on my considerable relevant experience and my connection to Edinburgh. DLA's tender covered how we would support TIE in all aspects of the legal work (both Bill promotion and actual project execution). In other words, our overall role would be the provision of the legal support for both the promotion of the legislation and the appointment of contractors to carry out the Project.

4.9 About four months before the legal mandate tender became imminent and came into the market from TIE, I began working three days a week in Edinburgh to learn about the Project and to accumulate first-hand knowledge of the probable public facing issues, e.g. the volume of public objection and the Scottish parliamentary process (which, at that time, was still a clone of Westminster), the engineering issues and what type of land take would be necessary for the tram. I

[5] See paragraph 3.12 above

also went to see the preliminary engineering drawings that had been drawn up by Faber Maunsell and Mott MacDonald. I informed myself generally about contractors, suppliers, consultants and who might be registering interest on other consultancies for TIE. The Project was exciting and high profile so was exactly the type of mandate that we wanted. It fitted with our pedigree in transportation and construction projects, PFI/ PPP and light rail schemes.

4.10 I interviewed three parliamentary agents - Bircham, Winckworth Sherwood and one other. We interviewed those agents with the intention of taking them into the DLA Piper tender as a subcontractor. Ultimately, that did not happen - as I have already explained - because of CEC's intervention and insistence on a three firm appointment.[5]

4.11 **DLA Piper Project Team**

4.12 The choice of the immediate DLA Piper Edinburgh or Scotland partners and colleagues to interface with TIE was mine. This is entirely normal practice within DLA Piper and, I would suggest, within any large commercial law firm. It is within the responsibility and authority for a lead partner on a project. The team I assembled pretty much remained constant throughout the procurement of the Project.

4.13 The core DLA Piper team on the Project was as follows:

4.13.1 Myself as the lead partner. I was on secondment to TIE from late October 2007 through to June 2008 by which time the Infraco Contract had been signed. I was simultaneously managing my team at the DLA Piper Rutland Square office and was DLA Piper's Head of Projects in Scotland. I discuss my secondment further below;

4.13.2 Dr Sharon Fitzgerald. Sharon was a senior associate and subsequently became a partner in the firm. She worked a great deal with Ian Kendall at the procurement stage and was involved in drafting the Invitation to Negotiate ("**ITN**"). She also worked hard and extensively on the drafting of the full DPOFA, MUDFA, SDS, TSS, Infraco and trams supply and maintenance documentation suites. Following Ian Kendall's departure, Sharon remained centrally involved in relation to MUDFA, but not Infraco and SDS;

4.13.3 Chris Horsley. Chris was a mid-ranking associate. He was involved with me in most negotiations on the SDS novation, as well as some aspects of Infraco – notably detailed interface negotiations with Network Rail and BBS, as well as SP4. This was from November 2007 onwards approximately;

4.13.4 Philip Hecht. Phil was in between Jo (see below) and Chris in terms of seniority. He was involved in most or all of the SP4 meetings and Infraco Contract main terms negotiations. He moved to work in DLA Piper's Abu Dhabi office in early April 2008, around one month before Close on the Infraco Contract;

[6] See paragraph 3.12 above

4.13.5 Joanne (Jo) Glover. Jo was a trainee and then NQ lawyer of very high quality who has now left DLA Piper. She worked closely with me on all aspects of the transaction; and

4.13.6 Lorna Tweedie (née Dunlop) was my PA and a very important team member, as was Nikki Horshall who came in when Lorna went on maternity leave. Latterly, Christa de Voss became my PA.

4.14 I involved other DLA Piper partners and senior specialists in their sectors, both in Edinburgh and in other UK and overseas offices. Those sectors included competition, contentious construction, real estate, employment, planning, rail and rolling stock, PFI/PPP and public procurement, EU Procurement, HS&E, public law and numerous others at various times where appropriate. I also consulted with appropriate US, Spanish and German colleagues on parent company guarantees ("**PCG**") being offered by Parsons Brinkerhoff (USA) and the BSC preferred bidder consortium.

4.15 If there was a matter that involved DLA Piper's legal advice surrounding an issue in which I was not a specialist, I would think the issue through myself and then brief a specialist who could assist. In most cases the advice I received would then be converted by me into an issues specific paper to TIE, so that it would present as a DLA Piper piece of advice to TIE. I was the key contact for DLA Piper and written and oral advice to TIE was coming out from me.

4.16 **Delivery of Legal Advice to TIE**

4.17 There were four main categories of advice provided by DLA Piper to TIE regarding the development of TIE's procurement strategy: 1) stand-alone reports; 2) reports which TIE prepared containing an element of DLA Piper's specific legal advice on procurement issues; 3) presentations, workshops and meetings, of which there were many; and 4) engagement with TIE personnel at management level and/or other TIE consultants, e.g. Grant Thornton, PwC, Faber Maunsell, Mott MacDonald, where TIE convened a meeting and were in the room where their consultants were talking about a particular aspect of the Project and developing TIE's procurement plan.

4.18 A great deal of my advice to TIE on behalf of DLA Piper, including about where the legal and contractual negotiations stood during the intense procurement phase of the Infraco Contract in 2007/08, was given in writing and orally both in person and by telephone. For the reasons discussed below, the majority of advice was given orally; particularly during the most intense negotiations.

4.19 I think it is worth understanding that, in a project of this nature when you are negotiating with bidders, often advice is provided orally during the negotiation. A clear channel of communication would typically be between me and the TIE executive who was in charge of that part of the negotiations. That could have been the engineering director, the commercial director or the procurement manager (but others at TIE were also responsible for aspects of the documentation and factual and commercial content); and usually also the Project Director. Advice was often oral and in short face-to-face meetings. There were TIE management meetings where I was present to

listen to what was happening and give advice from my perspective as legal advisor on the procurement. TIE did not give any specific instructions to DLA Piper to identify or specify *"this is how we expect you to deliver advice"*.

4.20 In my experience, the giving of legal advice in the manner that DLA did as outlined above is entirely standard practice on a project of this nature. During intense contract negotiations, there is often insufficient time to record advice in e-mails or formal papers and letters. We adopted what I believe was the ordinary, cost efficient and standard approach at the time. TIE was content to receive advice in that manner and I never received any comment or instruction to change this approach. The outcome of advising and taking instructions very often becomes enshrined directly in the next travelling draft version of the contractual provisions or components under discussion between the parties. So it was with all of TIE's five main procurements on which we acted, in order: DPOFA, SDS, MUDFA, Tram Supply and the Infraco.

4.21 **DLA Piper's relationship to City of Edinburgh Council**

4.22 It is helpful at this stage to consider DLA Piper's relationship with CEC. In doing so, I consider some documents which post-date the stage of the Project currently under discussion during which TIE was setting its procurement strategy.

4.23 DLA Piper's understanding from the outset was that CEC had chosen to appoint its own project delivery agent to represent it and protect its interests. The work for which DLA Piper successfully tendered in late 2002 was to provide legal services to TIE, a point about which TIE was extremely clear from the outset. I recall Mark Swindell and I raised the question of reporting lines with TIE at the 2002 tender process interview in November 2002. TIE explained to us it had autonomy to appoint and manage its advisers in its capacity as CEC's project delivery agent.

4.24 We were told again at actual appointment date in early January 2003 that TIE was our client and TIE would be instructing us directly. A joint TIE and CEC appointment of DLA Piper would have required the EU regulated formal tender instructions and the appointment letter itself to say this: it did not and TIE stated the opposite. And so it was that TIE, not CEC, issued and signed the DLA Piper mandate appointment documentation and made the media announcements regarding that appointment. No one from CEC attended our interview or met us during this process.

4.25 TIE senior executives also made it very clear that TIE would be the party entering into contracts to procure the tram scheme and this was what happened: TIE signed, as sole counterparty, the DPOFA, MUDFA, SDS, TSS, Infraco and Tram Supply and Maintenance contracts, all the utilities agreements, as well as the Network Rail Asset Protection Agreement. In each case DLA Piper represented TIE, not CEC.

4.26 DLA Piper was not retained to and did not provide advice direct to CEC in relation to the procurement strategy or the choice of contracts and was not at any point instructed to do so by TIE. During 2003 and 2004, there was no form of contractual duty of care owed by DLA Piper to CEC - since none was required by TIE until June 2005 (see paras 4.33 *et seq*).

4.27 When TIE decided to stand DLA Piper down for 5 months in 2007, there was no parallel communication from CEC confirming this TIE decision. In my view, that silence on CEC's part is not at all consistent with CEC regarding itself as DLA Piper's separate client, with separate interests.

4.28 Even after the June 2005 draft letters, DLA Piper had not been procured or appointed by CEC and were not advising CEC, unless specifically instructed to do so by TIE. I had made that very clear to Gill Lindsay of CEC Legal on one of the first occasions I spoke with her in late August 2007. We were to report direct to TIE and my point of contact would be Alex Macaulay and/or his deputy Andrew Callander, TIE's legislative process manager.

4.29 TIE were CEC's delegated statutory agent under the Acts, notified to the Scottish Minsters as required under Section 69 of the Acts and, in that role, notifying Scottish Ministers on the appointment of BSC to construct the tram scheme. TIE, TEL and CEC intermingled within their governance structure with - in some cases - the same core individuals sitting on TIE's Board, the Tram Project Board and other sub groups. The TIE Board and the Tram Project Board frequently met back-to-back on the same day.

4.30 CEC had created TIE and appointed it as the delivery agent for the Project without any advertised competitive tender. The rationale for CEC appointing TIE as its Project delivery agent rested on the established procurement law exemption applying: where the procuring authority (CEC) appoints a single purpose wholly owned public sector entity (TIE) to act on its behalf and in its interests to manage/carry out a single authorised project or undertaking. DLA Piper had advised TIE on this issue as early as 2003. CEC was the Promoter of the two Edinburgh Tram Bills during 2003 to 2006. CEC is the named authorised undertaker under Section 82 of the two Edinburgh Tram Acts 2006. So: in order for CEC's delegated authority to operate at law, TIE's function took on CEC's identity as statutory authorised undertaker and in turn passed that authority to BSC for design and construction. For this, TIE's interests were accepted as derivative of and synonymous with those of CEC. CEC could therefore avoid the strict legal requirement for a formal tender process.

4.31 TIE and CEC discussed, debated and negotiated the detailed TIE Operating Agreement for a period of approximately four years through 29 versions. CEC appeared entirely comfortable being advised by its staff legal officers on this matter.

4.32 That Operating Agreement at section 11.4 stated: "*TIE will enter into such contracts in its own name but will be acting on behalf of the Council*". Such contracts are listed as: Infraco Contract, MUDFA, SDS Contract and Tram Supply and Maintenance Contract and other relevant contracts. It is difficult to conceive of a clearer expression by the two parties themselves of congruity of interests between TIE and its 100% legal parent, CEC.

4.33 Against that background, DLA Piper accepted a request from TIE in 2005 to confirm that DLA Piper owed an ancillary duty of care to CEC. In doing so, DLA Piper made it clear that it was not willing to (and did not) assume a dual-track reporting or advising obligation.

4.34 The conditions upon which DLA Piper was willing to assume an ancillary duty of care to CEC are confirmed in DLA Piper's letters dated 23 June 2005 (DLA00006300 and DLA00006301). This requirement to extend a duty of care to CEC was first raised with me by Alex Macaulay of TIE in 2005, out of the blue. He explained to me that CEC was requiring that TIE obtained "duty of care" letters from all TIE's advisers. He was in fact slightly apologetic that this had not been raised before. Having discussed it with Mark Swindell (and reported the request in the normal way to the firm's risk management unit), I sent a draft letter and it rested with Alex. I addressed the letter to TIE, not CEC, and did not send the draft to CEC Legal or anyone else at CEC because it had been requested by TIE and I had had no dealings with any CEC staff at all on this subject. I never heard more from Alex on this nor from CEC at the time. Nor did I know who it was at CEC that had required this. I had never heard whether that DLA Piper letter was passed through to CEC.

4.35 These letters were a clear expression of the basis upon which DLA Piper agreed to and in fact did extend a duty of care to CEC for a period of over five years. These letters were not affirming that CEC was a joint client. Nowhere in the letter is that language used. DLA Piper was never informed who it was at CEC that required this duty to be confirmed. TIE handled this process.

4.36 These letters were referred back to on several occasions subsequently. Their content accords with how matters worked in practice, both before and after their issue in 2005 and their re-issue in August and October 2007 (discussed below). No comment ever came back to me from either CEC or TIE on the content of these letters.

4.37 Two years later in August 2007, the same letters were then re-issued at the request of Gill Lindsay of CEC Legal. They appeared to have been lost by CEC. On 16 August 2007, I sent an email to Gill Lindsay (**CEC01711054**) with an attached draft 'duty of care letter' (**CEC01711055**).

4.38 With this August email, as asked, I sent Gill Lindsay an identical letter to the one that I had was sent to Alex Macaulay of TIE in June 2005 and asked if there was anything CEC wished to add or alter. I state *"I do not envisage any conflict of interest here; to the contrary - in closing the required supply contracts as part of the procurement process, there needs to be complete commonality of interests and objectives among the Council, TIE and TEL. That is not to say that there will be and will have been detailed discussions (in which we would have our role as advisers for the Project) on key issues in order to reach that commonality…After the letter is acknowledged by the Council, we would have it signed by TIE to complete the formal amendment to the Appointment."* I never heard back from Gill Lindsay in relation to that letter.

4.39 In October that year, I had another contact, I believe from Colin Mackenzie, saying he no longer had the letter and asking me to send it again. So I did. I note the email chain stopped with the email from Colin MacKenzie to Gill Lindsay dated 7 December 2007 (**CEC01399575**). I explained to Gill Lindsay that DLA Piper had issued the same letter two years earlier to TIE, as requested, for delivery to CEC. I note I say in closing in my email of 7 December 2007 *"If you would like this signed now, let me know."* I did not receive a response.

4.40 It is important to note that I state in the DLA Piper letter at paragraph 2 that "DLA remains expressly authorised to receive and seek all instructions (and any clarifications) under the Appointment from TIE as Project manager and agent for CEC. In the absence of specific written instruction, DLA has not been and is not under obligation to advise CEC officers or members directly, under exception that DLA will brief CEC officers at regular intervals as instructed by TIE Limited, or as required by CEC." (CEC01711055).

4.41 This letter was never signed. It was never commented on. It was never sent back by CEC Legal. This letter acknowledges a duty of care, but it acknowledges a duty of care on the basis that DLA Piper is entitled to rely on the fact that there was complete commonality of interest.

4.42 Gill Lindsay had specifically said to me in October 2007 that detailed reporting from DLA Piper was not required. I discuss the requirements for DLA Piper reporting to CEC and the specific letters which we were instructed by TIE to provide to CEC below.[7]

4.43 Graeme Bissett of TIE sent an email to me dated 1 July 2008 (CEC00114232). This was sent on behalf of TIE approximately five and a half years after DLA Piper's appointment. The Inquiry's question 1 asks whether this email reflects a duty on DLA Piper to provide legal services to CEC which went beyond that detailed in the duty of care letters described above. This email is TIE's acceptance of a written proposal by DLA Piper, which I prepared, which was submitted to TIE in early June 2008. The proposal I sent was a response to TIE's request in summer 2008 for us to refresh our legal mandate at the end of my secondment. It had no connection whatsoever to any idea about a new or separate DLA Piper mandate for CEC. There had been no such mandate and there was never any idea or discussion about creating one.

4.44 Having been retained by TIE Ltd on the same fee earner hourly rate for over five years, DLA Piper had requested a small uplift on rates in the proposal. TIE agreed to this with absolutely no alteration to the terms of the mandate which was set out in the appointment letter in 2002. As far as I was concerned, none of these exchanges in 2008 changed the contractual position as far as our appointment was concerned as explained above. Nor did I discuss anything like this with TIE at the time.

4.45 Graeme Bissett, in his email dated 1 July 2008 (CEC00114232) mentions that he is not aware of arrangements which DLA may have with CEC as regards provision of legal services. I should make it absolutely clear that, whatever Graeme observed at that point, we had no arrangement with CEC at that time nor, in fact, did we ever make any arrangement with CEC for the provision of legal services, other than as specifically stated under the duty of care letter issued in 2005 and again in August and October 2007. If we had been requested to enter into such a direct advisory arrangement, there would have had to have been prior discussion and agreement with TIE and a clear and separate arrangement with CEC on payment of our fees for that work. There would also need to have been a specific EU public procurement for such an appointment.

[7] See paragraphs 11.49 - 11.68

4.46 In short, all three of the parties involved – TIE, CEC and DLA Piper – understood and proceeded on the basis that DLA Piper's duty to CEC was to be discharged by DLA Piper advising and taking instructions from TIE alone. DLA Piper was entitled to rely on TIE reporting matters fully to CEC, which TIE was of course obliged to do in terms of the formal Operating Agreement between those parties.

4.47 It is perhaps worth observing that D&W also acted for CEC, as distinct from TIE, on numerous other matters connected to the Project.

4.48 I had no discussions with TIE or CEC Legal about changing the way DLA Piper had been providing advice and there certainly was never any written instruction from TIE about advising CEC direct, as would have been required specifically under the 2005 Duty of Care letters. DLA Piper was not paid any additional fees for separate reporting. That was perfectly acceptable to DLA Piper on the basis of what had been specifically agreed in the letters, as there was to be no additional work required of DLA Piper. The reason there was no additional work required of DLA Piper was because any duty of care to CEC was discharged by continuing to advise TIE.

4.49 Very shortly before I went on secondment to TIE in September 2007, Gill Lindsay in CEC Legal raised the issue of who at DLA Piper would advise CEC. I explained to her that DLA Piper had been and was advising TIE and there was no requirement for us to advise CEC separately – nor would we, unless expressly told to by TIE. The subject was never raised again.

4.50 I am asked in Inquiry Question 92 whether I suggested at any stage that CEC should obtain independent legal advice or if I think that this would have been a good idea. I did not suggest this. This was not an issue for DLA Piper to advise on or consider. That is precisely why the DLA Piper duty of care letters are worded as they are. Did I think it would have been a good idea: an answer – covering a nine year period – enters a realm of speculation and hindsight and judgments about CEC's organisational processes and internal skills and responsibility allocation that I do not believe I can enter helpfully.

4.51 The only observations I would offer about CEC obtaining independent legal advice are that:

4.51.1 CEC Legal were in the best position to decide if their client organisation should be receiving independent legal advice, on top of the legal advice that their project delivery company was receiving. CEC Legal were also in the best position to understand any particular matters of concern to CEC staff or departments and to tell TIE this. This was in part why the LAC meetings were arranged;

4.51.2 CEC did choose to obtain advice from Dundas & Wilson on the subject of the breach and termination provisions in the Infraco Contract and CEC Legal issued the instruction to obtain this. CEC also appear to have instructed McGrigors in 2009 to provide advice;

4.51.3 CEC Legal dealt with Dundas & Wilson during the process of settling non objections status during legislative promotion and then the relevant Third Party Agreements from

2003 to 2006. In 2005, CEC Transport also retained Dundas & Wilson in relation to discussions with DLA Piper (representing TIE) regarding a draft protocol governing the overlap between contractual and statutory responsibilities for the maintenance of roads post installation of the tram scheme;

4.51.4 The Project governance structure comprised at least three different bodies containing CEC officers and officials - who were all in a position to discuss and decide if CEC required separate legal advice; and

4.51.5 CEC's Director of City Development held the role of Tram Monitoring Officer within the governance mechanism. His role was to monitor what tie were doing and to make sure that tie did not diverge from its role as Project delivery agent for CEC; another CEC officer with the insight to decide if CEC needed legal advice.

4.52 And so: it is quite clear on the facts that when CEC wished to obtain external legal advice on the Project, they did so without consulting DLA Piper if they should do so.

4.53 **Inquiry Question 90**

4.54 It is axiomatic that CEC, as Authorised Undertaker under the Edinburgh Tram Acts, bore the risk of Project cost overruns as noted in Inquiry question 90. In October 2007, on TIE's instruction, CEC Legal was sent by DLA Piper draft of the CEC guarantee that was required to underwrite TIE's financial obligations under the Infraco Contract. That guarantee was reviewed and approved by CEC Legal and Finance and, without this guarantee, BBS would not have accepted TIE as a contracting counterparty. No legal advice from DLA Piper was required for CEC to comprehend that it bore the risk of Project cost overruns, nor was it DLA Piper's responsibility to carry out assessments on the potential for cost overrun. Other than being shown the grant funding agreement by TIE (not CEC) at a late stage, DLA Piper played no role whatsoever in CEC's own deliberations about and its discussions with Transport Scotland regarding Project funding.

4.55 I am asked whether it was a reasonable assumption that the interests of CEC, the Authorised Undertaker and one of the Project's funders, were co terminus in all respects with the interests of its Project delivery company, TIE. I consider that this was a reasonable assumption for the reasons set out above in paragraphs 4.30 - 4.32.

4.56 I see no plausible argument at law or on actual facts to assert either that:

4.56.1 there was a lack of commonality of interests between TIE and CEC and DLA Piper was responsible for identifying and advising on this situation; or

4.56.2 if divergence of interests somehow happened, it was written anywhere or could be inferred that it was DLA Piper's duty to spot and report this.

4.57 What would the divergence pertain to: a technical decision, a financial decision, a public relations decision, a senior recruitment decision, a bill promotion decision, a Board decision, a fare-setting decision? How would DLA Piper, as lawyers, assess this or learn about it?

4.58 As a matter of law and fact, it was not the case that DLA Piper needed to concern itself in any way with whether (or how) CEC would receive legal advice, if somehow CEC thought its interests differed from those of its Project delivery agent, TIE, and its Edinburgh public transport integration manager, TEL. This would have placed DLA Piper in an impossible situation as an adviser: how would DLA Piper, an independent adviser, come to understand or anticipate when there was or might be a divergence of interests between a parent entity and its two wholly owned limited liability subsidiaries? And at what point would DLA Piper need to recuse itself from acting for TIE or CEC or both?

4.59 **Inquiry Question 96**

4.60 Question 96 suggests that my email to Nick Smith of 2nd September 2010 (CEC00098268) evidence that in 2010 I was taking a more direct role with regard to CEC. I do not agree with this proposition. I was sending materials and reports and copies of Instructions to Counsel to CEC Legal because Richard Jeffrey - as the CEO of DLA Piper's client - had instructed me to do so and to keep CEC Legal informed directly regarding Infraco legal matters on which DLA Piper was working for TIE and with Tony Rush. CEC00097692 on 11th August 2010 represents that instruction to DLA Piper from TIE. It did not impose or presume any relationship between DLA Piper and CEC, nor - in my view then and now - could it have.

4.61 TIE remained DLA Piper's client and TIE was CEC's Project manager and delivery agent. What was evident was that CEC Legal were requiring considerably more information from TIE about the status of the Project and a means of their obtaining that information was via DLA Piper. There was no formal (or other) change of any kind in terms of DLA Piper's mandate.

4.62 At all phases of the Project, I received frequent comment/direction from TIE management that I should not accept requests or instructions direct from CEC, without referring to TIE first. TIE were concerned about incurring legal spend (if CEC Legal came to DLA Piper without referring to TIE first).

4.63 I understood that TIE's concerns were related to: (a) budget - that CEC should refund TIE for work which DLA Piper did to service CEC Legal's needs and not use Project funds; (b) disruption - that CEC Legal would divert TIE's legal advisers away from tasks that TIE needed progressed and completed; and (c) information source - that CEC Legal in particular tended to ask DLA Piper if they were unable themselves to access Project information from TIE or direct from CEC personnel with project responsibilities for example: asking DLA Piper where CEC Planning was in terms of design approvals. TIE found this disruptive and disorganised. Susan Clark and both Graeme Bissett and Stewart McGarrity voiced those concerns to me frequently.

4.64 **TIE's procurement strategy**

DLA Piper's Initial Role

4.65 There were four general stages to the Project, which were (1) bill promotion; (2) procurement design; (3) procurements through an ITN; and (4) implementation.

4.66 DLA Piper's primary role at the start of the Project was to advise TIE on various procurement issues (including TIE's own appointment by CEC as Project delivery agent) and to produce an initial report outlining for TIE the critical issues within an overall procurement strategy that would deliver the tram Project into an integrated public transportation system.

4.67 From the outset TIE, as delivery agent for the Project, had looked for an innovative procurement strategy. Various papers with alternative models circulated from 2003 onwards. One of my first tasks in early 2003 (instructed by Alex Macaulay at TIE) was to prepare an outline procurement models report describing various procurement and contracting models which TIE might use, with or without commercial bank financing. I produced this document with strong input from other public procurement specialists at DLA Piper, especially those involved in light rail schemes. TIE tested these models itself and had independent specialists on PFI/PPP review the options. My impression was that TIE's focus was, understandably, on Bill promotion, but there was a lack of understanding of the lead time required to plan and execute a procurement strategy for a Project of this size because, so far as I could judge, TIE's management did not hold this experience.

4.68 I recall one session in which the top five or six models were ranked by those present after careful interrogation and comparison. There was also discussion on the type of contract to be used and I recall DLA Piper produced at least one paper for TIE on this subject ranking standard forms for suitability. Once it became clear that the tram scheme revenue projections prepared by PWC during the Bill promotion phase were very unlikely to support bank financing, TIE favoured an enhanced Design-Build-Operate-Maintain ("**DBOM**") model, funded publicly. This was what was ultimately chosen by TIE and CEC to go to market with the DPOFA party to ultimately provide the actual tram vehicle operating capacity. However, TEL and CEC favoured LB over Transdev as the tram operator. And so the system entered public service as a DBM project, with a public sector tram operator.

4.69 At that time, for light rail schemes, there really was not a recognised conventional approach to procurement models and contracting. Different schemes had taken different approaches. I have discussed earlier my background and experience alongside the firm's background with light rail schemes. The projects in Croydon, Nottingham, Leeds, Merseytram and Sheffield took different approaches. The contracting industry did not have a fixed view about what type of contract to expect.

Transdev - Early operator appointment

4.70 The report to TIE I mentioned above included a reasonably detailed description of the early involvement of a tram operator party as a consultant to assist the public sector client in preparing

the overall scheme concept that matched the best commercial and operational aspects for a tram scheme. For example: what ticket machines were reliable, how cost effective ticket inspectors might be, how certain types of tram performed, optimum positioning of tram signals and tram stops, driver sight-lines, traffic-tram interrelationship, key interchange ergonomics, ridership projections, fleet and tram vehicle size, tram depot dimensions and location, system trialling and tram driver recruitment and training.

4.71 I discussed this concept further with Alex Macaulay and Graeme Bissett at TIE who understood and liked its advantages to TIE: combining the operational experience of an international commercial light rail specialist company with an advisory, fee-based role that could be terminated with minimal financial consequences to TIE, with ability to transform the role into a full tram operator contract without the need for a fresh and lengthy procurement competition. They also saw that early input from an operator might very well be useful to TIE at parliamentary stage hearings, bringing a commercial operating expertise to the table that neither TIE nor its owner, CEC, possessed.

4.72 Once TIE had decided that it saw real benefit in the early operator appointment, we were instructed to prepare this procurement for the market and I did so, assisted by Sharon Fitzgerald whom I had recruited because of her strong EU public procurement and construction and engineering work background. At this point, DLA Piper also had direct informal discussions (as instructed by TIE) with the Office of Fair Trading about potential competition law sensitivities. These issues were taken into account in designing the ITN for the DPOFA.

4.73 I imagine TIE shared this DLA Piper report with CEC. My strong impression of CEC at this time was their focus was on the public and the influential Edinburgh business community's perception of the Project, as opposed to the very significant regulated procurements that would be needed to bring the Project into implementation stage. There was, perhaps understandably, caution within CEC about being seen to spend public money prematurely, but TIE had to develop and progress their thinking on structure and delivery timetable for the major procurements. The Project needed to attract tram scheme constructor/supplier sector interest and to project an organised, forwa(thinking image in order to engender a solid competition when the time came.

Partnerships UK

4.74 The DLA Report served to stimulate a number of workshops organised by TIE, and sometimes led by TIE, to take counsel about procurement from other experienced advisers/transport specialists. TIE by this point had engaged Partnerships UK ("**PUK**"), a government-funded advisory group which focused on and advised the public sector promoters of PPP/PFI projects in England. I was instructed by Michael Howell to negotiate PUK's terms of engagement with TIE and did so. Martin Buck of PUK London and James Papps came to at least one if not two informal workshops at our offices in 2003/4, one of which was led by Mark Swindell. PUK had an office in Edinburgh because of their work in the PPP/PFI sector but there was already a unit called Financial Partnerships, led by Sandy Rosie at the Scottish Executive and this unit's function had distinct overlap with what PUK offered. And so PUK were viewed somewhat as "poachers" in Scotland PUK continued to

advise TIE during the bill promotion phase, providing input on the procurement strategy TIE was developing. I recall the meetings in which both PUK and PWC were present to give their input to TIE on the various procurement models and also to engage briefly with KPMG, acting for Transport Scotland.[8] I believe at around the time Michael Howell left TIE, TIE ultimately stopped using PUK in a paid project advisory role, though I recall PUK (James Stewart) continued having a seat on either the Tram Project Board or the TIE Board – I do not recall now which.

Lothian Buses

4.75 I saw that the dynamics among public sector stakeholders in the Project were difficult for some time. Lothian Buses ("**LB**"), the CEC wholly owned bus company, made no secret of its reservations about the Project. This had an advisory cost impact on TIE. I can provide further detail on this aspect of the Project if that would assist the Inquiry but I note that it does not form part of the Inquiry's Issues List.

4.76 In 2003/4 DLA Piper had begun advising on the tram procurement regarding city integrated transportation. We advised TIE that if this was got wrong there could be the risk of a legal procurement challenge, as well as competition law problems. LB was dominant in the Edinburgh bus market and by law the other competing bus operators in the city needed to have the same access to and opportunity to integrate with the tram as well. Our advice was validated by Richard Greene QC, a competition law specialist whom DLA Piper instructed on behalf of TIE with LB's agreement. CEC appeared passive during this debate. DPOFA went into procurement, with a contract award in mid-May 2004 to Transdev.

Background – Previous Tram Projects

4.77 In one guise or another, the engineering, commercial, contractual and procurement knowledge held on the public sector side for the previous tram projects in which DLA Piper was involved was readily available to TIE and to CEC, if they wished to invest in that research. DLA Piper did all it could to assist TIE in introductions and knowledge transfer as, I believe, did other consultants engaged by TIE during the Bill promotion phase.

4.78 The Leeds supertram project (2001-04, proposed £500+ million scheme) was a "hub-and-spokes" configured light rail scheme. The lead DLA Piper partner was based in Leeds. The promoter was the regional PTE. It was ultimately dropped at pre-contract award stage when the central government funding commitment was cancelled. A major factor was considerable cost/programme uncertainty surrounding very significant and unexpected requirements for utilities diversions in the city centre. I recall being told that that the bid-back showed serious pricing qualifications, together with engineering assumptions and provisional estimates of upwards of £80 million. That was one of the reasons for TIE opting for the separate advance utilities diversions MUDFA contract in the Edinburgh Tram Project procurement strategy.

[8] See paragraph 3.139 *et seq.*

4.79 A further major English city tram scheme, Merseytram, was also cancelled after central funding withdrawal. The lead DLA Piper partner was again based in Leeds. The regional Transport Executive raised a judicial review because of the wasted public funds. Through the Leeds partner concerned, I introduced TIE to the Chief Executive of the local PTE. I believed he could speak to the state of public authority knowledge throughout the UK on how cost overrun on tram schemes was endemic and why various different procurement models were being tried to avoid the situation where the overall price was a compound of three or four different suppliers, basically all inserting risk and profit premia on their own component of a consortium's delivery obligations. The Chief Executive became, I believe, a non-executive member of TIE's board for a two-year period prior to Infraco Contract Close.

4.80 Ian Kendall also provided TIE with significant parts of a yet further English light rail scheme contractual documentation set which had been drafted and negotiated by Ashursts and (Pinsent) Masons. We reviewed this material closely for useful and appropriate market-tested language, including wording that Ian Kendall favoured.

CEC's Role in Choosing the Procurement Strategy (from DLA Piper's perspective)

4.81 CEC were initially focused on the public process of obtaining implementing legislation but began to take interest in procurement, particularly through its Transport department's interest in 'on-street' issues and CEC Planning department's views on how the tram infrastructure would look, the tram interface with traffic control and the process for new/temporary Traffic Regulations and its direct relationship with LB. Around this time, TEL became more active. Like TIE, TEL was another wholly owned CEC subsidiary whose (in my view somewhat vague) mandate was to supervise transport integration (i.e. bus and the separate guided busway at Broomhouse and tram). I have to say that CEC's part in selecting a procurement model appeared to be very reliant on TIE and by osmosis, as opposed to active decision. I discuss the Project governance structures chosen by CEC in more detail later in my statement.

TIE's Choice of Procurement Strategy

4.82 The procurement phase started in earnest in late 2004, once it became reasonably clear that TIE would obtain the enabling legislation, to give the promoter, CEC, statutory authority to construct, operate and maintain the tram network.

4.83 For the Project, the whole procurement was put together to fit what TIE said it required and would be competent to manage. TIE's procurement strategy was settled in the course of 2004 by a methodology involving options papers, workshops, independent expert input and options interrogation. Both CEC (sporadically and through different personnel) and Transport Scotland (as well as Partnerships UK) participated in this process. As far as I am concerned, CEC had every opportunity to input but chose to allow TIE to take decisions that were then adopted by CEC. So far as I could determine CEC was given this opportunity by TIE reporting what it was doing to the various governance bodies and by the procurement strategy being presented and discussed at TIE's Board meetings and at the Tram Project Board.

4.84 The conventional way in the UK of approaching a procurement for a tram project had been to invite the market to tender and see what potential tenderers came up with in terms of a consortium. In other words, the suppliers would form their own grouping and then tell you what their consortium roles, methodologies and pricing would be. This approach resulted in consortia coming together in rather a haphazard manner, e.g. one might get a consortium comprising an excellent civils company, a dominant tram supplier and a rather indifferent systems company. This would tend to create tensions and weaknesses within the consortium.

4.85 This approach had also resulted in serious issues of design compatibility, utilities causing cost overrun and construction programme interruption and intra-consortium troubles. One issue for TIE to overcome was sufficient market appetite for another UK tram project for which potential partners would come together (of their own accord) to bid as a joint venture or consortium for the Infraco Contract itself. Tram vehicle supply itself was not problematic since Siemens, Bombardier, Alstholm and CAF all had trams on well-known and modern operating schemes.

4.86 TIE's procurement strategy on the Project was designed to overcome these difficulties. The proposition was that TIE wanted to assemble the best qualified parties for each main role thereby delivering the best price and the best long-term value.

4.87 Ultimately, the range of procurement models - which included letting a full-blown operating concession under a DBOFM model with bank financing - fell away and TIE opted for a disaggregated DBM procurement model. This decision was taken after various quite detailed ranking and comparison exercises, both at workshops and in internal sessions. CEC staff were present at some of these sessions, I recall.

4.88 I believe that there are various TIE papers explaining to both CEC and Transport Scotland how this strategy was to work and what the key timings and risks would be. There were also several lengthy workshops on this with external input/critique from PUK, Transport Scotland (PFI / PPP government funded adviser) and other experts brought in by TIE. It was different from letting one large consortium contract, and was aimed at appointing the best of breed, rather than allowing the market to dictate how responsibilities would be divided among consortium members. As have said, I believe that this work was presented and discussed at tie Board meetings and Tram Project Board meetings.

4.89 The disaggregated DBM model chosen involved five major contracts: an early operator engagement contract ("**DPOFA**"), a design mandate ("**SDS**"), an on-street works contract ("**MUDFA**") engaging with substantial private corporations; a specialised tram vehicle supply and maintenance contract ("**Tramco**"); and a multi-part tram scheme civil engineering and tram operation control systems installation contract, with long-term infrastructure maintenance obligations ("**Infraco**").

4.90 Ultimately, TEL decided that the tram operator should be LB, not a consortium member. DLA Piper had recommended TIE set up DPOFA so as to allow TIE the flexibility of terminating Transdev's role, without Transdev becoming tram operator. However, DLA Piper played no role in LB's actual

appointment, other than competition law and procurement advice and the formal assignation of DPOFA.

4.91 The central idea of TIE's procurement strategy, was that the scheme design and utilities diversions would all be substantially complete before the Infraco Contract entered execution phase so that there was a clear sequential construction programme and a clean start on site for the main civils contractor, who would have submitted its bid on the basis of a substantially completed scheme design and being supplied with site-suitable 'Issued for Construction' ("**IFC**") drawings when he mobilised.

4.92 From the outset, TIE knew that the Infraco Contract construction pricing, programme and its risk transfer and allocations would be dependent upon various other large contracts in the Project as well as Network Rail possessions arrangements and ultimately well over forty third party agreements with commercial parties affected by tram scheme land take, construction and/or operation. And CEC knew that its role as the key design Approvals Body would be central to the timely production of design for the Infraco procurement.

4.93 With the appointment of Ian Kendall as TIE's Project Director in spring 2004 during the DPOFA procurement, I observed TIE growing as an organisation in 2005 and 2006 in order to respond to the need to launch and manage the five main procurements: DPOFA, MUDFA, SDS, Infraco, and Tram Supply and Maintenance. However, there were some important constraints:

4.93.1 There was a limit to the engineering and commercial knowledge in the UK on how best to develop and procure such light rail projects. TIE was in competition with the English tram and light rail projects for this relatively scarce senior engineering and commercial resource; and

4.93.2 I was instructed that TIE needed to be careful about recruiting resources too early and spending public money prematurely and, in an extreme situation, being attacked for pre-empting the parliamentary procedure prior to Royal Assent being granted for the enabling legislation.

4.94 The result was that for a considerable period of time, the personnel at TIE were neither experienced in dealing with contractors and large engineering and design consultancies nor well-versed in tram projects. However, in my view, Ian Kendall was a very competent, resourceful and energetic Project Director. He arrived at TIE with his own conviction that the optimal procurement strategy should put the constructor in charge of utility-cleared streets and provide the installer with a virtually complete scheme design (corresponding to the legislative limits of deviation e.g. the construction envelope), keyed into the client's output specification (as detailed in the ERs).

4.95 TIE was confident that it could manage the different major contracts involved and was attracted to the MUDFA concept after, I believe, looking at what had occurred on the Leeds Supertram project - where the estimated £80million cost of utilities diversions had been a serious contributing factor in the cancellation of the project.

4.96 TIE's procurement strategy was well defined prior to Ian Kendall's recruitment for the procurement and implementation stages in May 2004, Ian was enthusiastic about the choice of procurement model. He was very much in favour of the advance utilities works and a scheme design controlled by the client and then novated to the infrastructure contractor. He applied himself immediately to negotiating with the main Edinburgh utilities in order to secure their buy-in.

4.97 Ian was well aware of the need for firm, knowledgeable management of the proposed MUDFA and SDS contracts and, above all, the need to launch these critical early procurements. He was the first senior manager at TIE to stress to the TIE Board members and, through them, CEC that: (A) the MUDFA and SDS procurements and appointments were absolutely programme and cost critical, once the tram bills had Royal Assent and TIE and CEC had begun to make media announcements about the timing of public service opening; and (B) the Infraco Contract procurement and competitively priced, technically clear, unqualified bid returns were, in turn, deeply dependent upon MUDFA and SDS progress and quality in performance. Ian Kendall had stressed to colleagues at TIE the need to get the MUDFA and SDS procurements under way and to manage this process and the resulting contracts well and consistently.

4.98 Ian Kendall's idea was to run the competitions with firm control to get the best priced and most attractive technical proposal for the individual components i.e. tram supply/maintenance, infrastructure installation, systems design and installation, utilities diversions and scheme design. At its core was: (i) completion of a scheme design to be included in the ITN for the Infraco Contract, so that at bid-back the tenderers would be pricing scoped infrastructure with matching ERs and would be able to shorten their implementation programme with no or limited design phase and (ii) utilities diversion substantial completion before the tram civils works (Infraco) commencement. This was the absolute backbone of the main procurement and had been discussed in some detail at the various TIE workshops, both before and after Ian Kendall's arrival.

4.99 TIE was very clear indeed that it would require a very different set of personnel to manage these major contracts (as opposed to bill promotion phase objector management), the output from which was central to Infraco procurement price and programme certainty. In subsequent sections I discuss why, in my view, TIE failed to deliver on its procurement strategy.

4.100 Ian Kendall drove this forward as a concept, including the appointment of PB as designer under the SDS Contract, but, at his own admission to me privately, lacked a TIE team that could carry their responsibilities alongside him at the required speed and was very frustrated about TIE management's views on this. He told me that he was increasingly vocal in TIE about not having the right personnel for the procurements and about continuing resistance to commencing the major procurements early enough. I believe this was one reason why his relationships with TIE management executives became strained.

4.101 The exact dates now escape me – certainly relatively soon after DPOFA award and then leading up to Royal Assent for the two bills – I recall Ian Kendall mentioning that he had had a series of discussions with TIE management covering his views on how the MUDFA, SDS and Infraco

procurements, with design novation and a separate tram supply procurement, would interlock and drive out a better construction and installation programme and more transparent pricing.

4.102 I knew from discussion with Ian Kendall that part of his motivation for these management level discussions was to help overcome the resistance he told me he was experiencing in being given full authority to recruit personnel and for TIE to launch these major procurements. He was very keen for DLA Piper's work on the ITNs and contract suites to be visible and moving forward, in tune with his efforts within TIE as Project Director. He was also focused on TIE management and then CEC – through their formal meetings - being made directly aware of the advantage of telling potential bidder groups (by means of the EU procurement regulations PIN mechanic and informal briefings) that TIE was well down the road towards letting the major advance works contracts, MUDFA and SDS. Integral to this was the development of the two other major contract ITNs: Tramco and Infraco.

4.103 Following the successful DPOFA contract award on 14th May 2004, TIE (Graeme Bissett) told me that they might wish to re-compete all the advisory mandates, effectively this included appointments of: PWC, Faber Maunsell, Mott MacDonald and DLA Piper. My impression at the time was that this was because CEC, not TIE, wanted this. I saw no sense in DLA Piper being made to re-tender at all after only one procurement had been completed, and said so, and I wrote and presented a short but comprehensive written paper to TIE on the advantages of retaining us. So far as DLA Piper's mandate for the Project procurements was concerned, the matter was dropped and never raised again by TIE.

4.104 The MUDFA and SDS procurements took place in 2005 and 2006, followed by TSS and the preparation and then issue of the Infraco ITN in late September/early October 2006. I consider these in the relevant sections of my statement.

The Benefits of this Procurement Model

4.105 Since the approach was a hybrid Infraco Contract, the major benefits, which ought to have flowed, were:

4.105.1 the Infraco Contract suite released at ITN was interlocking with both MUDFA and SDS, as well as the tram supply and maintenance and DPOFA contracts. Hence, if these two major contracts had been engineered and administered correctly, the contractual control by TIE of MUDFA and SDS (up to the point of novation) would have presented the 'clear playing field' for the Infraco that, in turn, the procurement strategy had been intended to deliver:

4.105.2 clarity of pricing, risk management and allocation, construction programme (and its critical path) for on and off street works and a set of tram and control systems testing and safety certification regimes leading to a firm PSCD;

4.105.3 because of the high degree of interest that CEC Planning had in imposing its views on the compatibility of the SDS design with CEC's aspirational view of how the tram

infrastructure would fit into its City Public Realm and Tram Design Manual concepts, control of the design to deliver the ERs was important to CEC. This could not be readily achieved by a traditional design and build procurement without considerable uncertainty about the amount of time needed within the constructor's programme for this. For example: CEC City Development presented a paper to the Tram Project Board on 23rd January 2008 regarding £4.5 million improvements to St Andrew's Square, using funding for Public Realm works. CEC had retained a different arm of PB to produce a design for this and wanted TIE to discuss with BBS – three months after BAFO – inclusion of these works in the Infraco Contract works and a possible novation of this design to BSC;

4.105.4 Familiarity of the bidding parties' commercial management and their advisers with ICE design and construct forms as well as HM Treasury SoPC3 (2004) and the light rail schemes I mention. Hence an expected efficiency in contract terms negotiations.

4.106 The fact that these benefits were not delivered had very little indeed to do with choosing standard contractual terms or non-bespoke drafting for the contracts and everything to do with TIE and CEC's flawed approach to the pre-Close and post-Close phases of each of the MUDFA, SDS Provider and Infraco Contracts. By contrast: I do not recall a single ITN phase difficulty or post award claim or dispute under DPOFA - a contract tailored specifically for TIE's procurement strategy for which the ITN preparation, contract drafting and bidder negotiations were handled by the same DLA Piper team instructed by Ian Kendall, newly appointed at TIE – and subsequently managed by Alastair Richards of TEL.

Advice to TIE on the procurement strategy

4.107 In 2003 and 2004, DLA Piper's advice was given to TIE senior management (since at this point TIE had no Tram Project Director with procurement responsibility) in the form of reports, workshops and oral discussion. We see, for example, the TIE Procurement Report (CEC01880646) produced in June 2004 for Transport Scotland which identifies the considerations TIE had uppermost in its mind when selecting a procurement approach and what the interim recommendations were as to the type of contract required to match the preferred procurement model – at that point one of which contemplated the use of external funding. I regarded this process, and still regard it, as entirely normal for a project of this kind as did TIE and other experienced participants in the workshops. This was a TIE report which I believe used parts of DLA Piper workshop papers and representations, well as TIE's other consultants' input to explain the procurement model selection process that TIE was adopting.

4.108 In addition, it would be normal in my experience for a public sector client to be taking advice from engineering consultants on its favoured procurement model. TIE had no engineering consultants appointed in that role. Mott McDonald and Faber Maunsell were retained solely for their advice regarding engineering matters on the Bills promotion and also with regard to the preparation of the parliamentary drawings showing the formal and statutory Limits of Deviation for the tram scheme. I mention later at para 7.410 Ian Kendall's use of these two highly experienced consultancies to

assist in building up working drafts of the Infraco Contract ERs but that was the extent of their input. This engagement was in fact sometime after TIE had already chosen its procurement model and contract forms.

Market Discussions Prior to ITN Stage

4.109 I had accompanied Ian Kendall in his efforts to "warm up the market" before the Infraco ITN was sent out. TIE needed to be careful from a procurement point of view not to be seen to be making public statements about major contract award processes and pre-empting parliamentary authority. We talked informally to different contractors about the proposed contracts structure, to assess their interest in bidding, and to explain in outline how TIE would run the procurement. Some said they were not interested in tram schemes as they were too risk-prone and the Westminster government had set itself against them. Some were somewhat sceptical about TIE's proposed structure but said they would consider bidding if they could assemble a consortium. Some said it would be refreshing, as utilities would be out of the way. We were asking whether they would put together a consortium and, if so, who with.

4.110 Two Infraco bidders emerged who were serious: Bilfinger Berger Siemens ("**BBS**") and Tramlines. I recollect Tramlines comprised Laing O'Rourke, Grantrail and Bombardier (who would have delivered the tram fleet and control systems).

4.111 This exercise gave TIE – and I assume CEC – some confidence that there were still contractors who would consider tendering and forming consortia. The junior partners – the tram suppliers – were always very interested but the issue was always the combination of tram infrastructure constructor (civils) and systems provider (signalling, control and overhead supply). There was only a handful of companies and suppliers that had worked together successfully in the UK.

TIE's choice of contracts

4.112 The procurement strategy required putting the separate contracts together. The contractual provisions used were in very great part standard form and therefore market-tested (and devis through lessons learnt in the UK domestic and international construction and PFI/PPP market place) and in very limited part bespoke drafting to deal with novations to the main contractor.

4.113 I have essentially been asked by the Inquiry's Question 20 to comment on the proposition that "*if you do not use a standard form contract there is a risk that certain provisions in it might not work*". I agree with the Inquiry's proposition that bespoke drafting placed in a contract may not have been tested in a formal DRP process. But that does not of itself mean it will not work and the reason for tailored provisions appearing in a contract may be that they have been heavily negotiated between the parties involved.

4.114 In my experience as a lawyer advising in the civil engineering sector, any engineering proposition of the size of the Project would require provisions that are bespoke drafted. Bespoke drafting was required so that the contracts reflected the commercial position and technical agreements the parties actually came to.

4.115 It is axiomatic that there was and is no "off-the-shelf" standard form of engineering contract which covers a consortium-delivered DBM procurement model - as was ultimately the Infraco Contract that was let, with the tram supplier and maintainer and the scheme designer being novated to the EPC contractor, tram supply and systems delivery consortium. This is what TIE chose as its preferred EPC and long-term system maintenance and tram operator arrangements.

4.116 The contractual structure was intentionally tested under EU Prior Information Notices in the procurement process and informally with the contracting market. The reaction to MUDFA was extremely positive. The market thought it was a good idea and liked the novation of the design, if it was a good design and it was on time. TIE debated the issues again before choosing the procurement methodology in the contracts.

4.117 The Infraco Contract drafting for the document released with the ITN relied considerably on HM Treasury SoPC3 (2004) model language and the relevant guidance. This can be very easily verified by looking at definitions and a sample of the provisions used. For example: a variety of stock definitions are used e.g., Force Majeure, Qualifying Change in Law and Termination, as well as the provisions which use those defined terms. Since the urban light rail schemes for both NET and Croydon had been projects using external funding, provisions drawn from those projects were based on SoPC3. Indeed, Pinsent Masons - acting for BB on the ETN – had acted for the Croydon concessionaire – were familiar with these contracts, as was DLA Piper.

4.118 I would observe that contract drafting in the project finance and major public sector infrastructure schemes necessarily does not always rely upon language that has been tested in disputes. If it did, a significant range of recommended contractual drafting for documentation that emerged as standard form HM Treasury SoPC3 (and continual revisions) could never have been generated. The point of that standardisation was to progressively eliminate provisions or language that any one participant could find objectionable or ambivalent. SoPC3 resulted from detailed consultations with the community of experienced parties: public sector procuring authorities, government advisors, contractors, suppliers, financiers, insurers and technical, financial and legal professionals involved in the PFI/PPP market.

4.119 Elements of the proposed Leeds Supertram, SHRT and actual NET and Croydon light rail scheme contracts were used, as well as elements of standard forms for major project turnkey EPC contracts. This was in part due to my familiarity with these international standard forms from working both in Hong Kong and at the World Bank: I recall also discussing the use of FIDIC Silver Book, FIDIC Yellow Book and FIDIC Red Book (which TIE did not favour because TIE wished to engineer the contract itself) as well as ICE 6th and 7th editions Design and Construct. There was brief consideration by TIE in 2004/5 about the Project seeking commercial funding, for which the FIDIC Pink Book might have been suitable. This is why provision for a funders' Direct Agreement appears in the SDS Contract at Clause 29.7 - which was not deployed ultimately, of course. I recall also discussing with TIE in particular the use of FIDIC Silver and FIDIC Red Book, both of which are suitable for major infrastructure schemes.

4.120 I think it is important to make clear that the level of bespoke drafting contained in the Infraco Contract issued at ITN and indeed when it was signed after a prolonged period of bidder and preferred bidder negotiations that lasted from April 2007 until May 2008 was normal for a project of this nature and its underlying procurement plan and long-term obligations.

4.121 Ultimately the decision on the contracts that went out with the ITN lay with TIE. Ian Kendall, as Project Director, directed us and instructed us in relation to how TIE wanted to have the main procurement contracts set up: SDS, TSS, Infraco and Tramco. One of the best stress tests for a scheme of repeated contractual obligations is for a draftsman to put it into an earlier contract for use. I am not aware of anything in either the SDS contract or the MUDFA contract that caused anybody to say to DLA Piper "this contract has deficiencies in it in terms of client-side use". The contracts – which TIE had vetted – had what they needed in them in terms of client leverage and controls.

4.122 I would also remark here that in February 2010 CEC instructed Dundas & Wilson to report on the Infraco Contract termination and variation provisions. That report is CEC00551307. There is nothing in that report (written, I believe, by a senior construction and projects lawyer) that alights on any perceived difficulty or ambiguity in the language of the drafting. I recall discussing this report and its findings at the time with Nick Smith of CEC Legal.

4.123 **Inquiry Question 19**

4.124 I have answered much of Inquiry Question 19 above at paras 4.112 *et seq*. The question also refers to two emails (TIE00057545 and CEC01857004) on 21st and 24th October 2005 both of which refer to a DLA advice paper to TIE. It is put to me that "*there is no version of either e-mail with the attachment*". I am confused by this statement but will do my best to answer.

4.125 Firstly, this set of e-mails has nothing to do with the Project, they relate to the EARL project. Nevertheless, it is instructive to me to remember and see here that on central issues in the EARL project, TIE's Project Directorate retained and used a set of independent advisers to cover the full range of financial, engineering, technical, geotechnical and legal advice for the Project. TIE Project Directorate clearly had very different views on what external advisers were required (and how they should be instructed) to support TIE's chosen tram scheme procurement delivery plan.

4.126 In relation to TIE00057545: Mark Bourke was TIE's Risk Manager. From time to time, he would request input from DLA Piper on high level project risk, which he believed had a legal or contractual component that touched on procurement or implementation. Sometimes, this would be orally or in periodic meetings on risks emerging from the Bills promotion process. But DLA Piper was not advising TIE on the Bills Promotion –Dundas & Wilson and Bircham Dyson Bell were. The TIE Risk Register at this time was a high level document. But this particular email concerns the EARL project.

4.127 Regarding CEC01857004: This is an email to me from Graham Nicol, a graduate assisting Mark Bourke and so a junior member of TIE's EARL team. Graham reports a number of questions for

discussion at the next session in about 10 days' time. There is indeed mention of a DLA Piper paper on the use of bespoke contracts and it refers in that same sentence to the EARL. And so, again, the email does not in fact have anything to do with the Project. In any event, by 21st October 2005 (the date of this email), TIE had already engaged SDS under contract and was planning to go to market for MUDFA.

4.128 The Inquiry's question 19 also mentions my email (CEC01780708) to Scott Prentice on 1 November 2005. Scott was TIE's deputy project manager for the £600 million EARL project bill promotion phase. I sent this email and copied it to Susan Clark, TIE's Project Director, and to TIE's financial adviser for EARL, PWC (Tony Rose). Again, this e-mail has nothing to do with the Project.

4.129 **Sub-Contracts**

4.130 I have answered the Inquiry's question 20 regarding the risks of using bespoke contracts above.[9] The question also asks about the email dated 7 August 2008, copied to me by Jonathan Gaskell (CEC00593053). Jonathan Gaskell was a construction and engineering department assistant who was advising Dennis Murray (Infraco contract manager) of TIE about a subcontract form that had been put forward by Tom Murray of BBS, in order to satisfy a requirement under the Infraco Contract that protected TIE's right as client to review subcontracts that were going to be put in place by the Infraco. The whole concept behind the Infraco contract was an output specification for a tram scheme to be delivered by Infraco: a main contractor with prime subcontractors and key specialist contractors.

4.131 Question 20 also asks about the use of standard form sub-contracts. The decision about Infraco subcontractor contract type and forms was not controlled by TIE and nor, in my experience, would it usually be prudent for the employer to do so under any DBM contract. This is for good reason: an employer (TIE) insisting on dictating the form of subcontract to be used by its turnkey main contractor would immediately be at risk of adverse pricing since the turnkey main contractor would simply pass through the cost of any protective commercial/financial reaction of a subcontractor to the client's subcontract choice. If you tell a contractor "build me a tram scheme to this output specification, so it has to run in 28 minutes to the airport, it has to be noiseless, it has to not make sparks on the overhead catenaries, it must carry bicycles, it must not have a land take exceeding this limit, the trams must go around a corner in this kinematic envelope" and you also tell him "I want you to use these subcontracts", you will find that the contractor will quote back to you the price that he is getting from the subcontractors on the terms that you have imposed, instead of innovating and driving out the best subcontract price he can with his own terms. That process and outcome would run contrary to the concept of an output specification (i.e. Employers' Requirements) whereby it is up to the Contractor to deliver the desired outputs. With Employers' Requirements being delivered by Infraco Proposals, the employer would typically require the right to see and approve key prime subcontracts and to be given a collateral warranty. TIE held both these rights.

[9] Paragraph 4.112 *et seq*

4.132 The real control (beyond the Infraco Contract itself) to protect TIE's interests (as regards subcontracts) as client was the requirement in the Infraco Contract for the Infraco to provide collateral warranties for TIE from all key subcontractors. If the Infraco fails in some way so that the primary contractual obligation cannot be enforced against it, you can enforce against the subcontractor directly on his warranty.

4.133 I discuss later the importance of BBS sub-contractors, including how the incomplete SDS design impacted upon BBS' ability to commit to anything other than an indicative price.[10]

4.134 As the Infraco negotiations progressed, I kept saying to TIE that we wanted BBS to show us the sub-contractors' terms and get collateral warranties committed from them, in particular those nominated subcontractors who were going to be carrying out specialised work – as the Infraco Contract provided in standard fashion for a turnkey EPC under DBM basis. I had anticipated that BBS would use specialised sub-contractors, especially for laying tracks and stringing the lines. I pointed this out to TIE on numerous occasions, including in April 2008 less than a month before TIE's desired Infraco Contract close date when I established - through pressing BBS's lawyer(that there was only one prime subcontractor, BAM, actually under contract (in fact to Siemens) as a systems installation and erection specialist. All others were either not engaged or under basic letters of intent, which meant their pricing was not committed.

4.135 I tried to force the issue because the Infraco Contract sent out at ITN in October 2006 had an express requirement on BBS to get sub-contractors to sign warranties. I had not received any comment on those draft warranties, so I chased up Suzanne Moir at Pinsent Masons. She revealed that BB did not have any sub-contractors. I pressed and got TIE's instructions to break off discussions at that point, in April 2008, to show BBS that TIE was not impressed. TIE got temporarily hot under the collar, primarily because BBS mobilisation capacity was in great doubt if there were no subcontractors committed and projected Close was less than a month away. With no-one in the local Scottish contracting market to estimate cost-based committed supply, the entire BBS Infraco Proposals at BAFO had been indicative and had never been intended to be firm.

4.136 **Inquiry Question 21**

4.137 I note that in the document entitled 'Notes of Meeting' dated 18 February 2005, Tom Blackhall of TIE referred to the MUDFA contract and said that if the contract was not bespoke, he would like to use the NEC or ICE forms (CEC01853909). I note that this was discussed again in the Attendance Note dated 25 February 2005 (CEC01854993). These notes were written up by colleagues at DLA Piper and I do not dispute their content. I note the attendees at the meetings described in the file notes. Keith Bishop was a partner at DLA. Colin Cleland was a senior associate in the DLA construction engineering unit. These meetings were really about us following through with Tom Blackhall and supporting him in the exercise he was doing to get the utilities companies to play ball with the concept of the MUDFA works under one roof.

[10] Paragraph 7.133.1

4.138 One of the meetings, which is the second document, I did not attend so I cannot comment on what was being said. The meetings were in the context of TIE thinking about what type of contract or what type of arrangements were going to be used in order to make sure that the utilities companies were properly corralled for MUDFA. In particular, the second note is talking about what type of contractor the utilities companies might be content with. The utilities company that Tom Blackhall at TIE had been talking to had views about who might be a suitable contractor to carry out the utilities diversions works on their apparatus, but that could well have simply been the contractor responsible for reconnection work after the main diversionary civil work was completed. Clearly the names listed: Balfour Beatty, McAlpine, Amey and R J McLeod, might have emerged as bidders to TIE for the MUDFA contract.

4.139 The fact that Tom Blackhall, at this point, is talking about his preference for what form of contract might be used needs to be put into proper context. Tom was a member of TIE's procurement management team. I believe he left the Project in mid-2005. He was answerable to Ian Kendall. We already had instructions from TIE as to how we would be approaching the preparation of the MUDFA contract. It was not particularly instructive or useful for Tom Blackhall to be telling us what form of contract he might like or what form of contract might be acceptable to the utilities companies. The utilities companies were going to be under third party agreements and would already have signed up to the concept of one contractor being responsible for all utilities diversionary works. Tom was talking to the utilities companies and explaining to them the MUDFA concept, i.e. one main contractor carrying out all the utilities diversionary works.[11] I consider therefore that he was essentially feeding back the utilities companies' comments - because they did not necessarily want to sign up to or understand MUDFA at that point and were stating whom they thought were suitable types of contractors for the work concerning their utilities apparatus and what type of standard engineering contract they themselves used.

4.140 I have been asked "what consideration was given to the use of NEC and ICE forms?" What I can say is that the MUDFA contract was already in preparation at that point. That was being prepared following instruction from Tom Blackhall's boss, Ian Kendall. When the MUDFA works were taken from AMIS / Carillion and re-let, it was in the form of a NEC contract. I do not know why there had been a change of heart as to the form of contract to be used. The MUDFA contract, and the passing and transfer of the MUDFA works to Carillion from AMIS, was dealt with by Sharon Fitzgerald. Over 11 years later, I am no longer familiar with the detail of what happened in those contractual negotiations. I have no doubt that I talked to Sharon about this at the time, but I do not remember what was discussed.

4.141 I do not recall any disputes arising under MUDFA where TIE questioned DLA Piper if the contractual strength of their position was somehow disadvantaged by the MUDFA contract.

[11] See paragraphs 4.91 *et seq* and 6.11 for full discussion of the MUDFA concept

4.142 **Inquiry's Question 27**

4.143 I am asked about my concerns behind an email that I sent on 10 December 2003 stating that "CEC must let go and give TIE the freedom to manage the procurement. Looking over TIE's shoulder and intervening whenever it suits will seriously damage TIE credibility as the DPOFA procurement manager and contract partner" (CEC01873322). My concern by this time, some 11 months into DLA Piper's mandate for TIE, was that CEC had demonstrated clearly that it was ambivalent about the extent of control it wished to have over TIE as its Project delivery agent and tram major procurements manager.

4.144 In this email, I was reflecting on what Michael Howell, TIE's CEO, had already told me: CEC appeared to want to outwardly devolve responsibility for the Project to TIE and yet operated a style of input/oversight (from my perspective unpredictable) that undermined TIE's ability to present itself, and function, as the fully empowered Project management entity. Expressed simply: if CEC wanted to use TIE properly to run a credible process, it had to allow TIE full freedom to act using its professional competencies, and avoid unhelpfully ambushing TIE with urgent requests to revi matters that had been already debated at length.

4.145 The email I am referred to is quite helpful in the sense that it gives a context. I state "Met with Michael H briefly who accepts the advice the Farebox risk is fundamental. He made contact with Ewan Brown who agrees. Also called Andrew Holmes but not available." This email is to James Papps (of PUK, one of TIE's advisors), John Watt (partner at Grant Thornton), Andrew Jones (a DLA Piper associate who was helping with the procurement strategy at that point) and Sharon Fitzgerald. This was concerning an intervention by letter from CEC, I believe that the CEC letter was written by Keith Rimmer (Head of the Transport Department). That is why I was attempting to speak to Andrew Holmes, who was more senior.

4.146 CEC's intervention here – during TIE's first contact with the contracting market - was to state in a letter from the CEC Head of Transport to TIE that they wished the DPOFA contractor (essentially a flexible consultancy appointment with a discretionary option for TIE to award an operator contract) to agree from the outset to take full fare box risk on the tram scheme, meaning their remunerati would depend solely on the ticket revenue. This was commercially a complete non-starter and would have caused a serious question mark to arise regarding whether CEC/TIE actually understood their own DPOFA concept. The DPOFA procurement had been presented to CEC sometime before this and was already in the market and three serious contenders had formally expressed interest: First Group, Transdev and Keolis. CEC were persuaded, after several discussions, to drop the issue. I recall that Grant Thornton (supervising partner John Watt), TIE's financial adviser at this point, met separately with CEC Transport and possibly CEC City Development to explain that the CEC requirement about fare box risk transfer was not realistic, not consistent with the procurements and not market–aligned. Doing what CEC appeared to be suggesting would have been suicide for that procurement. That was what I was concerned about: it would have damaged TIE's credibility badly and might very well have resulted in no bidders responding. Eventually, CEC did drop the issue, but with reservations.

4.147 **Inquiry Question 24**

4.148 I have been asked in Question 24 to comment on the view that I held when drafting the Infraco Contract on the extent to which the design would be complete at three different stages: (a) initial bids (b) BAFO and (c) when the contract was awarded. I also comment on this matter above.[12] I respond here as follows.

4.149 My view was conditioned by TIE's client's instructions, which were that the Infraco suite was to be prepared in line with TIE's procurement strategy. For limb (a) of the question, under the SDS contract, the SDS design would be substantially complete by Q2, 2007. Therefore by definition, the SDS was to be substantially complete by the time stated in the ITN for submission of the Infraco initial bids. As to limb (b), under the ITN, I believe that BAFO bids were approximately three months after initial bids: the expected timing for completion of SDS Design by autumn 2007 appears in the Outline Design Delivery Programme contained in the SDS contract prepared by PB at tender stage and adopted by TIE as the initial contractual design production programme. Consequently, when preparing the Infraco ITN and draft contract in 2006, my view was that SDS design should be at a further stage of refinement at BAFO than at ITN issue. As to limb (c) of the question: at Infraco Contract award, my view at the time of drafting the Infraco Contract suite was obviously that the SDS design would be virtually complete (i.e. ready with its relevant consents to move to Issued for Construction stage) and that is why the draft SDS novation agreement was prepared as it was. Nor was DLA Piper instructed to prepare an ITN or contract suite on the basis that SDS design would be provided piecemeal, ending in the BDDI concept[13].

4.150 It was central to TIE's procurement strategy and risk transfer that SDS should have progressed their design through the CEC design approval process to a state where it was ready for the Infraco ITN issue and ultimately for SDS novation to the main contractor. PB knew this from the moment they bid for the design commission in 2005.

4.151 In the same question, I have also been asked to comment on the extent to which MUDFA works were intended to be complete by the time of Infraco contract award. On TIE's instruction, the Infraco Contract suite issued with the ITN was prepared on the basis that the MUDFA works would be, at the very least, sufficiently advanced to permit the Infraco to mobilise and have proper meaningful sequential access to site e.g. substantial areas of on-street city centre site available for tram track, street furniture and overhead equipment installation gangs to operate efficiently. It was also intended that MUDFA works would proceed to deliver more 'clean' on street sites as Infraco's construction programme progressed. It was essential to have efficient working. The idea of producing utilities diversions in a sequential, connected manner was extremely important to get the contractor to produce a construction programme and identify the critical path activities. At the very least, the strategy needed to deliver a utilities-free on street site through MUDFA's work where BBS would be able to mobilise and work. When the ITNs went out, the bidders were instructed that that the MUDFA works would be "substantially complete", by the time that Infraco would be mobilising, that is, shortly after contract signature on any normal construction contract.

[12] paragraphs 5.82 *et seq.*
[13] As ultimately occurred – see paragraphs 7.28 and 7.199.2

4.152 None of the above happened in practice. I discuss what I consider to be the reasons for this in the relevant sections of my statement.

4.153 **Final Business Case**

4.154 I am asked in Question 26 what involvement I, or others at DLA Piper, had in the preparation of the Draft Final Business Case and Final Business Case where it narrated procurement strategy. Neither the Draft Final Business Case nor the Final Business Case were DLA's responsibility. Nobody at TIE regarded them as DLA's responsibility. Periodically I was asked to comment by TIE on discrete sections within the document. I did not and do not regard that as providing advice. The document appeared to be generated in multiple iterations which came at various times and I was not necessarily told why a revised iteration had been produced. My assumption was that TIE were reporting to TS, showing what progress had been made or where they were in the preparation of the document. I understood that the approval of the Final Business Case had to be before, or simultaneous with, full CEC Council approval. The two things went together. They were the two funders who approved the Project and committed public funding at the same time. My interest knowing this was not because I was advising TIE or CEC about the funding arrangements, but because I needed to be in a position to explain the basic process cogently to BBS legal advisers, if asked – bearing in mind that neither TIE nor CEC had sufficient funding themselves for the Project.

4.155 **KPMG Queries (Inquiry Question 28)**

4.156 I recall that KPMG had been retained by TS to advise the Scottish Ministers. I am asked in Question 28 about TIE's responses given to a set of KPMG queries in documents CEC01882678, CEC01882679 and CEC1882680.

CEC1882680 should be CEC01882680

4.157 Any such answers would have been compiled by the various personnel with responsibility within TIE and any consultants who were helping TIE. Those questions would have been divvied up between the parties to provide a composite answer on behalf of TIE and it would have gone out as a response to KPMG from TIE as the procuring party. I note that Clement Walsh and James Papps from PwC and PUK respectively are included on the distribution list to Stewart McGarrity's email 9 May 2005 (CEC01882678).[14] I also note the TIE recipients but beyond that am neither able to recall now if I was told who at TIE co-ordinated a response to KPMG nor if I saw that composite response.

4.158 I note that Julian Ware of KPMG is asking the questions in his email on the same chain dated 6 May 2005 where he says, "I do not intend to discuss all of the questions in detail on Thursday. For instance, I know that PwC are already likely to cover points 1, 2 and 4 in the revised report. There may be others where the issues are well understood – and where we do not need to rehearse the arguments at this stage." In other words, it is a preliminary set of questions for him, working into writing a report to the Scottish Ministers. I suspect that following this meeting there would have been a paper answering the questions, as I say above.

[14] I discuss PUK's role at paragraph 4.74 and PWC's role at paragraphs 3.8 and 10.62 *et seq*

4.159 I have no clear recollection of being instructed by TIE to deal with legal aspects arising from this set of inquiries from KPMG. I believe TIE had already produced its substantive procurement strategy report in 2004[15] with input from DLA Piper and other advisers – PWC (and possibly their predecessors Grant Thornton) and I believe, Mott MacDonald and Faber Maunsell, as well as Partnerships UK. I do recall one, if not, two meetings attended by Julian Ware, the KPMG PFI/PPP specialist, and that various of the queries he had raised were in fact discussed and dealt with in those meetings, as opposed to by written reports. That memory is consistent with what he said in his email as quoted above.

4.160 It is not possible for me to recall at present who at TIE co-ordinated a response to the KPMG question about lessons learnt from the Holyrood Inquiry. Ian Kendall was at that time the newly appointed Project Director and I believe that Stewart McGarrity was the owner of the relationship with Transport Scotland.

4.161 It is clear that Julian Ware expected there to be answers forthcoming. He seems to be saying in his email responding to Stewart McGarrity on 6 May 2005, that at least one of TIE's consultants, PWC, were going to cover what he is asking in a revised report. That indicates to me that there was already a substantive document on the table describing TIE's procurement strategy. We were in May 2005. DPOFA had been in position for a year. We were probably at this point into MUDFA ITN issue. The Project was moving and the procurements were happening. It may very well be that the answers were all provided as a result of the meeting referred to in the email that was scheduled at DLA's offices for two hours on Thursday 12 May, with Julian Ware in attendance.

4.162 So far as KPMG's fourth question is concerned, I was aware of the Holyrood Inquiry's findings, having read them when published, and I was also equally aware of the National Audit Office's ("**NAO**")'s report on light rail schemes which had been discussed within the DLA Piper Transport Group at the time. I know that we would have taken both of those documents into serious consideration when advising TIE. I have no recollection of ever being instructed by TIE to provide DLA Piper's thoughts on legal aspects of the Holyrood Inquiry 'lessons learned', though I had read and absorbed its findings. That project was essentially the construction of a building on a defined site, with the works being controlled by a managing contractor. It was not a project that required enabling legislation (so far as I am aware) nor did it have a single purpose project management company in charge of its procurement and execution phases - combining civil engineering, infrastructure design, rolling stock procurement and operation, alongside sophisticated tram vehicle and road traffic control systems, as well as interface with road vehicles and other road users. In my view, a comparison on procurement techniques and contractual structure between the Project and the Holyrood project is of very limited value. What was of the essence for both projects was firm, competent and objective project and contract management.

4.163 The answer to the sixth KPMG question is that, on DLA Piper's advice, bidders for the SDS mandate were formally prequalified under EU procedure (PIN notice, interested party information sessions, informal market sounding, and a well-constructed OJEU Notice) to ensure a strong

[15] Referred to at paragraph 4.107

stable of contenders and were told in the SDS ITN that they would require to provide TIE with creditworthy performance securities (bondsmen rated Standard & Poors or Fitch at AA- or Moody's at Aa3 or better) to TIE. Issue the draft SDS Contract, Collateral Warranty, PCG and draft Novation Agreement with the ITN and give tenderers sight of a draft Infraco Contract. At SDS contract signature therefore, TIE obtained an on-demand multiple call performance/retention bond for £500,000 and a PCG from PB Group in the US. The SDS Contract required SDS to novate (Clause 29, SDS Contract). Refusal to novate was a material breach of contract entitling TIE to call on either the performance bond (in whole or in part) or on the PCG or both. In the event, and for reasons I had difficulty understanding, TIE did not use either sanction, in spite of repeated and clear DLA Piper advice to at least threaten this. I discuss TIE's approach to the SDS novation below.[16]

5 SCHEME DESIGN

5.1 Overview

5.2 TIE took the key procurement decision to procure and award a separate scheme design contract. DLA Piper drafted the ITN for the SDS procurement under instruction from TIE's Project Director, Ian Kendall and with technical and commercial input from Kendall's team. DLA Piper was instructed to prepare the full ITN suite and draft contractual documentation. This was then populated by TIE with the scope of the mandate and financial, technical and commercial requirements against which bidders would tender. My own role in this task was largely supervisory and consultative. Sharon Fitzgerald prepared the documentation under close instruction from Ian Kendall.

5.3 I wish to make it quite clear that DLA Piper had no responsibility whatsoever for managing the SDS contract once awarded which was a commercial and technical specialist function and a core responsibility for TIE as Project delivery agent.

5.4 OJEU Notice – Inquiry Question 29

5.5 I am asked in Question 29 (b) about the extent to which the SDS ITN identified the level of design completion required pre and post-novation. I have discussed TIE's procurement strategy in this regard above.[17] The SDS ITN identified which design required to be completed at the point of novation. It did not identify the aspects of the design which would be completed by or on behalf of the Infraco contractor post-novation, since TIE did not know the technical answer to that question at the point of letting the SDS Contract. It does not make great sense at all to discuss what aspects of design would be completed by or on behalf of the Infraco contract post-novation. Post-novation, SDS and Infraco are essentially one party. SDS became a sub-contractor of Infraco. There was a minor subtlety which related to utilities diversions. There was a school of thought that there could be some saving by leaving very minor utilities diversions until there was clarity and a precise IFC

[16] Paragraph 5.193 *et seq*
[17] Paragraphs 4.91 *et seq* also discussed later at 4.151 *et seq*

design for,where the tram stop was; e.g. perhaps diversion would prove unnecessary because of the placement of a tram stop and its furniture. However, that is a point of detail.

5.6 The exact state of design at a particular point is a technical issue, not a legal issue. There was to be a design programme and a master programme and there appear to have been some difficulties in TIE's initial approach to demanding this and agreeing it with SDS: there were difficulties with getting SDS to comply with their obligation to produce their detailed programmes within 30 days of the award of the contract and so TIE adopted the programme submitted at bid return without insisting this should be fleshed out immediately.[18]

5.7 I am referred in Question 29 (c) to CEC01861755 which is a draft document with mark-up relating to the OJEU notice entitled "OJEU proposed for Dec 2004". I am asked to explain my understanding of the passage in the document which states: "*It was TIE's intention that any residual design risk to be passed onto Infraco, was only that which could be managed effectively by Infraco on TIE's behalf*". I would need to see all documentation surrounding this OJEU notice draft; its wording appears confused.

5.8 I am not sure what that sentence means and it is obvious that this document was a draft superseded almost certainly by another draft and eventually by the ITN in any case.

5.9 I would be speculating if I commented on this document, because it was not prepared by DLA Piper. The document appears to have been marked up/produced by TIE and is a discussion draft with strike-outs and amends. I am uncertain now, over 12 years on, if I saw it at the time. My best guess now is that Paul Harrison produced this document. Paul was, for a short period, a member of Ian Kendall's team at TIE. At this point, he was responsible for managing the beginnings of the SDS official notification in the OJEU.

5.10 If I had seen this document at the time, I would have concluded that the draftsman had misunderstood how the novation of SDS was planned to operate. There are a number of things in this document which suggest to me that Paul Harrison was unclear as to what the procurement strategy was. I do not know why he was unclear about this. All I can say is that, similar to Tom Blackhall, he was reporting to Ian Kendall. Ian Kendall had given DLA Piper very explicit instructions and understood fully the procurement strategy.

5.11 The document seems to set out what SDS's remit was going to be. It appears to discuss Invitation to Tender for SDS and Invitation to Tender for TSS. Once SDS was novated, TSS would step in as TIE's Infraco contract execution phase engineering resource. That did not ultimately happen the way Ian Kendall had envisaged it or TIE's procurement strategy had planned. The procurement strategy required the Infraco to manage a novated designer, SDS, having priced, programmed and scoped its tender for the entire Infraco works against ERs and a substantially complete and approved SDS scheme design. Infraco would instruct SDS regarding production of any remaining design and would take overall constructability responsibility and design production management responsibility.

[18] See paragraphs 5.28 - 5.29

5.12 There is reference to a connection with the parliamentary process, which is also incorrect. I do not believe that this is in fact the OJEU text that was ever used by DLA Piper or issued by TIE.

5.13 The ITN itself is the document that sets out what SDS's remit was to be. The cover email talks about TIE wishing to issue an OJEU Notice and go ahead with SDS, but to wait on TSS. These documents do not really go together. This draft is for a preliminary notification of a procurement that is going to take place, not a full ITN or ITT. The OJEU notice is usually relatively light touch in terms of specifics. Tenderers respond and bid to an ITN or ITT. There is a big distinction: the OJEU notice puts them on notice of where to get tender documentation from, whereas an ITN is very specific. This was the particular type of procurement process which was chosen for those contracts. It allowed more scope to have discussions with tenderers at a later stage.

5.14 The definitive SDS Contract OJEU Notice 2004/S252217951 was in fact issued by DLA Piper using the electronic SIMAP OJEU system on 28th December 2004 - on direct telephone instructions from Ian Kendall, TIE's Project Director.

5.15 **The SDS Contract – Inquiry Question 30**

5.16 I am asked for my views on a variety of points, and for my confirmation about various facts, surrounding the SDS Contract and its provisions. In order to answer this question to the best of my ability and recollections, I have read in depth back into the SDS Contract, a 400 page document, (CEC00839054) signed by the parties in September 2005. It was the second major contract within TIE's procurement strategy to be let (after the DPOFA awarded to Transdev) and DLA Piper's involvement in its preparation began in 2004.

5.17 After issue of the ITN, TIE instructed DLA Piper to handle the bidder clarifications process and to police the ITN rules of participation. I do not now recall how long bidders were given to return their bids but I discussed progress with Sharon Fitzgerald and Ian Kendall frequently. The bid response was strong and included both Mott MacDonald and Faber Maunsell. I attended the bidder interviews post-bid submissions in the summer of 2005. Parson Brinkerhoff were selected and appointed as SDS without significant pause.

5.18 It was not entirely clear to me to whom Ian Kendall had delegated responsibility for managing the SDS contract. Gerry Henderson – who I think may have been notified to bidders as a TIE contact point – was the initial contract manager, with his colleague Tom Blackhall. Both were Kendall recruits to TIE and both left TIE not long after Ian Kendall did. Once the SDS contract was running, DLA Piper became less involved as would be normal. Sharon responded to routine requests for support from TIE (Gerry Henderson to begin with, latterly by 2006 Willie Fraser and Jim Cahill – both of whom left TIE during that year.

5.19 In the normal and necessary division of responsibilities between Sharon Fitzgerald and myself, Sharon took responsibility for the MUDFA and SDS procurements and the post contract legal support to TIE for each during the Infraco Contract pre-award phase. She also assisted with the Tram Supply and Maintenance contracts while I concentrated on the Infraco procurement post

bidder engagement from September 2007 onwards. We had worked together on DPOFA, with Sharon taking the lead as matters moved to close in mid-May 2004.

5.20 The thrust of the question put to me appears to be: did the SDS contract provide sufficient client-side controls for TIE to manage SDS design production, in step with the MUDFA, Infraco and Tram Supply procurements? My answer on all counts is: yes, it did. There was strong competitive tension among the five bidders and this meant that modifications to the SDS contract (as issued with the ITN package) were light. I would remark that there was considerably less – though specific – interplay between SDS design work and the tram vehicle supply and maintenance.

5.21 The SDS consultancy contract (structured with specific and continual input from the responsible TIE personnel at the time as well as earlier from Mott Macdonald and Faber Maunsell) provided TIE with all those contractual and commercial levers, for example in the then RIBA form of contract for a consultancy appointment, that were standard practice to have (and in many cases these were reinforced as required by TIE):

5.21.1 The Duty of Care provisions (see CEC00839054), Clauses 3.1 through 3.15 were all embracing and reflected industry standard language for a major design consultancy. The Scope of Services alone runs to approximately 30 pages;

5.21.2 TIE's absolute discretion as to completion of milestones for the purposes of SDS entitlement to submit milestone payment applications (Clause 11);

5.21.3 Clause 7.3 - establishing four stages of scheme design: (i) Requirements Definition Stage, (ii) System Wide Preliminary Design Requirements, (iii) Preliminary Design and (iv) Detailed Design. Each stage had a "Gateway" requiring notification of completion by SDS Provider and TIE's express approval before the SDS Provider commenced the next stage of design and each design stage was laid out in Schedule Part 1 (Scope of Services), together with Design and Technical Gateway approval process (illustrated by way of an example at paragraph 2.8.2 of Schedule Part 1);

5.21.4 Linked to Clause 3, the detailed Scope of Services providing for a variety of time, critical path activity, spend and resource reports to permit TIE complete oversight of what SDS Provider was doing (or not doing), using a snapshot of its Work Breakdown Structure;

5.21.5 Clause 11 (Methods of Payment) - discussed further below – dictating the timing and limiting the amounts of the SDS Provider's design stage payment applications;

5.21.6 Clause 29.1 - permitting TIE to reduce SDS Contract scope. This was an unusual and powerful provision structured with specific input from the responsible TIE personnel at the time;

5.21.7 Pervading requirements to update design delivery projections and to provide costed programming revisions at intervals and whenever TIE instructed (see below);

5.21.8 Clause 3.21 requiring the SDS Provider to give its full support to Infraco Contract bidders; and

5.21.9 The contractual requirement to novate and to provide a continuing collateral warranty to TIE at novation.

5.22 A number of points are also put to me regarding project risk registers and risk analysis. TIE chose not to have an EPC contract with provision for an engineer administering the contract on TIE's behalf as employer/client. The reason, I believe, was that TIE regarded itself as competent to administer the SDS Contract and the MUDFA, Tramco and Infraco Contracts and regarded the use of a client-appointed engineer for the Infraco Contract as an avoidable project cost.

5.23 However, Ian Kendall, as TIE's Project Director at the time of the SDS contract award in September 2005, saw benefit in using PB's engineering and major project management expertise beyond that of design production. The SDS Contract – under its detailed Scope of Services (Schedule 1 at pages 93-5, paragraph 4.2) – provides specifically for the SDS Provider to be responsible as an independent adviser for the creation and management of a detailed and updating project risk register and for preparing and documenting various risk analyses. That service was intentionally priced within SDS' management fee and it was, in my view, an important project management tool and engineering and budgetary control resource available to TIE. To the best of my knowledge, it was never used.

5.24 Whether TIE's new 2006 Project Directorate for the SDS Contract and Infraco ITN and contract implementation stages ever required the SDS Provider to engage on this part of its contractual responsibilities, I do not know. I never attended any meeting at which SDS presented or had sent any form of risk register or risk analysis. An extract from the SDS Contract, Schedule Part 1 showing SDS's intended clear contractual function and support for TIE on this matter is included below. It is directly relevant to TIE's ability to analyse and predict the financial effect of BDDI and the SDS Contract variation to V28 Design Programme in late March 2008:

Maintain close liaison with the tie project team, the Operator, stakeholders, the Tram Supplier and tie's technical, legal, financial and other advisors, regarding risk matters. The SDS Provider shall facilitate risk management meetings to support the scheme development, design, procurement and construction phases of the Edinburgh Tram Network. Liaison to include assistance with the risk identification procedure which is being carried out by the Client and attendance at management workshops which shall be facilitated by the SDS Provider to allow a sharing of previous experience.	Monthly meeting with the Client and tie's project team (as notified to the SDS Provider from time to time) and ongoing liaison with tie's project team, the Operator, stakeholders, the Tram Supplier and the tie's technical, legal, financial and other advisers throughout the term of the Agreement.
Prepare and maintain a project risk register to summarise all capex, opex, lifecycle, revenue, programme, quality, functionality and approvability risks to the Edinburgh Tram Network and their proposed mitigation. The project risk register should include analysis of each risk in terms of "likelihood" and "impact" prior to and following mitigation, responsible owner of each risk and graphical summaries of risk profile. The risks to be addressed should include strategic, commercial, economic, legal and regulatory, organisational, environmental, technical, operational and infrastructure risks.	Agree format of the project risk register with the Client's designated risk manager (as notified to the SDS Provider from time to time within 1-month of the Effective Date. The SDS Provider shall maintain, update and circulate the project risk register to parties designated by the Client from time to time on a bi-monthly basis throughout the term of the Agreement
Prepare and submit a risk progress report to the Client on the status of risk management and mitigation giving a summary of new risks identified, new assumptions, key matters to be resolved and achievements. This report should indicate "Red-Amber-Green" (RAG) status on key components including planning permissions, specification compliance, incomplete design, programme for outstanding work, adequacy of investigations	Agree format with the Client's designated risk manager (as notified to the SDS Provider from time to time) within 1-month of the Effective Date and submit monthly report to the Client's said risk manager throughout the term of the Agreement

5.25 **Programme for SDS Services – Question 30(a)**

5.26 I am asked to explain what the agreed programme was when the SDS contract was entered into, with reference to various sections of the contract. This is a question for the TIE personnel responsible for the commercial purposes within the contract and negotiating and managing the contract using its provisions, not for legal advisers.

5.27 However, I can comment that, on TIE's instruction, the SDS Contract provided pursuant to Clause 7.2 that the SDS Provider should update the agreed Programme for design production and delivery (provided with its tender and accepted under the Letter of Acceptance by TIE) within 30 days of the Effective Date (the date of signature: 6th September 2005). The core Outline Design Programme included within PB's tender was therefore included within the contract as Schedule 4 (Programme) at pages 238 *et seq* - as the Inquiry correctly observes in the question put to me.

5.28 I find that it is very instructive to see what that SDS Outline Design Programme shows in terms of completion dates for the required phases of the SDS Provider's Design. Allowing for the fact that SDS prepared the programme prepared for ITN bidding purposes (July 2005), my understanding of

what it shows is that all critical path activities were to be finished by late 2007 and many by considerably earlier.

5.29 Whether or not the contractually required update of this Programme was achieved by PB and accepted by TIE within the 30 day deadline, I do not now remember – nor would I or DLA Piper necessarily have been consulted on this. But I do recall that this was one of the issues, which led to TIE requiring David Hutchison's replacement as PB's first SDS Provider Edinburgh project manager. The clearest contractual sanction for TIE to apply for a failure to produce an updated Programme would have been a payment withholding and potentially a written warning.

5.30 On 17th January 2007, approximately three months into their function, TIE's new Project directorate considered that a temporary Dundas & Wilson secondee at TIE had the best knowledge of the SDS Contract (see CEC01789432) – as opposed to a named, current and experienced TIE contract manager with specific responsibility for monitoring SDS Design production and administering the SDS contract. This may go some way to explain why the SDS mandate caused TIE such difficulty. But if TIE had been operating the SDS contract properly, SDS itself would have been reporting in considerable detail on the status of the design in each contractual phase.

5.31 And I further point out on this issue that as early as March 2006, I had been advising TIE to tighten control on the SDS Provider using the SDS contract. Having been asked by Ian Kendall if DLA Piper could assist in introducing potential candidates for the role of TIE's SDS contract manager, I did so. (See my two emails to Ian Kendall concerning a possible interviewee known to DLA Piper - CEC01867255 and train).

5.32 **Master Project Programme – Question 30(b)**

5.33 I am next asked to explain what the "Master Project Programme" was as referred to in Clause 7.1.1. DLA Piper was instructed by TIE that the Master Project Programme (referred to in Clause 3.12 and Clause 7.1 of the SDS Contract, as well as at para. 4 of the SDS Scope of Services) was to be a document compiled, detailed and maintained by TIE, as overall Edinburgh Tram Project manager, to encompass all of the important interfaces, dependencies and criticalities between SDS design delivery and consenting for: MUDFA; all Third Party Agreements (including Network Rail possessions); DPOFA; Tram Supply and Maintenance; and, last and most importantly, the integrated Infraco Construction Programme.

5.34 The Master Project Programme's importance to TIE's management of the Project and to contractually compliant provision of SDS Services is stressed specifically in the SDS Contract at Clause 3.12. At Schedule Part 1 para. 4.1, for example, there are specific SDS responsibilities set out regarding the Master Programme.

5.35 Despite the references to this in the SDS Contract, I do not know precisely when or in what form TIE prepared and maintained such a Master Project Programme. I do not now recall it being

mentioned with this name in any of the TIE Project management meetings that I attended during secondment; nor do I now recall seeing this management tool in GANTT chart or any other form.

5.36 This Master Project Programme was important for SDS overall progress controls which TIE enjoyed by virtue of the overriding compliance and adherence obligations of the SDS Provider pursuant to Clauses 3.5 and 7.1.1. The absence or downgrading of this control document would have removed an important layer of SDS accountability.

5.37 In fact, we see from para. 1.9 in CEC01712216 (an SDS Provider summary of its April and June 2007 claims against TIE and CEC) that a primary complaint by SDS Provider against TIE was that TIE had failed to issue this Master Project Programme until February 2007, thereby causing SDS difficulty in understanding interrelated MUDFA design criticalities. These were needed in order to prioritise and sequence their drawings production and design prior approval submittals. And my August 2007 note to TIE (see in that document itself regarding DLA Piper's awareness about the programme) is entirely consistent with my recollections above.

CEC01712216 should be CEC01712262

5.38 **Programme Variations – Question 30(c)**

5.39 Next I am asked to comment on the procedures in place for updating or amending the programme, delays and seeking an extension of time. DLA Piper was not involved with how TIE chose - during contract implementation - to operate the provisions of the SDS Contract, permitting SDS Provider to claim for extensions of time, justify or notify delays or introduce design production programme amendments. Nor, in my experience, would any legal adviser expect the client to involve them in this process during implementation of a design consultancy agreement - unless there was a dispute. I consider that the contract is self-explanatory and so on the points the question asks about, I summarise in answer:

5.39.1 Updating and amending the Programme: Clause 7.1.2 sets out the process for obtaining client approval under the contractual Review Procedure (Schedule 9). As I have said already, SDS issued 28 different amended versions of the Programme - during its 28 month design mandate for TIE from September 2005 to May 2008.

5.39.2 This provision states the notification and information requirements SDS Provider has to comply with, as well as timelines (page 270 of the SDS Contract). Additionally, the SDS Provider is required under paragraph 4.1.2 of Schedule 1 (Scope of Services) to undertake weekly and monthly Programme updating, notifying TIE. The designated software (Oracle's Primavera P3e) for the SDS Programme for design production and submittals for approval and the required intervals for its updating are identified in SDS Contract Schedule 1 (Scope of Services) at paragraph 4.1.2.

5.39.3 Delays: as the question correctly states, the relevant provision is Clause 7.4. Clause 15 (Changes) is also material, if introduced under Clause 7.4.3 in respect of any variation sought by the SDS Provider.

5.39.4 EOT: the procedure for SDS Provider to seek any extension of time in delivery of its services, and for TIE's response as Client is set out in the substitute Clause 7.5. As correctly identified in the question, this sits at pages 262 and 263 of the SDS Contract.

5.40 **Criticality Provisions – Question 30(d)**

5.41 Next I am asked: "*What was the purpose of the criticality provisions for determining the order in which the SDS Services were carried out?*" This is primarily a question for TIE's engineering, construction, systems and tram commissioning programmers at the time the SDS ITN and draft contract suite were prepared and throughout TIE's management of the SDS Provider, since this is project management methodology, commercial and technical information translated into a contractual schedule.

5.42 In brief, the purpose of these provisions was:

5.42.1 to bind the SDS Provider to what TIE, as Project manager, regarded as core design for its procurement strategy and CEC Planning's design approval process; and

5.42.2 to match and control the sequence of SDS design production and its submittal to and successful exit from Approvals Bodies (primarily, but not exclusively, CEC Planning, CEC Transport, CEC in its capacity as Roads Authority in Edinburgh and CEC City Development).

5.42.3 All of this to service the MUDFA works programme and Infraco's proposal of its construction programme and mobilization.

5.43 My best recollection is that TIE's original purpose of the criticality provisions was to create a contractual design production and consenting requirement on the SDS Provider that would: (i) match and support the timely production of key Line One and Line Two tram scheme design to best enable Infraco tenderers to scope, price and programme their initial bid and then BAFO proposals; (ii) to match MUDFA key design availability to that central tram infrastructure installati programme (and its construction sequencing and methodologies); and (iii) to ensure that there was sufficient progress on SDS design production and its CEC Planning related consents to service the Infraco and MUDFA contract implementation phases with actual Issued For Construction drawings. My recollection is supported by the original completion dates given for priority A1 Sectors in Preliminary Design Phase (30 November 2005) and the Detailed Design Phase (30 March 2006) shown in Appendix 2 (Programme Phasing Structure) to Schedule 3 (Pricing).

5.44 Page 100 in the SDS Contract is Appendix 2 to Schedule 1 (Scope of Services). This is the Programme Phasing Structure showing the expected sequence for commissioning of each section of the tram route to reach readiness for the trial running of trams over it, prior to overall scheme testing and trial running. In simple terms, SDS Provider was to complete its design for sectors and subsectors in accordance with the priority shown by A, B and C in this chart.

5.45 I recall that the Gogarburn to Airport section design and construction was time critical because this was where TIE planned to carry out system acceptance testing and tram vehicle operational readiness trials and certification. I remember discussing this with Alastair Richards who began to voice impatience in TIE management meetings when the trams began arriving from Spain and he was not able to initiate any testing regimes provided for under the Tram Supply contract. Trams arriving from Spain were instead warehoused.

5.46 And so: TIE's tram scheme design management responsibilities as SDS Provider's client and the expertise required of TIE to serve its own procurement strategy lay in determining design production criticality from an overall engineering, technical, third party interface and commercial perspective and from the perspective of SDS Provider's engagement with CEC in its planning approval processes (the Consents).

5.47 **Statutory Approvals and Consents – Question 30(e)**

5.48 Next I am asked: *What was the responsibility of the SDS Provider for obtaining the necessary statutory approvals and consents?* The SDS Provider was wholly responsible for obtaining all approvals and consents required for the SDS design which, when constructed by Infraco, would align with, respond to and deliver the Infraco Contract ERs. That is why it was very important that TIE had developed the ERs to an adequate technical and commercial level before the SDS ITN was released and it is also why TIE's decision to remove the ERs from SDS Provider scope and amend them post Infraco BAFO caused serious problems, as I describe later.[19]

5.49 That fundamental contractual obligation is set out at SDS Contract at Clause 5. The definition of Consents was intentionally widely drawn:

> **"Consents"** means without limitation all permissions, consents, approvals, non-objections, certificates, permits, licences, agreements, statutory agreements and authorisations, Planning Permissions, traffic regulation orders, building fixing agreements, building control approvals, building warrants, and all other necessary consents and agreements from the Approval Bodies, or any Relevant Authority, any other relevant third parties whether required by Law or the Tram Legislation or under contract;

5.50 Schedule 1 paras. 2.6.2 and 2.6.2.4 oblige the SDS Provider to obtain Consents for all Detailed Design. The detail of the obligation regarding design is reinforced by the express reference, in Paragraph 2.3.2.8 of Schedule 1, to Appendix 3 of that schedule (Scope of Services). This Appendix is found in CEC00839054 at pages 0106 and 0107. In the penultimate column that applies the requirement to obtain planning approval for every category/type of SDS design drawing listed in the document (from SDS Provider bid adopted by TIE for this Appendix).

5.51 The requirement is reinforced again by paragraph 2.4.2.12, pursuant to which SDS Provider is to deliver all Deliverables set out in Appendix 3 to Schedule 1 (Scope of Services) prior to Preliminary

[19] See paragraphs 7.413 *et seq*

Design review stage. This, then, includes the relevant planning approvals for each SDS Provider Deliverable.

5.52 Furthermore, Schedule 16 contains the System Wide Non-Functional Requirements. Under Section 6.8 of that document, there is a further overarching requirement that the tram scheme should comply with applicable law and this ties back to the primary main contract term obligation at Clause 3.3.7.

5.53 The draft Infraco Contract issued at ITN contained a straightforward back-to-back obligation on the Infraco (I refer the Inquiry here to Senior Counsel's support for this view: CEC00810435 and also to DLA Piper's report to TIE: CEC01033533) on the basis that: (a) by the time novation occurred, the SDS design was to be substantially complete and the remaining consenting process (to be completed by SDS Provider as Infraco's design sub consultant) would be transparent and limited; and (b) Infraco itself would require to obtain a range of construction, systems installation, scheme commissioning, trialling, testing and initial tram infrastructure, systems and vehicle operating clearances - that were not related to SDS design itself. Because of the state of the SDS Contract terms of non-consented designs at BAFO in autumn 2007, Infraco became increasingly insistent that their obligations as to consents were heavily circumscribed as against what had been envisaged at ITN.

5.54 It is worth observing that TIE was not simply a bystander. TIE was monitoring SDS Provider's process of submissions to CEC Planning and CEC's responses as Approvals Body. CEC knew perfectly well where it had responsibility for design production delay and what that delay would mean to the procurement programme.[20]

5.55 **Price and Payment of Fees – Inquiry Question 30(f)**

5.56 Next I am asked to identify the main provisions with regard to price and payment of the SDS Provider's fees. The central provisions in the SDS Contract were:

5.56.1 Clause 11 (Methods of Payment),

5.56.2 Clause 12 (Arrangements for Invoicing and Payment); and

5.56.3 Clause 13 (Set off)

5.57 These were underpinned by the entirety of Schedule 3 (Pricing Schedule). Each of these main SDS Contract provisions is clear in its language, logic and terminology. I believe that reciting them here is otiose.

5.58 **Payment Milestones – Inquiry's Question 30(g)**

5.59 Next I am asked: *"What were the main payment milestones?"*. TIE determined that the modalities of payment to SDS Provider under the SDS Contract should be: milestone payments (sub-

[20] I discuss the role of CEC Planning/Roads Authority at 5.96 - 5.97 & 5.128 - 5.132

milestones and main milestones); fixed lump sum payments; and time based fee payments. This is set out in Clause 11 (Methods of Payment) and Schedule 3 (Pricing Schedule), a document produced by TIE for inclusion in the SDS Contract and based upon PB's bid response to the ITN.

5.60 The time-based fees, for example, were used by SDS Provider to calculate its two formal claims for £2.86 million (prolongation and variation and acceleration based) lodged with TIE in early summer 2007.[21]

5.61 From reading the SDS Contract, without knowing in any depth how TIE administered the payment provisions of this consultancy agreement in reality, I answer by saying that the signalled main milestone payment ceiling amounts were:

5.61.1 Requirements Design /System Wide Requirements Phases: £1,074,157;

5.61.2 Preliminary Design Phase: £5,565,699; and

5.61.3 Detailed Design Phase: £7,274,386

5.62 These milestone payments were subject to any adjustments (Clause 12.8), any set-offs applied by TIE (and any resultant interest due to SDS Provider) under Clause 13 and to any variations (Clause 15) or claims applied for and agreed by TIE.

5.63 Additionally, SDS Provider had priced for: additional scope: £2,600,00; mobilisation: £500,000; project and technical management: £5,541,339. The timing and amounts of contractual payment should have been governed by TIE's application of Clauses 11 and 12 to whatever the SDS Provider applied for and VAT invoiced:

5.63.1 during each of the Requirements Definition Phase (up to 50% of the total Milestone amount) and the Preliminary and Detailed Design Phases (up to 80% of the total Milestone amount), with the respective 50% and 20% remainders being released at TIE's certification of overall Milestone Completion or subsector or sector milestone completions by TIE; and

5.63.2 at the end of the System-Wide Requirements Definition Phase, a single entire Milestone payment (after a review following the completion of the Requirements Definition Phase) linked to paragraph 4.2 of Schedule 1 and TIE's specific certification of completion.

5.64 As regards applications for payment of time-based fees or lump sum payments, I would expect to see TIE's application of Clauses 11.7 and 12.2 to determine SDS Provider's entitlement to and timing of payment.

[21] See paragraphs 5.177 *et seq*

5.65 **Incentives and Penalties – Inquiry Question 30(h)**

5.66 Next I am I am asked if there were in the SDS Contract:

5.66.1 Incentives for SDS Provider meeting milestones early or on time. No, there were not at the date of award of the SDS Contract and TIE did not require this. Whether to include incentives is a commercial matter, not a legal decision. In my experience, this would be somewhat unusual for a design consultancy. But in order to settle the SDS May and June 2007 claims, TIE agreed to pay SDS Provider an additional £2.5 million: £1million in incentives to novate and £1.5million in additional design fees (also due in part at novation).[22] That payment was not linked to meeting dates or being ahead of programme. SDS also received a contractual stage payment at the same time.

5.66.2 Penalties for not meeting milestones on time and/or for late delivery of design: No, originally there were not. DLA Piper would not have advised a client to require contractual penalties since these might, in 2008, have been directly vulnerable to being unenforceable at law. (Liquidated damages had to be a genuine and agreed estimate of loss that will be incurred due to delay and should be supported by meaningful and transparent calculation of those losses. Recent jurisprudence has lessened the risk of challenge though not where there is manifest disproportionality). Liquidated damages in a consultancy contract were, in my experience at that time, not the norm (see for example the RIBA standard form consultancy appointments and the ICE equivalent). There were however, LADs in the novation agreement which BBS were responsible for applying up to a cap. These related to culpable SDS delays in design production and were, I believe, limited to a specific amount per infraction under clause 27 of that agreement.

5.67 Instead, and as is normal in a major design consultancy in my experience, for each of the four design production phases, there were effectively significant design phase fee withholdings until TIE, as client, was entirely satisfied as to quality and completeness. TIE's decision on sub-milestones and overall Milestones completion was final. TIE was also in control of when SDS was cleared to enter the next of the four distinct design production phases. I describe this mechanic:

5.67.1 Requirements Definition Phase - SDS Provider was only permitted to apply for payment and invoice for up to 50% of its allocated direct design services fees for all completed sub-milestones (Milestone Payment). Not until following the issue by TIE of the Milestone Completion Certificate for that entire design stage, did the SDS Provider have contractual entitlement to apply for payment and invoice for the remaining 50% of the completed phase sub-milestones (Clause 11.3).

5.67.2 System Wide Design Requirements Phase – SDS Provider entitlement to apply for payment and invoice was triggered by TIE's issue of the overall Milestone Completion Certificate for the entire phase (Schedule 1, paragraph 4.2).

[22] See paragraph 5.186

5.67.3 Preliminary Design and Detailed Design Phases - SDS Provider was permitted to apply for payment and invoice for up to 80% of its allocated direct design services fee for all completed sub-milestones (the relevant Preliminary Design or Detailed Design Subsector of Sector Milestone Payment). Not until following the issue by TIE of the Milestone Completion Certificate for the entire design stage, did the SDS Provider have contractual entitlement to apply for payment and invoice for the remaining 20% of the completed phase subsector or sector sub-milestones. (Clauses 11.5 and 11.6).

5.68 The withholding of payments for non-compliance with payment application requirements would be the market standard contractual remedy (in addition to Clause 13) and this appears in my advice to TIE on 22nd August 2007 (CEC01629883) as mentioned at para 5.171 and in earlier DLA Piper advice. Clause 12.7 dealing with retention was dealt with (as it provides for) by SDS Provider giving TIE an 'on demand' bond for £500,000 at contract award.

5.69 **Recital E – Inquiry Question 30(i)**

5.70 Lastly, I am asked what my understanding of Recital E in the SDS Contract was. The Recital is contextual. It reflects precisely what TIE intended and what DLA Piper had been instructed to place within the SDS Contract: that at Infraco Contract award there would inevitably be some elements of scheme design still under production by SDS Provider. SDS Provider would, at that point, novate to become the Infraco's subcontractor and the Infraco - not SDS Provider - would therefore become contractually obliged to TIE for the production, refinement and completion of that outstanding design to Issued For Construction stage (from which as-built drawings would be produced).

5.71 **Mechanisms to Control SDS Programme Performance – Inquiry Question 40**

5.72 I am asked about my email to Geoff Gilbert dated 21 January 2008 (CEC01544498) where I state "*The SDS contract already contains the mechanisms to control SDS against programme performance*" and am asked to state which mechanisms I had in mind.

5.73 Since TIE had been managing the SDS Contract for over two years at this point (and Geoff Gilbert had received a briefing paper from DLA Piper in December 2007 on the SDS Contract, there was no need for me to repeat again with exactitude in this letter what the mechanisms were. Geoff knew (*and so did the TIE SDS contract manager before Geoff arrived*) what they were from the briefing we had provided and from the advice we had given TIE in 2006 (see 5.101et seq.) Most of them are listed - again - in the July 2009 DLA Piper report on the SDS contract. At this stage in early 2008, Ian Laing of Pinsent Masons had begun to ask questions about novation and where SDS was in terms of its design delivery programme. This was the beginning of the extremely difficult tripartite negotiations to do with novation[23] where BBS was saying they would not take on a designer under novation who would not warrant their design and TIE needed to sort that out with SDS.

[23] See paragraphs 5.205 *et seq*

5.74 BBS had done design due diligence, starting in December 2007, on the state of SDS's design to review what SDS had produced post BAFO. BBS were saying to TIE that their design review and report found that there were serious quality questions in the SDS design. I cannot remember what the percentage was now, but there was only a certain percentage of scheme design complete. This period was the beginning of BBS exerting pressure on TIE about the novation and design risk and this was entirely consistent with what happened in Wiesbaden about a month before this email. I discuss this in detail later in my statement in the context of the Infraco contract negotiations.[24]

5.75 Insofar as what contractual levers I had in mind when I wrote this email to Geoff Gilbert in January 2008 is concerned, I have explained in answer to the Inquiry's question 30 in considerable detail what contractual levers were available to TIE, including withholdings, performance bond and PCG[25]. All of them were conventional and clear.

5.76 I am asked why "the measures" were not implemented. I do not know and this is a question for TIE's various SDS Contract managers and Project Directorate, not for DLA Piper or for me. No o(at TIE had suggested at that time that the SDS Contract did not provide TIE with contractual power to manage and supervise SDS and to integrate CEC Planning's vital role. CEC's role was a matter for TIE to manage with CEC direct and since CEC was the Project's owner, an objective assumption would be that CEC would direct it's planners to perform.

5.77 I am asked to comment if the measures were effective in practice to ensure that design was delivered timeously. My reply is 'yes, they were, provided that they were deployed by TIE', but I do not believe they ever were, and TIE was responsible for managing the vital CEC Planning input. But no such contract measures could be effective for deployment as intended if the client (TIE) attempting to use them was in such acute breach of its own obligations and its parent's (CEC) planning approval unit was in obvious chronic delay to the extent alleged by SDS.

5.78 **Design Delay**

5.79 The period of delay in progressing design was essentially the entirety of the SDS contract peri(which stretched from September 2005 to October 2010, when I left my function, and well beyond that date. The scheme design, as far as I understand it, was never complete throughout this whole period.

5.80 The SDS Design Delivery Programme was amended 28 times by SDS between SDS Contract Award in autumn 2005 and Infraco Contract Award in May 2008 and the contractual notification mechanics and justification required for these changes were contained in conventional provisions in the SDS Contract. If SDS compliance with the Design Delivery Programme became too burdensome or impossible because of requested client variations or unreasonable delay in approvals, then SDS could apply to have it amended contractually to reflect the additional time

[24] See paragraphs 7.177 *et seq*
[25] See paragraphs 5.21 - 5.23 & 5.67 - 5.68

(and other relief/ payment) required to progress the relevant design through the phase of design development I have explained at para 5.68.

5.81 **SDS design status when Infraco put out to tender in 2006**

5.82 Before going on to say what I know regarding the SDS design contract and output by PB under it, I comment on this specific Public Inquiry identified issue from the Issues List. At the date of the Infraco ITN issue in early autumn 2006, the available SDS scheme design had been so limited that TIE had needed to amend the Instructions to Bidders by bulletin. These original instructions had referred bidders to the fact that they would be receiving referenced and indexed CDs containing substantially complete SDS scheme design based upon the Employer's Requirements. Instead, in January 2007 TIE needed to notify the two bidders that the SDS design would be released to them as and when it was produced by SDS, often only at preliminary design stage. This meant the initial bid returns from BBS and Tramlines did not, for example, contain any pricing for their proposals that could be evaluated by TIE.

5.83 By January 2006, SDS Provider had been under contract for approximately five months. TIE had already requested the removal of PB's Edinburgh-based manager, David Hutchison. I was aware from Sharon Fitzgerald that she was receiving regular calls from Gerry Henderson, TIE's SDS contract manager at the time, advising that there were difficulties with SDS Provider and asking how he should respond. I did not have any information about TIE's performance client-side, but I was aware that CEC's planners were being heavily criticised by TIE and by SDS for being very slow and requiring an iterative approach to drawings. DLA Piper was supporting TIE with contractual advice when instructed to provide it. I do not in fact recall any sustained or direct contact with Tony Glazebrook or David Crawley who, I believe, were ultimately TIE's SDS contract and design programme managers for part of the pre-novation period.

5.84 **Design Status at Mid/Late 2007 – Inquiry Question 38**

5.85 I am asked what the position with design was in mid/late-2007. TIE management decided to remove DLA Piper from any involvement in the Infraco procurement and related matters from April 2007 for a period of five months to September 2007. I cannot therefore answer this question with any first-hand knowledge of that period.

5.86 From my perspective as a legal advisor, I was not advising TIE on anything to do with SDS during the period from April 2007 to late August 2007. I did not know, in mid-2007, what the position was on SDS or on Infraco. I knew that the SDS design was extremely late and that it must have been in part immature or non-existent given the progressive design stages foreseen under the SDS Contract. I knew some design was continuing to be produced by SDS, but there were problems with the design approval process involving CEC. I had no knowledge personally of what SDS, TIE and CEC were doing in the charrettes process[26].

[26] Para. 5.148

5.87 For contemporaneous evidence of SDS Provider's position at that time, I refer to my discussion of SDS Provider's two detailed claim letters lodged with TIE's Project Director in May and June 2007,[27]

5.88 **Causes of SDS Delay – Inquiry Question 38**

5.89 I am asked about the apparent causes of delay. From my perspective at the time mainly based upon what I learnt after TIE re-instructed DLA Piper in September 2007 and I went on secondment, the causes of delay were a combination of: client-side and CEC performance problems that had begun in 2006, SDS being recalcitrant as a result of its unpaid claims and the result of the indifferent start on the SDS Contract in early 2006 by both SDS and by TIE.

5.90 In my opinion and from what I observed over the course of over two years (October 2005 to October 2007), the performance of PB under the SDS contract had at times been poor and erratic. The relationship appeared to start badly. By the time novation neared in 2008, PB were defensive and argumentative, with their two very substantial contractual claims in the background. But remained unclear to me who at TIE was managing this key contract and pushing CEC Planning to serve the Project properly. It transpired over the period that TIE was simply not set up to manage a massive, time-critical technical consultancy contract.

5.91 I believe that two important reasons for this were: i) from the beginning TIE did not have a contract manager who understood how a large design mandate should be engineered and administered; and ii) TIE's personnel in charge of the SDS contract administration changed several times in a short space of time, as is apparent from TIE –DLA Piper correspondence in 2006, 2007 and 2008.

5.92 Ian Kendall had privately admitted to me that he lacked a TIE team who could carry out the responsibilities with the required speed and then manage the contracts themselves. My impression was that the start of the SDS contract needed a fair-minded, but tough and very experienced client contract manager on TIE's side. I do not believe that Gerry Henderson, TIE's contract manager, had ever managed a significant design mandate and I do not recall his qualifications. There was an issue on the right type of experience being available, in my mind, client-side which is why I wrote Ian offering help[28]. Ian Kendall had asked if DLA Piper knew of someone who might fit the job description. I asked our Engineering and Construction Group and we put him in touch with a construction sector professional known to DLA Piper. It was up to Ian Kendall to decide whether to take this recommendation further.

5.93 As I have said earlier, Ian Kendall had also told me privately that his existing team was not adequate in terms of the personnel that TIE had when he arrived and he was trying to get budget to recruit. Within two months of SDS contract award David Hutchison, the PB Project manager, had been removed and this did not seem to me to be a good omen. I recall Ian Kendall complaining that SDS's design production was dispersed over several UK locations and that this was affecting their production flow and quality. Eventually there was a co-location idea and some

[27] Paragraphs 5.178 *et seq*
[28] CEC01867255

of SDS team moved into TIE's Haymarket Yards premises and then an entire floor at City Point. Whether this improved design production and the rate of CEC Planning approvals, I cannot say.

5.94 I do not know what more contractual provisions, performance securities or disincentives could have been inserted in the SDS contract to oblige the consultant to recover delay at its cost and to recompense the client for damage suffered. The issue emerged clearly to be: though SDS performance had had negatives, TIE and CEC bore a very and undeniably substantial responsibility indeed for causing the delay – and accepted this by paying £609k for acceleration measures as well as settling the prolongation and variation claim for £2.24million which I discuss later.[29]

5.95 As to why SDS was itself late in producing key tram infrastructure designs and what sanctions TIE applied to this failing, I do not know. I asked TIE for this information (in the context of TIE's rights under its collateral warranty from SDS) and advised why I considered this was important, but received nothing. Exactly what TIE assembled as evidence of concurrent or contributory SDS responsibility for late production of key tram infrastructure and scheme design, how TIE analysed this and what sanctions TIE applied after its findings, if any, I do not know.

5.96 CEC Planning had the central function as the nominated key design Approvals Body under the SDS contract. SDS would present a design to CEC's Planning unit and then they would decide whether to provide consent and approval for that design. In simple terms, if CEC had an issue with the design, then the design would be returned and SDS would have to go away and revise that design. The designer was obliged to factor an element of iteration into his contractual programme and pricing. What SDS asserted in its large claims against TIE was that this process had gone far beyond what was reasonable and the client-side performance and Approval Body process had caused serious and compounding delay and disruption.

5.97 This process and the performance of CEC Planning caused considerable delays. What ultimately happened was that SDS started to look at how many times it was reasonable for them to be re-issuing design to accommodate the requirements and changes requested by CEC. As far as I understood the issue, it lay in part in CEC Planning's general approach and in the interpretation of CEC's public realm and Tram Design Manual planning documents that governed aspects of tram specific design as well as street furniture and cityscape. SDS would have been aware of those documents which set out preferences and/or requirements like "do not use titanium cladding opposite the National Gallery; use granite kerbstones in keeping with building frontages".

5.98 From my standpoint as TIE's legal adviser, it was significant that SDS knew about these documents because:

5.98.1 SDS was TIE's designer with complete responsibility for obtaining CEC planning approval for all its scheme designs up to Issued for Construction stage – that is the drawings that the Infraco would actually be using on site to follow when installation was under way; and

[29] Paragraphs 5.178 *et seq*

5.99 If SDS designed any part of the tram scheme which conflicted with CEC's stated requirements or aspirations in either its City Public Realm documentation or the Tram Design Manual) then this would be likely to cause an immediate delay in approval while the design was amended to answer CEC's requirements and ensure that in doing so the design still met and delivered the important requirements of the Project's ERs. It was SDS's contractual responsibility to take these design constraints and preferences into account. But it was an area (which I learnt from TIE) was causing design production delay was eating into project budget (additional SDS designer's fees and capital cost for materials) and absorbing procurement programme time irretrievably.

5.100 **DLA Advice in 2006 (Inquiry Questions 33 to 36)**

Inquiry Question 33

5.101 I note my email dated 24 March 2006 (CEC01867255) to Ian Kendall, where I mention "push-back" from PB and indicate that PB had begun their own collation of evidence on alleged client-side shortcomings and is going to lodge a prolongation claim. My email sets out what I was aware of and I am not in a position now to speculate about client-side shortcomings at that time. TIE did not report to me or to Sharon Fitzgerald that they were failing.

5.102 I was aware that Sharon Fitzgerald was monitoring the MUDFA progress meetings at that point (or at least getting this information from TIE) and there were already issues with SDS Design not being available to the MUDFA contractor – whether through SDS delay, TIE mismanagement or CEC Planning/Roads Authority indifferent performance on approvals I cannot personally say. But what is obvious is that SDS used their detailed collation of evidence about these matters to support their later substantial prolongation, variation and client-instructed acceleration claims against TIE. I mentioned this MUDFA issue in my email to Ian Kendall.

5.103 I also provide advice to Ian that: if PB is underperforming contractually in some way (given the situation that TIE has PB performance under the SDS contract under continual review), do you want some assistance in relation to engineering the contract on them? In other words, if TIE is getting to a stage where you need to write to them contractually, then you need to be sure that your team and your contract manager are sending out the right letters, stating the salient facts supported by the right information and putting the right pressure on PB; especially if PB are asserting that TIE and CEC are causing or contributing to the problem.

5.104 You will see that the email is marked "*Subject to legal privilege*". The reason I marked the email in this way is because, in the event of DRP or litigation, that phrase assures solicitor client privilege. You might say that is premature, but I was simply protecting my client interests. The email is copied to Fenella Mason who was the DLA Piper partner at that time who had instructions from me to brief others in her team to help in relation to potentially issuing warning notices.

5.105 I need to make a distinction here. In the timeframe under discussion, I was not seconded to TIE, so that I did not receive information about TIE contract management issues through attending TIE management meetings in the same way as I did when I was on secondment. Anecdotally, I learnt

that CEC were extremely slow and difficult in the approvals process as I say at paragraphs 5.96 - 5.97, but I had no involvement in this aspect of the procurement. I assumed that TIE would be using TSS to assist them - as that was part of their contractually defined function and scope and precisely why TSS had been appointed. I involved contentious construction colleagues to support in preparing written and oral advice to TIE on administering the SDS contract as regards potential SDS defaults.

5.106 My main concern at the time of this email was that TIE should be using the SDS contract levers properly to arrest delay. I became increasingly worried that the type of expertise for the management of a very large time-critical design production consultancy was beyond TIE's current team.

5.107 Question 33 also asks me about a letter dated 24 March 2006, where DLA Piper gave advice about service of persistent breach notices under the SDS contract (DLA00000763). That advice sits contemporaneously with the email I discussed above (CEC01867255). I think there is an Ian Kendall email which says "Yes, we need support here", or words to that effect. Even if there is not, shortly before he left TIE in spring 2006, Ian had, somewhat dejectedly, told me that TIE did need more and better technical and commercial personnel and access to resource rather than legal assistance. I have mentioned Ian Kendall's first conversation with me about this at para. 10.9.3

5.108 **Inquiry Question 34 (a) – (c)**

5.109 I note that in her letter dated 11 May 2006 (CEC01881982) Fenella Mason of DLA noted her view that it would be counter-productive to serve a persistent breach notice on PB at that time. This was because, in her view, serving a contractual notice in these terms could have created an adversarial relationship between TIE and PB which, as a consequence, could have had a detrimental effect on the Project as a whole. By this time, Gerry Henderson had left the Project. There was a new Head of Project Development in the form of Willy Fraser. I note Fenella's letter states "*My initial meeting in relation to this matter was with Gerry Henderson. Given Gerry's departure from TIE and the subsequent departure of Ian Kendall, I thought it appropriate to report back to TIE through you in the first instance.*" It can be taken from this letter that we are in the Project Director and SDS contract manager void, before Andy Harper joined TIE for about three months before resigning. As I have said, I knew in March of that year that TIE needed some support from DLA Piper in relation to using the SDS contract.

5.110 Eleven years on, I cannot say with certainty why Fenella Mason felt serving a persistent breach notice could be counter-productive. I note she mentions her colleague, Jonathan Gaskell and I take from this letter that Chris Reed and Jim Cahill had met with Jonathan Gaskell in late April. It appears that some information had come to light with them along the lines of "I know Gerry Henderson told you that there is bad news with SDS, but actually they pulled their socks up". That would appear to be why the picture has changed three months on.

5.111 Question 34 also asks me about the email from Philip Hecht to Geoff Gilbert dated 17 January 2007 (CEC01789432). This is eight months on from Fenella's letter. Philip Hecht, one of my team

associates, had been briefed by me to let Geoff Gilbert, the relatively new Commercial Director at TIE, have a summary of the SDS contract which he had requested from me and Phil did. I remember that Ailsa McGregor was a brand new junior manager at TIE. This email exchange shows a new project team at TIE coming in, trying to get to grips with the SDS contract.

5.112 The two pieces of correspondence above (CEC01881982 and CEC01789432) are prime examples of DLA Piper working with somebody new at TIE and supporting them while they are struggling and then three months later they are gone. The two pieces of correspondence are entirely logical. We got one piece of information from the client, we reacted to it and then we gave them advice. Three months later some more information came in and we advised not to issue a persistent breach notice. That was because, at that point, we had been told that SDS performance had seemed to be improving. The moment to serve a contractual notice had probably passed in Fenella Mason's judgement. I see nothing controversial or odd about this.

DLA00002083 is advice from Sharon Fitzgerald

5.113 Fenella Mason's advice is set out in DLA00000763 and DLA00002083 and this had been brought about as a result of me pressing TIE to deploy formal warning notices with substantive complai(if they had continuing concerns about SDS performance. I do not know why TIE chose not to issue warning notices, but by this time they had reported to DLA Piper some improvement in SDS performance. I want to observe here that I do believe TIE was never open and transparent with DLA Piper as to the real extent of its own (and CEC's) poor performance of its client-side contractual obligations and Approval Body process.

5.114 **Inquiry Question 35**

5.115 I deal with this question in its numerical order because it does not sit logically with others. I am asked about the agenda for a meeting to be held at DLA Piper's offices on 6th June 2006 (CEC01628981). I do not recollect attending this meeting and I would not necessarily have done so. TIE quite frequently asked DLA Piper to host meetings due to lack of meeting room space at TIE's offices in Haymarket Yards. The topics indicated for the meeting are all issues for TIE's SDS Contract manager and QS team, not legal matters, and may well indicate some kind of internal TI review process in which DLA Piper was asked to act as a past knowledge provider. I note tha there is no list of attendees and there are no notations or other evidence on that document itself to say that a meeting actually took place. I cannot say anything more about this meeting.

5.116 **Inquiry Question 36**

5.117 I note the email from Sharon Fitzgerald to Geoff Gilbert dated 22 November 2006 (DLA00002083) to which I was copied in. Sharon noted that consideration was being given by TIE to whether the SDS contract should be terminated. This was shortly after the arrival of Matthew Crosse and Geoff Gilbert at TIE. I think it is clear in the first paragraph of Sharon's email what my involvement was when she states "*Andrew and I ran through the options for terminating the SDS contract with Bob Dawson when we met him the other week.*" In other words, sometime in mid-November 2006, at which point SDS was a year into their design contract, Geoff Gilbert asked for our advice about termination of SDS. I recall finding it curious that two months later, Geoff Gilbert was having to

brief his Project Director on what the SDS contract was[30]. Before Sharon sent this email out we had had an internal discussion about the provisions of the contract and we had met Bob Dawson. This email is a summary of what we discussed. For us, the idea that TIE was going to terminate its designer less than a year into that design contract was a very serious legal and contractual question with significant cost and procurement timetable implications. Following that, we got an email from Geoff Gilbert asking us to advise on the basis of terminating the SDS contract and the remedies.

5.118 The decision to terminate SDS would have been a major commercial decision for TIE, with the risk that what SDS had produced in its full year of work might be abortive. Whether or not it was the correct financial, commercial and technical decision for TIE to make was not a judgment that DLA Piper had been either retained for, or was in any way professionally equipped to make. The delay in re-procuring a designer immediately post Royal Assent to the Edinburgh Tram Acts would certainly have exposed TIE's strategy to close scrutiny from the Scottish Executive.

5.119 Clearly, one potential solution was for TIE to re-calibrate the overall Infraco procurement schedule to allow SDS (or its replacement) to accelerate/recover the obvious and compounding design delay. There was, however, a political imperative by this time: the two Edinburgh Tram Acts had been successfully promoted and had force of law, the Project was in the public eye and there were CEC elections and a Scottish Parliamentary Election coming in the spring of 2007. I knew from Ian Kendall that TIE wished to be seen to be progressing smoothly. Terminating one of the three key advance works contracts (SDS Design) did not align at all with that aspiration. The possibility of a moratorium was discussed later in the procurement.[31]

5.120 **Inquiry Question 34(d)**

5.121 I am asked in Question 34(d) what remedies TIE could employ if they did not wish to terminate the contract. I have set out the full set of contractual levers available above.[32] In brief:

5.121.1 warn SDS of continued material breach and the possibility of a call on either their 'on demand' bond or the PB Group PCG. The bond was a multiple call on demand instrument, requiring simply a TIE letter to the bondsman affirming SDS breach and formally calling down an amount;

5.121.2 issue appropriate contractual warning notices regarding SDS underperformance and default;

5.121.3 withhold design phase and sub-phase contractual milestone completion certificates and related final payments under TIE's absolute discretion;

5.121.4 build up and assert TIE's own case as to damage incurred by SDS delay;

[30] document CEC01789432 discussed at paragraph 5.30
[31] paragraphs 7.97 *et seq*
[32] paragraph 5.20 *et seq*.

5.121.5 remove appropriate scope from the SDS contract if SDS was underperforming and there was somebody that TIE could put on that job;

5.121.6 lessen SDS design criticalities by looking at the entirety of the Infraco procurement programme (in other words: do not let the Infraco contract until the designer has caught up);

5.121.7 require SDS to report regularly on its delayed production with acceleration proposals, enforcing the contractual obligations to do so specifically set out in the SDS Scope of Services; and/or

5.121.8 interrogate CEC Planning's role in this carefully.

5.122 My main focus was always to emphasise to TIE that it should be using the SDS contract levers properly to arrest design production delay. It was not our function to manage the SDS contract with or for TIE, or to comment on what CEC Planning was or was not doing. As I have stated above, I became increasingly worried that the type of expertise required for the management of a very large time-critical design production consultancy was beyond TIE's team. In mid-2006 there were also problems caused by the fact that there was both a Project Director and SDS contract management void at TIE.[33]

5.123 **Risk to Procurement Strategy and DLA Concerns – Inquiry Question 32**

5.124 The serious and un-arrested delay in SDS design production did cause me, as the lead partner at DLA, serious concern in terms of its: compounding impact on the procurement timetable for the Infraco Contract; the reaction of Infraco bidders; its inevitable destabilising effect on novation[34]; and its direct negative link to MUDFA progress.

5.125 Members of the DLA Piper team were also aware of and concerned by this. Although DLA Piper had had no involvement in the assessment of the two initial Infraco bid returns, it had been clear to me that because of the serious lack of consented and/or detailed SDS design to inform the bidders about the Project's scope and major tram infrastructure requiring civil engineering works (beyond the ERs), these initial bids had been very immature. Both bidders also said as much to DLA Piper when we were instructed by TIE to re-engage for the short period in September and early October 2007 before BAFO bids were due. This situation directly affected the bidders' willingness to engage with any real enthusiasm and focus on the pre-BAFO Infraco contract terms negotiations.

5.126 TIE and CEC knew this since TIE was feeding SDS design piecemeal to the two bidders all through 2007 after the October 2006 issue of the Infraco ITN, and CEC was advised about it in Project progress meetings in 2007 and early 2008. Under TIE's eyes, CEC Planning was handling the SDS design that was to be approved to service the design release process described in the ITN. Indeed, it is, in my view, wholly artificial to suggest, as question 32 seems to, that either TIE or CEC somehow required advice from DLA Piper on how late SDS design was at Infraco BAFO

[33] See paragraphs 10.9 *et seq*
[34] See paragraphs 5.193, 5.205 *et seq* & 7.417 *et seq*

date in October 2007 and what BSC's contractual attitude was towards this situation. TIE was managing the SDS contract itself and CEC planners had been central players in the SDS design approvals process for nearly two years; from this, they had first-hand knowledge of the overall state of the tram scheme design. CEC Planning's (and also in key instances on signalling interface, CEC Transport's) vetting and prior approval of all SDS designs were at the heart of SDS's design production programme. CEC had the means to have known precisely how advanced or delayed SDS scheme design was and why.[35]

5.127 **Consents & Infraco Contract – Inquiry Question 62**

5.128 I am asked about an email exchange I had with Colin MacKenzie on 30 January 2008 regarding how consents would fit into the Infraco contract (CEC01496537). The Council's Legal Department had had a full set of the Infraco contract documentation and the ITN at the time it had been issued in early 2007. The email from Colin was the Council's Legal Department saying to me, a month after full Council approval, that they wanted to understand how the consents fit in with the SDS, the Infraco contract and the "overall risk profile". The consents and approvals process was within CEC's own control as it was being performed by CEC planning and had been since autumn 2005. It is evident from this that TIE and CEC legal were not talking efficiently and directly about consenting. It was also apparent from this that CEC legal were not being kept informed by their own planning colleagues about how the consenting and approvals process was working – or malfunctioning – under the SDS Contract. If they had been communicating effectively, there would have been no need for CEC Legal to be writing to DLA Piper asking for explanations about CEC planning consents with me at this stage. This was not a legal issue in any event and something that should have been settled months earlier, not still being discussed three months post-preferred bidder appointment.

5.129 CEC Legal seemed to be saying that they did not understand something which was fundamental to the procurement. It astonished me that CEC Legal was not aware of the overall risk profile associated with this area themselves. In August 2007, DLA Piper had briefed CEC Legal on how the SDS contract operated within the procurement[36].

5.130 I was probably in a meeting with the bidders when Colin's email came in and four hours later I emailed Graeme Bissett, Willie Gallagher, Matthew Crosse and Geoff Gilbert essentially saying that this enquiry from the CEC Legal Department was far too late and far too general. I needed to cross-check with TIE to find out what they had told Duncan Fraser (who was copied on Colin's email along with Gill Lindsay) about the consents process but I do not recall receiving any specific reply from TIE. I am not entirely sure what Duncan Fraser's remit was. He was in my view a decent, conscientious and clever man. He was, I think, seconded from CEC into TIE for precisely the purpose of passing on information, raising issues with TIE in a straightforward manner or hearing what TIE was saying about a problem and acting as a mediator between the TIE Project team and the various units within CEC that seemed to remain remote, but became active - when

[35] See also paragraphs 5.146 - 5.150 regarding CEC knowledge of delays
[36] See for example the workshop discussed at paragraphs 11.31 *et seq* and 7.84

something came across their desk – often inconveniently late and in a confused and unhelpful way.

5.131 I note that Colin Mackenzie states in his email "*Following today's meeting of the Chief Executive's IPG ...*" I had and have no idea what that was. I did not know anything about CEC's internal workings, but they could have spoken direct with their own colleagues who had the source information about consents. At this point, I did not understand why Colin MacKenzie was not contacting Andy Conway (CEC City Development) in the first instance. Andy was the CEC staff member who I understood was monitoring CEC Planning's input into approvals. Alternatively Colin Mackenzie could have sent his email to whoever at that point within TIE was managing the SDS contract. That person would have come back and confirmed that the Infraco negotiations were on-going. As I state in my email "TIE's team has been attempting to negotiate a close on the position on Consents."

5.132 My email reply to Colin Mackenzie shows an example of me returning to TIE before offering any response to CEC Legal. I had no remit to respond directly to CEC. At this stage, TIE had h(evaluated BAFOs, TIE had announced a preferred bidder and CEC had passed a full Council resolution to run with the Project and to stand behind approval of a Final Business Case submitted to TS. As I have said, CEC Planning was the central party (an 'Approval Body') within the Infraco contract and the SDS contract that controlled approvals and consents. CEC Planning's performance would determine how long an SDS design submittal took before it became an approved design package that could move to Issued for Construction status. Their performance would also be influential on how much time SDS spent on the design and the resultant design production cost payable by TIE.

5.133 **Impact of SDS Delay on MUDFA – Inquiry Question 38**

5.134 The delay in SDS design production and CEC approvals had a very serious negative effect on MUDFA. MUDFA was alleging it was in delay because they did not have sufficient CEC approved SDS design to service the critical path of their construction programme. I was not lead lega[illegible] advisor on the MUDFA contract at that point. I could not lead Infraco, SDS and MUDFA so Sharon Fitzgerald was DLA's senior lawyer on MUDFA. Whether absence of critical SDS Design was a primary issue on the delay in the MUDFA contract I simply did not know. But the effect of late SDS design production and late CEC approval was that it slowed MUDFA's progress and formed part of the argument for significant prolongation and extension of time claims against TIE from the MUDFA contractor who was not able to execute works to programme.[37]

5.135 **Effect of the incomplete and non-existent SDS design on the terms of the Infraco Contract – Inquiry Question 38**

5.136 There were at least eight distinct impacts on the Infraco contract negotiations. I discuss these in detail in the section of my statement which addresses the Infraco negotiations. In summary:

[37] See paragraphs 6.67 *et seq*

5.136.1 First: It resulted in neither Infraco bidding group being able to provide: (i) a priced Infraco initial bid capable of proper technical, commercial, legal, financial and programme evaluations at bid return date in summer 2007 or, five months later, an unqualified and anything like complete priced BAFO bid; or (ii) a construction programme supported by a sequenced critical path and related construction methodologies for the various city centre and critical third party affected sites. I learnt, probably from Stewart McGarrity, that the initial Infraco bids that came back were nothing more than indicative. In other words, there was nothing that could be used by TIE to evaluate and compare one bidder's proposals to the others'. By that point, in the mid summer of 2007 there was a very significant time issue indeed for TIE. The original ITN programme was compromised. There was a political imperative to present the Project for approval to CEC soon and TIE required to do this before the end of that year, as well as securing Transport Scotland grant funding by approval of a Final Business Case. The last CEC Full Council meeting was set for 20th December 2007. That timetable gave TIE less than nine weeks after receipt of BAFOs to evaluate the bids, appoint a preferred bidder, complete all technical, financial, commercial and contract terms negotiations required to confirm a complete price that fitted within the budget and was linked to agreed project scope and construction programme for a committed PSCD. The known position on SDS Design and MUDFA and, effectively, the loss of five months' negotiating time on the Infraco Contract terms due to DLA Piper being stood down were entirely at odds with that time constraint and TIE's requirements. TIE's solution to this great difficulty translated, through the Wiesbaden Agreement, directly into Infraco Contract SP4 Pricing and substantial transfer of design completion risk back to TIE.[38]

5.136.2 Second: During the spring and summer 2007, it allowed bidders free reign to say that they were unwilling to engage in any focused discussion and commitment (in terms of their task priorities for bid teams and the cost of lawyers supporting them) regarding the draft Infraco Contract terms and conditions. They said that the scope and detail of the tram scheme was still to be given to them by TIE and also that the scope of their contractual responsibility as SDS's design services client post novation remained unclear. To name only a few examples of the provisions in that category: all ground conditions provisions, MUDFA interface provisions, the entire Consents regime, the infrastructure maintenance provisions and all provisions regarding their entitlements after SDS novation. In short, it began to undermine or leave open for post BAFO negotiations many contractual risk allocation positions in the draft Infraco Contract which had been drafted to reflect TIE's chosen procurement model and a solid balance in public – private sector risk allocation.[39]

5.136.3 Third: It resulted in BB, at Wiesbaden, insisting that TIE took back design development and completion risk and agreed to a set of assumptions and protections in BSC's

[38] See paragraphs 7.177 *et seq* and 7.214 *et seq*
[39] See section 7 for a detailed discussion of these negotiations and paragraphs 7.84 *et seq* in particular

favour that fundamentally changed design and construction risk allocation. In turn, this generated on going adjustment of the Infraco Contract terms to accommodate BBS's further requirements for protection against perceived SDS risk – including SDS critical design interface with MUDFA. In effect, SDS design delay was the reason for a major part of the contractual protections BBS insisted upon and which entered the Infraco Contract as SP4. BB also refused to accept Consent responsibility as envisaged under the SDS contract with SDS as Infraco's design subconsultant.

5.136.4 Fourth: It resulted in the late April 2008 negotiations for and the critical amendments to Clause 80, (the Infraco contractual change mechanic), which subsequently were at the heart of BBS's post contract avalanche of automatic TIE Change claims (Notified Departures or INTCs) and further contractual protection for BBS at TIE's expense against perceived SDS design quality issues. Again, I discuss this development in detail later in my statement.[40]

5.136.5 Fifth: It resulted in the Infraco's (intended) contractually binding construct programme being extended until June 2011 at significant additional cost to TIE and a further allowance of £2.6 million being inserted into the contract price to cover "SDS quality risk", with a specific provision to protect BBS being added to the Infraco contract terms.

5.136.6 Sixth: BB did its own further due diligence post BAFO in October 2007 and had become more informed through access to SDS. They had learnt about the reasons for design delay. From January 2008 onwards, this resulted in intense negotiations as BB – under close instruction from BB Wiesbaden - sought to close off every conceivable risk to them from the TIE/CEC - SDS design approval and production process. The eventual much altered Consents provision in the Infraco Contract was probably the most commercially negotiated provision in the Infraco main terms and conditions.[41]

5.136.7 Seventh: it resulted in wholesale detailed amendments to the TIE-BBS-SDS novati agreement and the corresponding provisions in the Infraco Contract, with associated DLA Piper legal costs and TIE management time to negotiate and produce this.[42]

5.136.8 Eighth: it compromised TIE's ability to seek remedy against SDS post novation as originally envisaged under the terms of the Infraco contract and the novation agreement, although DLA Piper insisted that SDS provided TIE with the envisaged collateral warranty.[43]

5.137 I have already discussed the importance for TIE's procurement strategy of the design being substantially complete in advance of the Infraco contract being awarded.[44] The procurement

[40] Paragraph 7.518
[41] Paragraphs 5.53 *et seq*
[42] Paras. 5.210 *et seq*
[43] Paras 5.199 *et seq* and 5.21
[44] See paragraph 4.148*et seq*

strategy in this regard was a simple proposition: get SDS designs substantially complete before Infraco ITN or, at the very least, before Infraco BAFO. I have also given my views on TIE's poor management of the SDS and MUDFA contracts.

5.138 I repeated DLA Piper's advice numerous times as to the vital importance of the SDS design delivery and quality to the procurement programme, to the novation, to the bidders' ability to tender a solid and unqualified construction and systems supply price. My focus on this was also exemplified by my various conversations with Steven Bell and others about using the SDS contract to invoke its remedies to make SDS improve their performance.[45]

5.139 TIE was well aware from top to bottom in their Project team – as was CEC - how far SDS was in delay against the design programme required to de-risk the Infraco Contract. BBS produced a report saying that the design was only 60% complete (at outline stage only). So: basically, at the very least 40% of the tram scheme scope had been unavailable to bidders at BAFO and even that was available was to large extent not mature in terms of the requirements of the SDS Contract i.e. at detailed design stage. This report was dated a few days before the Wiesbaden Agreement in December 2007[46]. Indeed, it appears that this report was in large part the basis for the positions that BBS were taking before Wiesbaden and in the Wiesbaden Agreement. It is axiomatic that both TIE and CEC Planning had on going knowledge of the programme impact of SDS delay and TIE's inability to accelerate design delivery.

5.140 Aside from TIE's acceptance of the two 2007 SDS claims,[47] which was implied from their settlement, the clearest contemporary evidence of TIE's knowledge of just how late SDS design was sits in the SDS Contract itself at its Schedule Part 4 (which Infraco bidders were shown in the Sept/October 2006 Infraco ITN). The SDS contract provided for a date by which SDS was to have completed all detailed scheme design - February 2007 (a date TIE chose on appointment of PB in 2005). This date was at least eight months before Infraco BAFO; all CEC Planning's SDS design approval was therefore to have been finished by February 2007. In fact, as I have said previously, I do not believe the SDS detailed scheme design was complete when my involvement ceased in 2010 - more than 18 months after Infraco Contract award and over three years after TIE's procurement plan required. CEC must have been aware of this as the SDS design approval authority.

5.141 The SDS delay was a dominant factor in the Infraco contract negotiations and well known to everyone involved in them. I discuss this in detail in the relevant section of my statement.[48]

5.142 As two examples of senior CEC officials' knowledge about this: (i) at the meeting held at CEC's offices on 12th December 2007, the question of SDS's delay on scheme design delivery was raised directly by CEC officials. I know myself that the risk to budget and construction price was also specifically discussed; (ii) again at the special TIE Board meeting held on 19th December 2007 -

[45] For example see my advice at para. 5.103
[46] Paras 7.177 *et seq*
[47] Paras 5.177 *et seq*
[48] See section 7

after the Wiesbaden meeting[49] - Andrew Holmes, CEC Director of City Development, is minuted as asking specifically about the impact and risk of the SDS design continuing to be late[50]. I refer to this again at 7.208 below.

5.143 At the 12th December 2007 meeting I also gave clear comment regarding BBS' position on design delay/inadequacy and I advised TIE regarding the possibility of Infraco claims at numerous points in 2007 and 2008. Furthermore, the concept of BDDI had been introduced after BAFO, to allow BBS a notional platform from which to give indicative pricing. And so, as a base position: CEC and TIE knew that BBS would adjust their pricing and construction programme as further design was produced after BDDI.

5.144 By early January 2008, SDS Provider was indicating that they were unwilling to novate. I was reporting to and advising TIE on this difficulty and so were my team under my supervision. I conveyed this concern to both TIE - consistently over a period of several months – and, as instructed by TIE, directly to CEC senior staff[51]

5.145 On occasions, when instructed by TIE directly to do so, I talked to CEC senior staff about my concerns. I repeat that it was not DLA Piper's remit or responsibility to report to CEC or to advise CEC Legal about the state of TIE's contracts, unless instructed to by TIE and then only as regards legal and contractual aspects, not financial exposure, technical and factual risks or programme criticalities. I refer to my discussion of DLA Piper's duty of care.[52]

5.146 TIE was managing these contracts and, as I have stressed many times in my evidence, TIE had the project management tools, communication channels and relevant personnel to report both internally and to whatever branch of CEC required information: the TIE Board, Tram Project Board, the Tram Monitoring Officer, the CEC Tram Project Executive Group, City Development, CEC Finance, CEC Planning or senior CEC personnel with whom TIE management liaised. DLA Piper was not responsible for the financial, commercial and technical management of the SDS contract during its performance. Our remit was to provide TIE with legal advice on how the SDS contract operated and what the parties' rights were.

5.147 It is also entirely reasonable to assume that CEC Planning knew in considerable detail how their performance was impacting SDS design availability and what the very negative effect on procurement strategy, programme and cost was, since Andy Conway from CEC City Development was embedded at TIE, alongside PB and its team, managed by Jason Chandler and others.

5.148 CEC Planning was also a principal actor in the 'Charrettes' process which is noted in the Inquiry's Issues List. From my perspective: in 2006, I recall hearing about this process being introduced as a means to intensify combined efforts to improve co-ordination of CEC Planning's scheme design approvals process and to accelerate SDS design production. I was not personally in a position to judge how or if this arrangement was materially improving CEC turn-around time for SDS design

[49] Paras 7.205 *et seq*
[50] Para. 7.208
[51] See paras. 7.168 - 7.169
[52] Para. 4.33

production of drawings that could be priced and progressed to Issued for Construction stage. The facts on the severe and unrecovered delay on the SDS design after novation - far into 2009 - speak for themselves. Furthermore, if Charrettes had had a material beneficial effect, I doubt very much that the extensive TIE-SDS- BSC design workshops in 2008/9 post Infraco contract signature would have been necessary.

5.149 I specifically draw the Inquiry's attention to Andy Conway of CEC City Development co-authoring a report presented to the Tram Project Board on 9th January 2008. This report seeks £633,000 from the Project budget going forward into 2008 for CEC to provide an additional 13 personnel across Planning, Transport, Communications and Legal. This resource is said to be required to support:

5.149.1 the Roads Authority approval process for SDS design;

5.149.2 a range of technical approvals for SDS design on roadworks, street signage, lighting, signalling, structures;

5.149.3 Corporate communications;

5.149.4 Property acquisitions; and

5.149.5 Legal functions (on which I have commented specifically at para,11.6 below).

5.150 The Inquiry may find it odd the internal CEC budget request lists legal tasks that were at that time already long completed or not legal functions at all. I do not recall either meeting or hearing from either of the additional CEC staff lawyers named between January 2008 and December 2009.

5.151 Since by this time in early 2008, TIE had been obliged to introduce the BDDI concept[53] into the Infraco contract due to lack of approved and/or non-existent SDS design and TIE was on the brink of settling prolongation, disruption and acceleration claims lodged by SDS in the spring of 2007[54], this January 2008 report appears to me to be direct evidence that CEC had seriously under resourced its vital role throughout the entire SDS design consenting process during 2006 and 2007. If this is not true, why then was TIE obliged to instruct an SDS acceleration at TIE's cost to try to retrieve the situation?

5.152 Furthermore, this paper reporting to the Tram Project Board repeatedly refers to the serious delay that will occur if the CEC personnel are not deployed. As one example: *".....if these staff were not employed next year (2008) then this would significantly delay the prior approvals process and would have a significant impact on the Infraco Contract as works could not commence without the necessary planning approvals in place."*

5.153 This situation matches exactly with the reasons SDS gave behind its two claims: based on client acceleration instruction and client and CEC planning delay and default which I discuss in some depth elsewhere. The claims were for additional SDS services from July 2006 to April 2007 and for

[53] Para. 7.199.2
[54] Para. 5.178 *et seq*

further services to accelerate design production from 9th April to 22nd June 2007 and for an extension of time of 40 weeks. This January 2008 CEC staff report to the Tram Project Board blithely ignores the fact that CEC Planning and Roads Authority delay in processing design approvals had already caused very serious negative impact on the procurement process: insufficient SDS design for bidders to use in formulating both their initial bids and their BAFO bids, the need for the introduction of BDDI as a reference point, and the inability of MUDFA to programme its on street works.

5.154 It appears to me that, for CEC, project delay was simply something that could be predicted might happen, without any particular analysis of responsibility or consequence. This is not the behaviour of a project owner that is keenly focused on its exposure for cost overrun.

5.155 DLA Piper had advised consistently that TIE needed to take far firmer action to use the SDS contract to control SDS's performance. That advice was given by me to Geoff Gilbert and to Steven Bell and to other TIE senior managers, including, I believe, Willie Gallagher, on several occasions during 2006, 2007 and early 2008. As early as mid-2006, I had been advising I Kendall and his team (primarily Gerry Henderson) that PB's performance was going to affect TIE's ability to novate the design and that it would affect the later vital procurement of Infraco. I involved colleagues in DLA Piper's contentious construction team where appropriate.

5.156 TIE never used the contractual instruments to coerce SDS: such as the Parent Company Guarantee or on-demand bond, despite my advice to do so. I was not made aware until late August 2007 – essentially two years into the SDS design mandate – just how complicit and responsible TIE and CEC were in the chronic delay on SDS design production and CEC approvals.

5.157 I respected Steven Bell's work ethic and his dedication to the Project through thick and thin – including very harsh personal attacks by BBS regarding his professional competence. But, as Project Director, he did not appear to me to favour using contracts in anything like an aggressive, coercive or tactical way. He preferred discussion when, in my opinion, a more forceful and early use of the SDS contract would have served TIE's interests and provided a far stronger client position when novation began to be challenged and debated by SDS in 2008. But there is no doubt that this situation, in part, was an inherited problem caused by TIE's indifferent start in managing the SDS mandate and in ensuring that SDS acquired design approvals in 2005, 2006 and 2007 and CEC's very significant role in this. I continued to express my view to TIE management, that TIE should use the SDS contractual terms to exert more control over SDS performance.

5.158 TIE reported later to CEC in TIE's Close Report at Appendix 2 that there were 87 outstanding unconsented SDS design packages at 14th May 2008 and the SDS design for the tram scheme would not be complete until six months after Infraco Contract award. CEC Planning/Road authority were well aware of this situation. It is obvious from Section 2.4 in the draft TIE Close Report v6 that the TIE draftsman is unable to report where design production had reached: see CEC01450479 in which blanks are shown and colleagues (Dennis Murray and Damian Sharpe) are instructed to complete them. All of this indicates a clear factual, commercial and cost exposure to TIE.

5.159 **Advice to TIE in August 2007 – Inquiry's Questions 37 and 39**

5.160 Inquiry's Question 37 asks various questions about an email I sent to Geoff Gilbert on 16 August 2007 (CEC01642351) with an attached draft persistent breach notice (CEC01642352). To put these two emails in context, DLA Piper had been stood down (and still was) from any involvement on the Infraco procurement for a period of five months. As I have said[55], I do not recall there ever being any TIE written communication on DLA Piper being stood down. In this period,. there was very minimal contact consisting of occasional phone calls from Lesley McCourt or Jon Moore, I do not now recall exactly about what – though I was aware that this TIE team were meeting and engaging bidders to negotiate the draft Infraco Contract. I comment specifically on the negative impact of those engagements later. But DLA Piper's position was that we were not instructed. My recollection is that TIE requests for assistance on contractual matters on MUDFA also dwindled but occasionally flared up if there was a crisis – perhaps because of contract manager change. We had had no further involvement since, I believe, early March 2007 on SDS until Geoff Gilbert contacted me out of the blue in mid-August 2007.

5.161 I note I copied my email (CEC01642351) to the Project Director (Matthew Crosse), the Deputy Project Director (possibly Susan Clark) and the Engineering Director (Steven Bell). The last sentence is interesting to me. I state "*I am also conscious that the Exec. meeting accepted that Steve Reynolds had improved performance on one level...*" To me this indicates that the senior executives at TIE were looking at SDS at this point and that they had been persuaded by Steve Reynolds that things had improved. I further go on to state "*but that important working deadlines were still being missed and commitments not adhered to.*" At this point, ten years on, I do not know what the substantial deadlines being missed were –and this would in any event have been information given to me by TIE. It would, I believe, have been Steven Bell's job, as Engineering Director, to point out what deadlines were being missed with regards to the critical designs going into MUDFA. I suspect that the MUDFA contractor may have been taking the position that they couldn't work because they did not have approved SDS designs for the critical path diversions works on street. Since CEC were the statutory Roads Authority responsible for approving all roads designs for the utilities diversions, CEC would have known precisely how late they themselves were. I cannot recall but on reading this email my best guess is that there was a meeting in which I was briefed about what was going wrong with SDS Design production. I doubt that meeting would have gone into the detail. What I am saying to Geoff in the opening paragraph of this email is that TIE needed to fill this out with factual details to hand within TIE. I note that I go further to state "*I consider it would have considerably more force, both as a marker now and as a record in the future, if TIE were able to cite some detail on how and when this failing manifested itself.*" What I am saying here is that TIE needs to tell me what the factual background to the formal persistent breach notice to SDS will be.

5.162 The attached document is a draft persistent breach notice (CEC01642352). I note that it states "*As examples of this fundamental pervasive shortcoming we would cite ...*" and there are three blanks left for TIE to fill in. This is simply a tailored persistent breach notice which cites the clause and

[55] Paragraph 7.56

says TIE reserves the right to operate clause 24.2 of the contract to move to terminate the contract. This is quite a serious warning, but it is not saying "if you do not do this by tomorrow morning we are terminating you". It is a marker.

5.163 In the content of the draft persistent breach notice it is entirely clear that I had not got any information from TIE to enable me to populate it. I therefore sent to the relevant person responsible at TIE a framework to complete. I had been asked by Geoff Gilbert or Steven Bell to undertake this work. TIE wanted me to produce a draft which they could get to their SDS Design mandate contract manager to fill these details in and get it ready to send.

5.164 I was asking TIE what, in TIE's opinion, the SDS defaults had been and recommending that these should be properly cited in any warning letter issued – the attached draft warning letter for TIE to consider and use (CEC01642351 and CEC01642532) had blank spaces for TIE to complete. My view above and in these two August 2007 letters was entirely consistent with the advice that TIE (Gerry Henderson) had already received on 24th March 2006 (DLA00000763) from my partner, Fenella Mason. By May 2006, I believe, Gerry Henderson had left the Project and TIE (Will Frazer and Jim Cahill now responsible at TIE for SDS) had reported some recovery and improvement in SDS performance so that no persistent breach warning notice was in fact issued at that point. I recall Jim Cahill resigned from TIE on ill health grounds around this time also.

CEC01642532 should be CEC01642352

5.165 The Inquiry puts to me the proposition that that the issue of a standard contractual warning notice to a consultant was at odds with a conclusion that there should be a commercial settlement with SDS Provider. I do not agree with this.

5.166 The use of any contractual warning notice: (a) can be entirely consistent with setting up the best negotiating position when a review of contractual claims is imminent or ongoing since the party making the claims may itself have responsibility for the events it relies on for its claim; and (b) may very well never have anything to do with commencing DRP. The issue of a warning notice does not necessarily itself crystallise a dispute. DRP would not be triggered by a breach notice and TIE did not in any case, instruct DLA Piper to examine the use of DRP. On 16th August 2007, neither I nor anyone else at DLA Piper had any knowledge of the two SDS Provider early summer 2007 formal claims, amounting to £2.856,724 and seeking a 40 week extension of time.[56]

5.167 It would have required proper and careful thought about SDS's culpability regarding design production delay before issuing a persistent breach notice at the same time as trying to settle claims. It would certainly have put SDS on their guard. The whole idea of issuing a persistent breach notice, or any contractual warning, is to make the person receiving it sit up and do better without any necessity for the contract to be terminated. You want to put in the notice that there is the ability to turn it into a termination process. A contractual warning might initially have caused SDS Provider to be on its guard, but my intention with TIE issuing a warning notice was to provide a platform for TIE to negotiate with strength – without any necessity for the SDS contract to come

[56] See paras. 5.178 *et seq*

anywhere close to being terminated – and for TIE to be able to demonstrate to BBS that it was not simply being manhandled by SDS Provider.

5.168 I do not know why TIE chose not to use the Persistent Breach Notice and I do not know why TIE asked DLA Piper to prepare one. It is very obvious from CEC01642352 that when asked to provide a draft contractual notice, I had no knowledge of what it was that TIE wished to cite as SDS breaches. My email asks if TIE have that information and advises why this would be required.

5.169 DLA Piper's mandate was restored in September 2007. As I began to have access again to information on TIE's project management activity in September 2007, it appeared to me that SDS was indifferent to TIE's approach on contract management. Steven Bell had seemed very reluctant to use the SDS Contract levers to exert pressure on or formally criticise SDS Provider. I did not understand why and it indicated to me that there was a communication issue within TIE when I learnt shortly after this exchange with Geoff Gilbert about the SDS Provider claims.

5.170 Of course, due to the substantial claims made by SDS Provider based on SDS's position regarding TIE's and CEC defaults throughout 2006 and 2007, TIE faced an awkward situation: a recalcitrant designer who alone could solve TIE's continuing major procurement problem – the significant missing and/or unconsented design so urgently needed by the Infraco bidders and by MUDFA; and two bidders who were in communication with that designer about their perspective on the true causes of design production delay.

5.171 Six days after DLA provided TIE with a draft persistent breach notice, Geoff Gilbert again contacted me by email dated 22 August 2007 (CEC01629883). He essentially informed me that he had a draft settlement letter that he was considering sending to SDS to settle their claims for £2.86m. My reaction to that was extreme surprise because I knew nothing about the claims. I certainly did not know that TIE was intending to settle them by letter.

Email sent from Andrew Fitchie to Geoff Gilbert

5.172 I am asked in Inquiry's Question 39 about the reference in this email to withholding of payments to SDS. At this point I had been shown, for the first time, some kind of settlement letter by Geoff Gilbert and I was being asked, further to a conversation that I had had with Geoff, to comment on it.

5.173 I discuss the SDS settlement below. As regards the withholding of payments to SDS, I was trying to say to Geoff here that TIE should put down a marker that failure to hit target dates would entitle TIE to be at liberty to invoke its contractual remedies in relation to the lump sum payments due at certain points in design delivery and completion. Please refer to paras 5.19 *et seq* on how the SDS contract payment mechanism operated contractually. I was advising TIE that they have contractual entitlement to withhold design stage payments at their absolute discretion.

5.174 My best recollection is that in this email I was attempting to give Geoff Gilbert further contractual ammunition for his approach and thinking about how to make SDS Provider improve its performance.

5.175 I do not know if Geoff Gilbert (or Tony Glazebrook, latterly the SDS Contract manager) used my advice or not. I doubt it - because in mid-February 2008, TIE settled the two SDS claims (lodged in early summer 2007) to 89% of their value. I now consider those SDS claims against TIE.

5.176 **SDS Claims against TIE – 2007 to 2008**

5.177 If either TIE or CEC desired SDS to alter what they were contractually obliged to deliver or produce or did not perform their own obligations, SDS could assert contractually that they required time and cost to deal with either a variation or a client default.

5.178 SDS ultimately asserted themselves contractually when they sought additional time and money for dealing with many variations and serious client defaults. SDS lodged two claims in the spring of 2007 for approximately £2.86m. DLA Piper was entirely reactive to what TIE had done and already discussed with SDS without informing us. Please also see my evidence at 5.193below.

5.179 SDS had claimed £2.24million for the cost of delay and disruption during July 2006 to April 2007 SDS had then claimed an approx. further £609,000 for additional staff costs on a TIE instructed acceleration of design production.

5.180 The two substantial SDS prolongation cost and additional acceleration services claims submitted to TIE in spring of 2007 reveal to me that between July 2006 and April 2007, SDS said it had committed a further £2.24 million to dealing with TIE and CEC's mismanagement of the design contract and the design approvals process. The complaint included failing to keep SDS properly appraised of the important interface with MUDFA works installations and by April 2007 SDS was recording delays on design sections of anywhere between 150 to 350 days, in many cases in relation to completing preliminary design only. Clearly, TIE and CEC were aware of this at the time.

5.181 SDS stated that the prolongation and variation claim rested on six distinct areas of client and CEC Planning/Roads Authority default:

5.181.1 Failure to manage third party requirements impacting design;

5.181.2 CEC Planning's imposition of the Tram Design Manual;

5.181.3 Unreasonable withholding of consents for design;

5.181.4 Failure to process design submittals timeously;

5.181.5 Failure to update the Master Project Programme; and

5.181.6 The Charrettes process.

5.182 I am asked in Question 33 whether there was any merit in SDS Provider's allegations of client side shortcomings. Answering that question requires an assessment of TIE's administration of the contract, which goes beyond my role as TIE's legal advisor. As I say, SDS Provider was clearly focused on major client default in its two claims, which TIE accepted without argument. Nor did TIE

contest the 40 week extension of time. Though the settlement agreement was worded to extinguish the extension of time claim, SDS had already obtained version 28 as its contractual programme.

5.183 I saw for the first time and close to nine years after the event, the two fully documented contractual claims for £2.856,724 and an extension of time for 40 weeks that SDS submitted (to TIE's Project Director, Matthew Crosse) in May and June 2007. The claims run to well over one hundred pages. I read from these claims that SDS asserted that 11 or more batches of designs for central sections of the Infraco installation works under the Charrettes process had been delayed in production ranging from 205 to 370 days, due to many alleged TIE (and CEC Planning) contractual and approval process defaults and unreasonableness. The claims also state that the MUDFA related SDS design was in serious delay due to a further list of 13 different TIE/CEC Planning contractual defaults/delinquencies.

5.184 I was shown a draft SDS settlement letter by Geoff Gilbert in late August 2007, I saw that there was no rebuttal at all by TIE and TIE was agreeing to pay SDS these two claims. TIE and, I assume, CEC therefore also accepted full responsibility for the £2.24 million cost of delay and disruption and for the need for the additional SDS services at a cost of approx £609,207. These facts mean that CEC Planning and TIE knew perfectly well how delinquent the SDS design delivery had been and that they had very significant responsibility for this themselves (e.g. delays by CEC Planning). TIE knew how and why the slow progress with SDS design was arming BBS in their objective of complete contractual protection on the time and cost consequences of incomplete design and as yet un-designed scope.

5.185 In summary: SDS Provider's position – which TIE and CEC accepted - was that TIE and CEC defaults/unreasonableness/poor performance had caused massive cumulative delays (40 weeks) to the design programme and additional costs of over 10% of the original design mandate bid price of £23,547,079.

5.186 When TIE actually settled the two claims in February 2008, TIE committed to pay SDS Provider an additional £2.5 million: £1million in incentives to novate, plus £1.5million in additional design fees (also due in at part at novation). TIE also paid SDS a further significant contractual stage payment the amount of which I do not know. DLA Piper played no role whatsoever in any discussions/negotiations TIE had in reaching this decision.

5.187 To the best of my recollection, and I believe this is borne out by the contemporary Project documents, the sequence of events regarding the SDS claims and DLA Piper's instructions was: in late August 2007, Geoff Gilbert sent me a draft of a letter he proposed to send to SDS settling their claims. The week before, I had been asked by TIE for advice on persistent breach by SDS and TIE potentially issuing a contractual warning. This appeared strange to me since TIE said it had reason to warn SDS then, within a few days, they produced a draft heads of terms letter making settlement of claims by SDS amounting to £2.5million and the contractual stage payment.

5.188 My role in the settlement of these claims really started when Geoff Gilbert sent me the draft letter mentioned above which he proposed to send to Steve Reynolds reflecting the basis for settlement. Geoff sent it to me for discussion on 22 August 2007 (CEC01629951 and CEC01629952). This draft letter could have been in a form that it had been in for days, or even several weeks, before I saw it. I had no idea when TIE and SDS had first discussed settlement although the draft letter to Steve Reynolds states it is "Further to our discussions last week", but I did not and do not know what discussions between Steve and Geoff this refers to. Geoff Gilbert sent me this document on 22 August, "last week", taking it literally, would have been 15 August, the day before he had contacted me requesting a draft persistent breach notice – see my answer to the Inquiry's Question 37 above.

5.189 Geoff wanted my comments on the draft claims settlement letter. I recall I asked if this was something that had been discussed within TIE, but I do not remember Geoff's reply. Certainly, once I had started my secondment to TIE about six weeks later, this topic was never mentioned at any of the TIE project management meetings I began to attend. I found this very strange but I had provided DLA Piper's advice by this time. This showed me that Geoff Gilbert, the Commercial Director, who appeared to be in charge of looking at the resolution of claims, may not have been communicating properly with Steven Bell, the Engineering Director. Something was not functioning well in terms of Steven and Geoff's communication.

5.190 I believe that I provided quite detailed written advice, more or less immediately to Geoff, in the form of comments in what seemed to be a draft summary of SDS's claims prepared by TIE. This was not the claims letters themselves mentioned in Geoff Gilbert's proposed settlement letter. The thrust of my comments and advice was that TIE should be challenging the claims strongly – if and wherever they could.

5.191 I heard nothing more on this issue until November 2007. I explain what then evolved below.

5.192 A Senior Associate in my team had prepared a basic draft settlement document in November 2007 on a verbal instruction to DLA Piper from Geoff Gilbert. DLA Piper was not briefed further and were not instructed to advise on any aspects of the SDS claims themselves.

5.193 In January 2008, SDS was refusing to novate, in part because it had lodged the two as yet unsettled claims with TIE in early summer 2007[57]. I advised Steven Bell and Geoff Gilbert to inform PB that if they refused to novate, it would be a material breach of their contract and that TIE could call their performance bond and the PCG. It was at this point that I learnt from Geoff Gilbert about TIE's intention to settle the large contractual claim in their entirety. Prior to that, as I have said, I had some knowledge about the extent of SDS's various allegations about mismanagement by TIE and chronic delay by CEC Planning that had been occurring under the SDS contract and I had advised TIE how it might challenge this contractually. What I never knew or saw was what TIE had done about the advice I had given to TIE (Geoff Gilbert).

[57] Paras 5.178 *et seq*

5.194 Neither Geoff Gilbert nor Steven Bell was really open with me about the history and reasons for, or merits of, these claims against TIE by SDS. My impression at the time was that they must relate to the period immediately after issue of the Infraco ITN, when TIE had appeared to recognise the absolute urgency over the state of SDS design available to bidders. But they were also cumulative and historic. TIE had instructed design production acceleration measures by SDS – seemingly without securing any contractual agreement that these urgent measures might be, in part, due to SDS's own failings. TIE's ability to contest what SDS was claiming had been seriously compromised by TIE's management of the SDS mandate during 2006 and 2007 and by TIE's delays, changes (due in appreciable part to CEC's role as design approval body) and other defaults SDS was alleging. I did not hear about this matter again until the meeting I describe at 5.198 below.

5.195 I have no knowledge of how or if TIE reported these claims (and their settlement), and the incentive payment , to CEC. According to PB, CEC had, inter alia, unreasonably withheld consents and were in serious culpable delay in their performance as the Approvals Body. DLA Piper was not involved in any way in the decisions about how CEC planners would interact with the Project design evolution and approval or the process under which SDS made design submittals to CEC Planning.

5.196 As simple examples of CEC wanting, for their planning department's reasons, to change/influence the SDS design: CEC required input on tram stop and overhead line support pole design since it was part of the Public Realm city streetscape and CEC had its own requirements (expressed in the Tram Design Manual) which it wished to impose on the Project. In basic terms, this was moving well away from the Infraco ER's concept of an "output specification". As an illustrative example only: an output specification might state "the scheme needs poles to support the overhead line; please design these to appropriate engineering standards". But, in contrast, a more prescriptive approach would be to state: "the poles must be in character with City streetscape, must be set at intervals not less than x metres and clad in an aesthetically sympathetic but durable material without compromising engineering purposes. No poles may be placed in front of historic buildings". This approach would give SDS plausible contractual reasons to seek more time and money. To continue the above example, using building fixings to support the overhead lines (as opposed to vertical poles) created a need for different designs and for third party agreements with associated delay and cost.[58] An extract from the Tram Design Manual illustrates this issue:

> "3. The public realm along the tram corridor should be considered, and where desirable and feasible, upgraded wall-to-wall and designed to be appropriate in its context, recognising the tram acting as a catalyst for additional investment."

5.197 DLA Piper had no involvement at all in the study of the SDS claims dispute. This is presumably because TIE received the formal contractual claims from SDS when we were stood down, No-one at TIE had informed me or anyone else at DLA Piper that SDS had formulated claims. By the time Geoff Gilbert consulted me, TIE had already discussed and agreed to pay them.

[58] See also paragraph 5.196

5.198 At a point in early 2008, I remember discussing briefly with Geoff Gilbert what he described as the final draft of the settlement agreement between PB and TIE on the SDS claims. I do not recall seeing either of SDS' actual claim submissions to TIE before or after that time. Burgess Salmon, who represented PB and appeared for some of the novation negotiations in early 2008, seemed to have had some input on this final draft settlement document Geoff showed me. My focus was and had to be on how this would impact TIE's ability to seek general recourse against SDS and how it was impacting novation and design production.

5.199 My immediate concern was that this settlement might well cut across the preservation of TIE's rights for earlier SDS breaches (e.g. pre-novation in 2006 and 2007) which I had tried to preserve for TIE in the collateral warranty to be provided by SDS to TIE and in specific language in the draft SDS novation agreement. I asked about this and my distinct impression from Geoff's reply was that he did not want to brief me about how TIE might preserve its rights against SDS: first because he could not do so factually (e.g. TIE (and CEC Planning) had not carried out any kind of design control/contract analysis of how SDS claims could be challenged); and secondly because TIE's entire focus at this point was to reach close and SDS had said it would not move in step unless claims were agreed and paid; thirdly, TIE had already agreed with SDS to pay the claims almost in their entirety. I was not entirely clear why he was showing me this at this late stage. Geoff's focus seemed to be to trade settlement of the SDS's claims for the novation. But I had already advised him specifically that SDS was already obliged to novate under the terms of the SDS Contract itself and was bonded at £500,000 to do so.

5.200 Not pursuing a designer that was so seriously late seemed odd to me: i.e. TIE's decision not to challenge SDS in any way meant TIE was accepting their and CEC's responsibility for the entire delay and additional costs claimed, without any attempt to examine if SDS had contributory fault itself. Ultimately, the template document came back to DLA Piper with instruction for engrossment. It was signed by TIE on 13th February 2008.

5.201 I recall a discussion with Jim McEwan and Steven Bell (immediately prior to a tense meeting with SDS) regarding TIE using the SDS performance bond and calling it as a means of a wake-up c to senior corporate SDS management in the USA. I had in mind the potentially negative impact on PB Group's credit lines if a bond was called. I also reminded them that TIE held a PCG and that notifying intent to call this (perhaps without ultimately doing so) would also be a means of showing how seriously TIE viewed SDS' sub-standard performance. TIE didn't want that. Instead, I remember Willie Gallagher went to New York to ask for better people on the job, but it was too late. He was not saying: '*we will sue you*' or '*we will not pay you*'. Now I understand why, having seen the timing of the SDS claims settlement. The claims had been submitted to TIE in May and June 2007 and, uncontested apparently, were therefore considerable leverage for SDS. I said to TIE that they must put a clear marker down in writing to protect their position as there would come a point when SDS design and its development post Contract award might very well be at the core of BBS claims for time and costs. I do not know if this was done or not.

5.202 Sharon Fitzgerald had spent considerable time with Ian Kendall at the outset ensuring that the SDS provider would be hand-cuffed as much as possible – including complex negotiations which I handled over from where in PB's US corporate structure TIE would take the PCG. This made me extremely frustrated that TIE's failure to manage SDS properly now threatened the Infraco procurement. There was no point in dwelling on this. TIE simply wanted quick solutions – which at this stage evolved into the 2007 claims being settled and, as I have said, £2.5 million of additional payments and financial incentives to PB to go ahead with novation, with no stated sanction attached for any provable SDS' poor performance up to that point and continuing contractual stage payments.

5.203 The timing of the SDS claims strongly reinforces my view of how much trouble both TIE and CEC knew the SDS Design production delay was causing and would continue to cause. I have little doubt that SDS's performance had become a larger problem because TIE had not enforced the SDS contract hard in 2005/6, providing SDS with the information it required from TIE, injecting its views as client and managing SDS in the way in which Ian Kendall had envisaged. In my mind, this oversight role was what TSS had been appointed for. TIE itself simply did not have the expertise to manage a designer producing engineering drawings on the scale, complexity and programme criticality required for the tram scheme. Nor, apparently, could TIE compel CEC Planning and Roads Authority to act timeously and reasonably in support of CEC's own project.

5.204 **SDS Novation**

5.205 TIE's core idea had always been to control the production of a mature, CEC Planning and Roads Authority approved and full scheme design which at ITN stage would be given, substantially complete, to bidders to price alongside Employer's Requirements.

5.206 The SDS delay undermined TIE's procurement strategy, altered **contracting** parties' attitudes to risk tolerance and impacted upon TIE's ability to close out contract negotiations and claim settlement with:

5.206.1 SDS – whose position ironically became "we are being obliged to novate far too early in our scope thus exposing us to risk"; and

5.206.2 MUDFA –who asserted inability to proceed with their programme due to lack of SDS critical design. SDS asserted in their claims that TIE (and CEC Planning/Roads) had prevented them from delivering this design to deadline; and

5.206.3 BBS – who, particularly once confirmed as Preferred Bidder, could justify a position whereby it maintained that it could not commit to (i) a fixed price, (ii) a master construction programme, or (iii) a PSCD.

5.207 Based on TIE's procurement strategy, PB was not to be involved directly in the Infraco Contract negotiations. The SDS design contract had been awarded in September 2005, well over two years before Infraco procurement BAFO. The detailed scheme design was to be completed by October 2007 and PB was obliged to novate to Infraco at Close.

5.208 But by early 2008, PB was throwing its weight around, asserting that it was not willing to novate to Infraco, unless all its prolongation and other claims against TIE were settled. SDS also stated that because TIE had revised the ERs, they would not warrant that construction by BSC using SDS design available as at 25th November 2007 and then on into early 2008 would deliver the revised ERs. As a simple example: the desired tram runtime from Airport to Haymarket might be longer because of unforeseen consequences from a design adjustment required to be introduced to respond to TIE's new ERs.

5.209 The fact that TIE required to draw up a Novation Plan, with TIE leading on the practicalities and diarising a substantial programme of post-contract award design workshops with CEC Planning involved, could not have failed to make CEC, at project technical "negotiating team" level, realise that the tram scheme design status at March/April 2008 could not possibly deliver a fixed price contract. Notably: the TIE management Novation Plan in January 2008 stated that SDS design was to be completed by January 2009 i.e. SDS design would now be completed in parallel to the Infraco works. As I have discussed, even that extended deadline was not met.

5.210 There were tripartite amendments to the SDS Contract to get the novation signed. This was during March/April 2008. They were very difficult negotiations. There had been a breakdown in personal relations between the relevant senior personnel and it was clear to me that BBS and SDS had discussed their concern about TIE and CEC management of this aspect of the Project. Burgess Salmon represented PB and were at some, but not all, meetings. It was a senior director at PB, Steve Reynolds, who was in charge and a commercial director, Chris Atkins, who negotiated the SDS contract amendments and the novation.

5.211 The incomplete SDS design was absolutely central to the difficulties which TIE faced in the Infraco contract negotiations (including the introduction of BDDI, the Wiesbaden Agreement and SP4). I discuss the impact of design delay for the Infraco contract negotiations in more detail in section 7 below.

5.212 Another direct important impact of the SDS design delivery being late and subject to significant claims that I saw was the time and effort demands this placed on TIE management, particularly Steven Bell, at a time when it was critical for him to engage fully on the Infraco Contract negotiations.

5.213 **Post Novation**

5.214 In 2009 and 2010, during the Infraco contractual implementation phase, I repeated my view that SDS had responsibility for the design delay. I would regard it an error if no action had been taken against PB by TIE or CEC. The SDS Settlement Agreement had been worded to deal with finality for PB claims against TIE, not vice versa. It was signed off by Geoff Gilbert and ultimately Steven Bell and Willie Gallagher.

5.215 One problem with pursuing SDS' earlier defaults was that, as I recall, only one Persistent Breach warning may have been given by TIE and I do not believe, initially, that TIE had ever demanded a

detailed design delivery programme, other than an end date of February 2007, so SDS final approved design production obligation essentially began by depending on what was reasonable. This was despite SDS having been contractually obliged to produce a detailed design delivery programme which met with TIE's approval. The SDS contract was drafted and prepared by DLA Piper on the basis that TIE, as client, and SDS, as designer, would agree a detailed design delivery programme. The SDS provider was to provide TIE with its specific design delivery programme within 30 days of contract signature and TIE was entitled to accept this or require it to be revised. I have no memory now of what TIE did about this, but the fact is that the programme that was adopted contractually was the PB indicative programme used in their bid. This was not a matter for DLA Piper to police.

5.216 I recall being disturbed to find that TIE had never really settled this detailed design delivery programme with SDS, which was a strange and very important omission on a high value consultancy mandate worth at contract award over £23 million and, in the end, nearer to £30 million. TIE and CEC knew that the SDS design was at the heart of TIE's procurement strategy. In essence, it meant that SDS, not TIE, began controlling design delivery with its successive programme versions, of which by the time the Infraco Contract was awarded there had been 28 versions. This situation was seriously at odds with the procurement strategy's dependence on giving the bidders a substantially developed scheme design for which they could offer a committed price and a construction programme.

5.217 **Inquiry Question 109**

5.218 I am referred to the advice note produced by DLA Piper dated 27 July 2009 (CEC00652331), and in particular para 2.2.3.8. I cannot specifically remember this report which was almost certainly co-authored by me and a senior associate in the DLA Piper Edinburgh construction department who had been supporting colleagues in the office on the SDS contract advice. The reason for the report was, I believe, a request from Steven Bell. Adherence to the SDS consents programme and the design delivery programme is essential to compliance with the SDS contract. What TIE did with the advice, I do not know.

5.219 **Inquiry Question 45**

5.220 On 23 August 2009 I emailed Susan Clark about whether there was traceable evidence that SDS performance had caused delay and expense claims against TIE on the Infraco contract (CEC00854847).

5.221 I was writing to Susan, who was the deputy project manager at the time, because she had taken on responsibility for an audit that TIE was doing. She may have been instructed by Steven Bell (Project Director) to respond. This email is me, I believe on my own initiative, following through on something that had puzzled me for the best part of three years, which was TIE's continuing reluctance to chase SDS using the contract.

5.222 I do not recall receiving any response from Susan Clark or being directed to any evidence that TIE had collated relating to SDS culpability (following, perhaps, internal meetings on this subject), in particular delay in critical design production. I never saw nor was told about any input from CEC on this issue.

5.223 You can see from this email, which was over a year on from Infraco contract award, that I say "I am refocused on the fact that TIE has independent rights against SDS in relation to both the utilities scope of work on which SDS continued with TIE as client post novation and rights under the collateral warranty." There were two potential sources of claim for TIE against SDS, despite the novation and the claims settlement. DLA Piper put language into those documents to preserve TIE's rights as far as feasible and, insofar as I could see, TIE had done nothing to preserve evidence to support its use of those rights. I state "*To the extent TIE uncovers obvious breaches of the SDS Agreement, the effects of which have been passed on to TIE by Infraco, there needs to be careful analysis of TIE action to put SDS on notice that there has been damage caused to TIE by SDS default. This is because, as previously mentioned, the DRP provisions in the SDS Agreement contain time bar provisions which are intended to prevent the parties storing up claim until the end of the commission.*" It was important to take a conservative position on when the time bar period might begin to run.

5.224 My best recollection here is that I was still seeking to encourage TIE to preserve its rights for a contractual and/or delictual claim against SDS regarding loss and damage suffered by TIE as a result of SDS's contribution to the immense design delay, which was still continuing at that time and occasioning Notified Departures. I say "still" since I had never been informed properly by TIE at any point what their precise grounds for complaint against PB were. See, as one example, my email of 16 August 2007 discussed at para. 5.160 *et seq*. I was also focused, as is evident in the email, on time bar – by reason of Clause 28 in the SDS Contract. I was also seeking to establish if TIE could and should require BBS to operate the LADs provision contained in the SDS Novation Agreement.

5.225 As I say above, I do not recall receiving a specific response from TIE to this email. If there has been a specific response to my request here, I am absolutely confident that I would have drafted up a letter for TIE to send to SDS, to put them on notice and saying something along the lines of *"we reserve our position in relation to these matters which caused us damage as a result of your default in producing defective design for the utility diversions or not producing any design*". Whatever material TIE could give me in relation to what SDS breaches there had been would have gone into a draft document that I would have sent back either to Susan Clark or Steven Bell for TIE's consideration for issue as at least an initial 'place marker'.

6 UTILITIES

6.1 Overview

6.2 As instructed by TIE (Ian Kendall) DLA Piper managed production of the MUDFA ITN and prepared the draft MUDFA Contract to go with the ITN.

6.3 There was still resistance within TIE to be committing to procurement preparation when the tram scheme legislation was still in promotion. This indicated to me that there was a lack of understanding at TIE as to how long a £500 million infrastructure project procurement would take to prepare and launch successfully. Ian Kendall complained to me privately about this. I believe this resistance and TIE's own lack of readiness held back the MUDFA ITN issue until mid-autumn 2006 when the Infraco ITN was also issued. And so MUDFA essentially had the Infraco bid period and period to Infraco contract signature (October 2006 to May 2008) to produce sufficient utilities-free sequential on-street sites. This was not the lead-time Ian Kendall had pressed for within TIE. I cannot now recall exactly when DLA Piper had a fully assembled draft ITN (which relied predominantly on TIE providing the works specific technical, commercial and financial information for a DLA Piper detailed template) and accompanying contract suite ready for TIE. But I would estimate that MUDFA could have gone to market perhaps two to three months earlier if TIE had prioritised this and had been more organised and had had suitably experienced personnel working on the ITN preparation.

6.4 Once the ITN was issued, TIE instructed us to administer the bidder clarifications during the negotiated procedure under the EU Directives on public procurement. By this, I mean we logged and answered the enquiries and formal requests for information and TIE provided us with the information and the answers, where these were not legal points. Sharon Fitzgerald was the principal fee earner on these tasks and I supported her as required.

6.5 Once the MUDFA contractor was appointed in October 2006, our role was to provide TIE with support in administering its contract when requested – again verbally. Our files would demonstrate what this advice was and how frequently we were engaged – which was often on the telephone during 2006 and early 2007. I recall a renewed fairly intense involvement for Sharon in late 2007 and also again when in February 2008 Carillion acquired Alfred McAlpine (AMIS), the original MUDFA contractor and the MUDFA contract was formally assigned.

6.6 From the MUDFA contract award date onwards, Sharon handled the DLA Piper legal advisory work for TIE in relation to the contract management of the works execution phase. I had absolute confidence in Sharon who was a Scottish Senior Associate at the time and subsequently became a partner in the firm. Sharon had worked closely with Ian Kendall, TIE Project Director, on DPOFA and in the preparation of not only the MUDFA contract but also its complete ITN suite from its inception. Her continued involvement was logical, efficient and beneficial to TIE.

6.7 I remained the supervising partner with direct client management responsibility, but in normal fashion, I did not replicate what Sharon was doing. I remained in close contact with her through the MUDFA execution phase. We both worked in the same DLA Piper open plan office in Edinburgh. Quite apart from regular team meetings, we discussed most of our key involvements with and work for TIE more or less on a daily basis. I was also copied on some components of e-mail traffic. From my discussions with Sharon, both 'ad hoc' and team meetings, from what I read and from what I saw and heard first-hand at TIE during my secondment, I formed the very clear impression that the MUDFA contract was not being managed consistently or firmly by TIE. At various junctures, I know

that TIE engaged Turner Townsend (Gary Easton as senior consultant) on an 'ad hoc' basis to support their approach on the management of MUDFA since I recall being asked by Steven Bell to advise on the procurement implications for TIE of appointing Turner Townsend without a call for tenders.

6.8 The core works under MUDFA were: the construction and engineering planning and activities for identification and location of utilities using TIE's information and information provided by the affected utilities (and in some limited cases by CEC); the diversion of utilities equipment and apparatus; and the reinstatement of the streets and areas where diversions had taken place.

6.9 SDS were responsible (as TIE's consultant) for the design of all utilities diversionary works since these works required to dovetail with the design of the tram street and infrastructure works (as permitted and envisaged by the parliamentary plans), except for very specific reconnections and individual utility apparatus refurbishment/replacement work. CEC Planning in their capacity as Roads Authority were responsible for the approval of all MUDFA designs –whether critical or non-critical – produced and submitted to CEC Planning by SDS. Any relevant design was to be given(MUDFA by SDS and the late and possibly indifferent quality production of that design formed part of a prolongation claim by Carillion against TIE.

6.10 **Procurement Strategy**

6.11 As discussed above,[59] the contracting and economic advantage of a comprehensive advance works utilities diversion contract was to provide the Infraco Contractor with an unfettered site for on-street works. This would give far greater clarity in terms of the Infraco construction programme, which would be free from reservations or caveats about interference with critical path activities due to the need to interrupt programmed works if sub-surface on street utilities apparatus was discovered after the main works were under way.

6.12 **Utilities Records**

6.13 It was commonly known in the UK and from continental Europe that the utilities mapping for stre(in any old city, particularly one that had had tram infrastructure in it for over sixty years such as Edinburgh, was not reliable. I refer in this context to the National Audit Office's April 2004 Report on Light Rail Schemes. This formal study concluded that the cost and delay of utilities diversion had proved to be a key inhibitor for successful and cost efficient urban light rail construction in the UK. The Leeds Supertram project was eventually cancelled due to the unbudgeted estimated cost of city-centre utilities diversions exceeding £80 million.

6.14 Finding and/or requesting utilities records was not something DLA Piper was involved in, nor would any legal adviser be. I consider it was a technical undertaking and one that TSS was appointed to assist TIE with. I remember TIE talking about engaging a specialist consultant with ground-penetrating radar. We drafted specific language in the ITN to indicate that TIE was providing as

[59] Paras 4.91 *et seq*

much advance information on utilities mapping as it could, without any warranty as to accuracy. But bidders were instructed they should satisfy themselves independently on this.

6.15 I recall hearing from Steven Bell that TIE was having difficulty assembling this information beyond basic levels. I believe some information on the major utilities was provided by TIE to the bidders with the ITN, but this was TIE's engineering and commercial remit as client, not DLA Piper's. How much and how up-to-date and useful to bidders this information was, I do not know. However, when we prepared the Third Party Agreements for utilities at bill promotion stage during 2005, we negotiated, as best we could, provisions about the utilities' co-operation with TIE and the MUDFA contractor (as well as provision for some of the utilities' nominated specialist reconnections subcontractor to be involved in MUDFA works).

6.16 I remember specific discussions about Leith Walk where the need to move and re-install a major gas main revealed a multiple property issue: the individual feed pipes to domestic properties were not owned by Scottish Gas Networks and, I recall, were too old to guarantee that they would handle an increase in delivery pressure from the new main. Some utilities were very reluctant to release their information about extent and location of their apparatus, in particular the water and gas companies who had rolling statutory obligations to renew and refurbish their underground networks.

6.17 **Advantages/Disadvantages of MUDFA – Inquiry Questions 45 and 46**

6.18 MUDFA was aimed by TIE to deliver better construction works pricing and programme certainty and clarity by limiting the pricing and construction time qualifications that the Infraco would otherwise use to protect itself from unforeseen or very unpredictable ground conditions during on street works, as well as multi-party interface with the utilities. The MUDFA contract **aimed to** deliver the utilities diversions to a programme which coincided with clearing the streets of utilities in order to enable the Infraco contractor to price on the basis of sequential access to site.

6.19 I am asked in Question 46 about an email from Sharon Fitzgerald to John Low, Dave Ramsay and others dated 18 January 2006 (CEC01858524) which discusses some of these points. At that point preparation for the MUDFA procurement was up and running. MUDFA was in fact signed on 4th October 2006. Dave Ramsay was part of Ian Kendall's team at TIE. He may later have been the first TIE contract manager for MUDFA. What Sharon says in the first paragraph is essentially a précis of why the MUDFA contract concept was an advantage: it is a single point of responsibility. This was in response to a question from John Lowe of TSS who were consultants appointed by TIE as engineering advisors. I do not know when TSS were actually appointed, they were not part of the procurement planning.

6.20 This email is Sharon familiarising TSS (and Scott Wilson people) with MUDFA. I note that she goes on, in the second paragraph, to point out who the utilities are. There is a question surrounding amendment to the agreements. Sharon says "*To move the NTL, Thus, Easynet, Scotland Gas Networks and Scottish Water Agreements to the BT position undermines the concept of single point responsibility which has been formally agreed in the contracts with these 5*

utilities." BT had taken a special position in that they did not want 'any old person', i.e. MUDFA, to move their apparatus. They wanted a BT preferred contractor. A compromise was brokered in which they eventually allowed MUDFA to move their apparatus, but their preferred contractor would reconnect it.

6.21 Sharon talks about single point responsibility. There is an advantage in having one contractor in the supply chain carrying out the work because there are potential cost savings on scale and costs savings related to multiple appointments. There is also an advantage with regards to the contract management aspect, i.e. you do not need ten different managers managing different utility diversion contracts, each with their own programme. The other attraction is that if there is any interface with those works, one person is responsible for it. A further advantage would be one point of liaison with the Infraco, as opposed to multiple contacts, once the Infraco is also doing work on street. There is also an advantage with regards to cheaper insurance on the contracting.

6.22 Sharon was trying to summarise those advantages quickly in her email. These are commercial and factual points, not legal advice, and TIE had been over these itself and analysed its Strengths, Weaknesses, Opportunities and Threats (SWOT analysis) when deciding on the MUDFA approach. Clearly, the whole proposition is to get a contractor in the street and moving the utilities quickly, sequentially and efficiently, to build up momentum and actually make it an attractive contract, as opposed to 15 different, smaller contracts moving individual utilities in different areas. That concept had been sold in the EU PIN notice process and the informal soundings that Ian Kendall had undertaken to put the Project as a whole into the market. There was a contracting market which understood the process and the pre-qualification exercise for MUDFA. We tested who knew how to undertake the work and the market response was *"yes, we like that idea. That is something that would work for a main contractor. We, as the main contractor installing the infrastructure for the tram, would need to price for fiddling around and making connection with and talking to multiple small contractors doing utilities diversionary work parties, and fitting all of them into our critical path construction programme, if there were lots of different utilities contracts going on".*

6.23 It is worth bearing in mind that MUDFA also needed co-operation from Network Rail. Network Rail, being the entity that they are, wanted a monopolist's dream world of indemnities, negotiations and agreements. MUDFA removed that responsibility from TIE. If TIE had contracted with a number of smaller subcontractors, TIE would have had considerably more difficulty obliging these much smaller contractors to handle Network Rail's requirements on their own. I am not saying that Network Rail was a stumbling block, but it is always a big party in the background for any construction or installation works of this nature in the vicinity of the operating railway line and its infrastructure. Its processes are slow and impose onerous and unilateral responsibilities.

6.24 If TIE had had three MUDFA contractors, it would have had three sets of contract management functions. It is true that putting this utilities work all under one roof put a lot of onus on solid performance by the selected contractor and firm, knowledgeable management by TIE. The procurement process to get a contractor into a position that could do this work was rigorous. The

bidders were pre-qualified as regards their experience and skills on utilities diversions and installation. They were all people who knew Edinburgh. The fundamental problem for the MUDFA contract, and any utilities diversions contract in ancient cities, is nobody has a complete picture of where the underground apparatus is exactly located. You go to a utility company and they do not know where all their cabling is. They dig for it, and then they bump into something else. Having a single large experienced contractor that is used to doing this type of work for the utilities meant they had knowledge and familiarity of the way every utility worked.

6.25 As far as I am concerned, from a legal advisor's standpoint, there were no visible major disadvantages to MUDFA, as long as it was administered and engineered correctly. The only discernible disadvantage to MUDFA was the possibility of delay as a result of failing to corral the utilities properly. Because of TIE's desired procurement timetable, that was a very urgent task. DLA Piper did a significant part of this work in securing non-objector status from all Edinburgh utilities under Ian Kendall's instruction because TIE did not have the resource to commence this even though it was time-critical to the MUDFA procurement. That said, other than that one particular instance, I cannot personally think of any significant disadvantage of having a single point, multi-utility diversion agreement.

6.26 The main commercial challenge of using the MUDFA approach was that it required the full engineering co-operation of all affected utilities in identifying and locating their underground equipment and planning diversions, in some cases involving replacement of old or underperforming materials and assets. But the reward was all the utilities diversionary work under one roof for TIE to control and co-ordinate for optimal site availability as opposed to the utilities themselves through preferred contractors and the resultant interface and programme risk.

6.27 I was pretty impressed when Ian Kendall went straight to Scottish Water and said "right, you lot, tell me where your pipes are, because I know you have got a statutory obligation to produce and implement a rolling maintenance programme and you can change that programme and get your work done for you under the tram project, if you co-operate with me." In response Scottish Water just said "our rolling replacement programme is a matter for us". Ian Kendall explained to me that it is all about capital expenditure timing: they want to leave the 1928 water main until it actually leaks before they replace it. But we were able to bring Scottish Water into MUDFA.

6.28 DLA Piper supported TIE in overcoming this issue virtually completely, including Scottish Water as I say above. I say virtually because there were some utilities who were very awkward about reaching agreement on how their equipment would be handled during diversionary works and others who insisted that actual reconnections would have to be carried out by their specialist contractors, not the MUDFA contractor (e.g. BT as mentioned above).

6.29 In summary: under urgent instruction from TIE, we first secured non-objector status from all Edinburgh utilities. We succeeded in capturing them all on sensible terms for TIE and TIE was responsible for keeping CEC informed. I recall that this was done with memoranda of understanding or heads of terms and we moved quickly on to secure the actual agreements with

TIE, as authorised agent for CEC, on how each utility would interface with MUDFA so that these specific arrangements could be passed down for the benefit of the MUDFA contractor.

6.30 When DLA Piper were first appointed I knew that utilities diversions would be critical for TIE and I insisted that these third party agreements were carved out of D&W's scope so that they could form part of the main suite of the four tram implementation contracts: DPOFA, SDS, MUDFA and Infraco.

6.31 This essential legal work had to be achieved very swiftly indeed, since TIE had decided not to engage on it until it became clear that the Bills would pass into legislation; what I can say is that TIE Project Director at the time, Ian Kendall, was extremely happy about our work and said so to me and to Sharon.

6.32 CEC were at best inert and often entirely unhelpful in this process, except for Duncan Fraser, the CEC liaison at TIE. Since CEC were the statutory Roads Authority responsible for issuing TROs and TTROs related to on-street occupation by MUDFA Works, CEC had an additional obvious means of direct knowledge about what level of MUDFA works was on-going and how the non-availability of produced and consented SDS Design progressively impacted MUDFA.

6.33 **Third Party Agreements – Inquiry Question 50**

6.34 The Third Party Agreements in this context essentially divided into three categories: 1) agreements where CEC had agreed with an affected enterprise to carry out protective works or to carry out works inside certain time windows, site constraints or working hours; 2) TIE's agreements with the utilities and with Network Rail; and 3) a variety of less substantial accommodation works/undertakings with private persons or small businesses. The first and last categories were stepped down into the Infraco Contract. The specific utilities agreements were stepped down into MUDFA. The Network Rail asset protection requirements were written directly into the Infraco Contract to place all those interface and works obligations on the Infraco. The whole idea was that TIE would be the counterparty in these agreements. TIE would then be able to step the agreements and their obligations down to a MUDFA contractor under the MUDFA contract. The third party agreements that DLA Piper dealt with were the utilities' third party agreements. I do not remember how many there were. I think there were roughly 15 Edinburgh utilities. If the Inquiry requires reference to the relevant list of Third Party Agreements, this sits in Schedule Part 13 of the Infraco Contract.

6.35 I am asked why CEC were reluctant to enter into third party agreements with Scottish Power and Telewest, although my recollection is of Cable & Wireless rather than Telewest. As discussed above, DLA Piper had negotiated TIE's agreements with the utilities companies in 2005. Nearly two years later, on 27th April 2007, I had an exchange of email correspondence with TIE about these important agreements. This was seven months after the Infraco ITN had been issued and, in fact, well after MUDFA Works had already commenced. Essentially, I had asked a considerable period of time before for further CEC input on the basic agreements with Scottish Power and Cable & Wireless. Nothing happened whatsoever. Eventually, a reply from TIE (in fact from a D&W

secondee, not from a TIE manager) came with an apology. It was to the effect that CEC had done nothing to address my queries and claimed to have been told nothing by TIE in 2005 about the two agreements, essential to facilitate and enable MUDFA.

6.36 I do not know the reason for CEC's reluctance, but it was extremely unhelpful as, due to TIE's lack of resourcing, DLA Piper were instructed late that we should tackle the utilities negotiations for TIE. We were immediately under great pressure to coral all Edinburgh utilities into clear, binding third party agreements to ensure that these commitments to permit work on and around on street sub-surface apparatus could be used by the eventual MUDFA Contractor and shown to them, wherever possible, in the ITN to improve costings. I had two associates working on this full time.

6.37 I recall that initially CEC said that it wished to be the party to enter into all third party agreements. This was initially being handled by D&W under their scope of work advising TIE on the Bill promotion but:

6.37.1 due to the direct engineering, programme, approval and practical interface between the utilities and TIE's MUDFA contractor, we had advised TIE that it would be more practical and transparent if TIE concluded these agreements with the utilities itself. CEC was informed of this (as were Dundas & Wilson by their own scope of work). The task of drafting these agreements was within our scope of work as I had specifically agreed in early 2003 with Alex Macaulay of TIE for this reason;

6.37.2 TIE was very concerned that if CEC were involved there would be unexplained lengthy delay in obtaining the agreements and this would interfere with the issue of the MUDFA ITN; and

6.37.3 at some point CEC had indicated that it wished, as Promoter, to approve all third party agreements and TIE must have sent the Scottish Power and Cable & Wireless agreements we had prepared for approval and negotiation. As I say in para 6.35, CEC gave no response for over 21 months. Scottish Power, in particular, was very difficult to negotiate with and I believe that TIE simply moved on and signed the agreement without any CEC comment.

6.38 It is also put to me that TIE and CEC had powers under NRSWA and I am asked why it was felt necessary to enter into specific agreements. There was detailed discussion around this issue with a number of utilities. I cannot now recall the advice that DLA Piper gave to TIE at the time but it is in writing and was prepared by a member of my team. I believe that: (1) there were issues being raised by utilities about the nature and necessity of the works that would require diversion of their apparatus and equipment (that is: CEC had no statutory authority to install the tram at this point in 2005 and therefore neither did TIE – so NRSWA had no application); (2) there were debates about whether NRSWA authority could be properly assigned to MUDFA if TIE itself was not the statutory Authorised Undertaker with the mandate for a public works project (as defined by NRSWA); and (3) TIE wanted specific contractual commitment that it could rely upon and step down direct into MUDFA, as opposed to a more general statutory power held by CEC as Roads Authority, and not

by TIE. The Operating Agreement between TIE and CEC took CEC and TIE 29 draft versions and four years to settle. This is central to the reason why the third party agreements with utilities were necessary to ensure TIE could step these utility diversion rights down into the MUDFA Contract: CEC failed to formally delegate its NRSWA powers to TIE until 2008 – despite this step being recommended by DLA Piper over four years earlier as part of proper procurement preparation for MUDFA.

6.39 Ian Kendall's position on this matter (and TIE's instruction to DLA Piper) was that if it went to CEC for discussion, any decision/input would be very slow and he wanted TIE to push ahead to secure heads of agreement with the utilities. He was right: please see my comments to CEC involvement on Cable & Wireless Scottish Power and, later, Edinburgh Airport Limited.

6.40 **Design Responsibility for MUDFA – Inquiry Question 47**

6.41 I am asked what the design responsibility split between the MUDFA contractor and the utilities was. The MUDFA Contractor was not in contract with the utilities, save as provided for by the individual third party agreements. These did not concern the positioning and design of diversionary works, other than where specific approval from the utility concerned was necessary, so there was no 'design split' between MUDFA and the utilities. SDS Provider was responsible for the MUDFA design works. I have discussed this aspect of SDS Provider's role above.

6.42 The statutory utility companies did not have any contractual design responsibility. It was up to the MUDFA contractor to find the underground apparatus, using the utilities' mapping and ground radar as well as reasonable assistance from the utility concerned (as provided under the third party agreement). It was SDS's job to produce a tram design to show MUDFA how the utilities needed to be removed and diverted or left in place or reinforced etc.

6.43 There may well have been, in those third party agreements between the utilities and TIE, fundamental rights for the utility company to look at the design and require certain changes, for example to the depth at which cabling would be buried. But this was not design responsibility and the utilities were not stipulating the position in the street where their apparatus had to be placed because the design - produced by SDS and, importantly, approved by CEC Planning as the Roads Authority - was to accommodate the tram works and infrastructure and post-installation tram infrastructure and systems maintenance needs.

6.44 I am also asked what is meant by the term 'critical design' in the MUDFA contract. In simple terms, this was SDS design for MUDFA works that TIE planned and saw as essential to ensure that MUDFA works cleared a path for Infraco to mobilise and progress the tram installation works efficiently and sequentially, especially the on street track and overheads installation works. As the SDS design production and release for MUDFA became more and more delayed, thus compressing time, so more SDS design moved onto the critical path of the MUDFA Works programme.

6.45 The MUDFA mobilisation and works programme began on contract award in autumn 2006, roughly a year before TIE's planned Infraco contract award. This programme therefore had very little, if any, programme slack, meaning there were certain on street areas that were to be programmed for completion quickly.

6.46 **Inquiry Question 48**

6.47 I am asked about an early February 2007 letter from AMIS to Susan Clark at TIE (CEC01792998) which includes a list of Bills of Quantity that are incomplete. Sharon Fitzgerald was dealing with any issues on MUDFA at this point. This letter came in a rather strange period when we started to get information from TIE on a fitful basis. It was probably a month and a half before I learned informally from Stewart McGarrity that DLA Piper were going to be stood down. I do not recall having seen this letter at the time, or having been shown or sent a copy of it. It discusses missing commercial information. I was aware from Sharon, at some point, that TIE had failed to produce a number of Bills and I note the 30 items listed in Andrew Malkin's letter which are all to do with Bills of Quantity.

6.48 Bills of Quantity are the client's responsibility. It is their responsibility to get those documents ready, after agreeing them during the bid process.

6.49 I was not closely involved with the AMIS takeover of the MUDFA contract. This is a letter from somebody at AMIS to Susan Clark at TIE in February. The parties signed this contract on 4 October 2006. Clearly there was not too much concern at that point. There must have been an understanding between the parties that TIE would produce these Bills of Quantity within a period of time. I am not in a position from first-hand knowledge to say what happened.

6.50 The preparation of Bills of Quantities is not a legal advisory responsibility, nor would a legal adviser be in a position to say that this type of documentation was materially incomplete from a technical or commercial standpoint. Typically, a legal adviser might review the engineering and commercial language and descriptive passages in a Bill of Quantity to ensure that terminology is consistent with the main terms of contract.

6.51 As is normal under any EPC contract, pro forma Bills of Quantities would be completed and produced by the bidder as part of its tender, using its prices for works, labour and materials and any provisional sums. These would be evaluated by the quantity surveying and financial advisers/staff of the client and then used as the core of the financial and pricing component of the contract, if that bidder won. I was not involved at all in the process of producing the Bills of Quantities. In my experience in the construction industry, and my experience of construction contracts, it is always the case that the client populates the Bills of Quantity with what they think is needed. The contractor then prices them and puts in what he thinks may be other items that are needed. Anything that is not capable of being priced in terms of labour and materials is put in as a provisional sum, or at some rate or a line in cost. Doing this generates certainty as to what will be charged for what. Producing them to go into the contract would usually be the job of the client's quantity surveying unit.

6.52 This AMIS letter refers to the fact that TIE had not provided the information on applicable contract rates required to complete the 30-odd Bills of Quantity cited in the letter as being outstanding since 30 October 2006. Providing that fundamental financial and commercial information is a quantity surveying and engineering administrative responsibility; that is a responsibility that was core to TIE's function as Project delivery agent.

6.53 I do not know whether these issues caused or contributed to any delay in commencing or carrying out any of the MUDFA works. It does not look like it from the face of this letter. The letter is not saying "by the way, since you have not paid us as a result of not having these Bills of Quantities, we are going to stop work or seek an extension of time". The MUDFA works by February 2007 had been on going – in some guise or another - for approximately five months.

6.54 **Penalties / LAD Provisions – Inquiry Question 49**

6.55 We see that by 23 March 2007, TIE had asked Sharon for advice (and received this in detail: CEC01621726) in relation to how to deal with the fact that the SDS Design relevant to the MUDF works was not available at MUDFA contract signature or immediately after it. Consequently, pre-construction activity under the MUDFA Contract to identify and set out programme for the critical MUDFA works had not taken place. The MUDFA contractor was by now complaining to TIE that it had not been able to plan efficiently and looking at its contractual ability to seek prolongation and disruption costs.

6.56 I was copied into Sharon's email dated 23 March 2007 to which she attached a document on which she had marked up comments on a document entitled "*MUDFA Contract Improvements*". One of the suggestions in that document is that there needs to be more effective penalties/LAD provisions. I am asked why there were not more robust penalties in the original contract.

6.57 In context, what Sharon wrote is entirely clear and follows from DLA Piper having been involved in drafting the MUDFA contract under instruction from Ian Kendall, TIE's Project Director.

6.58 TIE were concerned at this point about their failure to lock SDS Provider into an overall desi delivery programme[60] (so that the MUDFA works could progress supported by the relevant SDS Design) had resulted in MUDFA's construction programme being impacted.

6.59 To the best of my recollection, the MUDFA contract ITN was drafted in early 2006. That was shortly before Ian Kendall left the Project. The client decides what amount of liquidated damages should go into a contract. There would have been discussions with Ian Kendall about the level of liquidated damages for this type of contract. The level of LADs chosen for the major advance works MUDFA construction contract and how and when LADs could be applied would have been determined by TIE producing a sustainable and realistic estimate of damages suffered if MUDFA sectional or substantial completion was late. An indication of the level and mechanics of the LAD sanctions may well have been included in the MUDFA ITN.

[60] See paragraphs 5.26 *et seq* & 5.215 - 5.216

6.60 I have no recollection at this point, eleven years on, of what that would have been said in those discussions. What I would say, at this point, is I was not dealing with the day-to-day detail of the transfer of MUDFA to AMIS. Sharon Fitzgerald was handling these negotiations, as we can see from this email. I am copied in because Sharon is telling me what is going on and she is reporting to Geoff Gilbert, who is on the scene at TIE by this point.

6.61 I stress that the calculation of liquidated damages and how/when they are to be applied in a construction contract is not a legal function – it is a commercial (how much will the market accept) engineering (what are the impacts on linked or dependent activities in the overall client-side development programme) and quantity surveying (what are the likely direct and foreseeable losses and exposures for the employer) exercise. This was one of the functions of the Master Programme which TIE was to develop and use which is discussed above.[61]

6.62 I personally am not aware of any time when TIE explicitly consulted DLA Piper about being in a contractual position to apply LADs on the MUDFA contractor.

6.63 In my opinion, TIE struggled to administer/manage the MUDFA contract. DLA Piper was involved frequently to try and manage crises on contractual points. Sharon would report getting numerous queries from TIE on a reactive basis. As a client with a master programme where MUDFA progress was on the critical path all over the city, TIE needed its best people on this after contract signature in October 2006. There were periodic changes of TIE's MUDFA Project manager and TIE was being drawn into the contractor's claims and arguments, as opposed to using the contract and its client-oriented control levers.

6.64 Sometimes hired hands or TIE staff would leave, causing a contract management void, with limited hand-over and institutional memory. Often it appeared to us that a new person tasked with taking MUDFA on did not know the background and would call DLA Piper. John Casserly was the designated MUDFA contract manager for an appreciable period.

6.65 Turner & Townsend as project management consultants (predominantly through Gary Easton) were involved in the Project on a "case by case" basis. They did work on claims but were not managing the MUDFA contract on TIE's behalf. I have discussed what I know of their role.[62]

6.66 By early 2008, after 16 months, MUDFA was very late, but in full swing in the public eye. For example, I believe the Haymarket Station – Morrison Street – Dalry Road – Maitland Street junction was first dug up in 2007 but the Heart of Midlothian War Memorial was not eventually removed to storage until May 2009. And so TIE's construction work in that key area three years after contract award still concerned utilities.

6.67 Ultimately, Carillion – the MUDFA contractor – brought a multi-million pound prolongation and variation claim against TIE. I was aware that this had been signalled before Infraco Contract award in May 2008. Steven Bell was planning and supervising TIE's response to the claim for a

[61] Paras 5.33 *et seq*
[62] Para 10.55

considerable period of time. I believe that Turner & Townsend and possibly other consultants assisted TIE in assessing and ultimately settling the Carillion MUDFA claim. DLA Piper was not instructed on this though I recall attending one meeting in which a consultant presented their view to TIE on aspects of the Carillion claim.

6.68 I had a doubt about the consistency and quality of TIE's management of MUDFA – a very large, highly visible, disruptive and, in fact, technically difficult undertaking. For example, TIE seem to have forgotten that they held a significant defects liability bond. This was at the time of the assignation of the contract. It was specifically pointed to TIE as an important commercial matter at assignation that they should negotiate an equivalent bond from Carillion as the previous bond with AMIS could not be assigned (as is normal).But TIE did not insist on this at the time and Carillion refused to provide one after the event. Ultimately, the Carillion MUDFA claim was mediated – I think – to a settlement but I have no recollection of being informed directly how much TIE had paid in the end. I believe it may have been around £12 million, and part of it – the prolongation and standby claims - had been caused by SDS MUDFA design delay. This was a significant additional payment by TIE that ate into the funding available for the Infraco Contract works.

6.69 As with SDS, TIE was well aware from top to bottom in their Project team how far MUDFA was in delay against the works programme required to de-risk the Infraco Contract. The strategy had been to get MUDFA works substantially completed before Infraco contract was let and EPC contractor mobilisation was imminent. Both TIE and CEC had on-going knowledge of programme impact of MUDFA delay and the failure to accelerate progress.

6.70 **Impact of MUDFA on Infraco Negotiations**

6.71 I discuss the impact of the MUDFA delay on the 2007/8 Infraco negotiations and on the Notified Departure claims in 2008 and 2009 in sections 7 and 8 below. In summary, together with the SDS delay, it gave BBS further justification for claiming on going inability to commit to (i) a fixed price, (ii) a master construction programme, or (iii) a public service opening date. The onsite problems in the MUDFA works also caused BBS to heavily re-negotiate the standard ground conditions clause in the Infraco Contract; this appears in the Pricing Assumptions and the Infraco main contract terms.

6.72 Some of the utilities works were not in MUDFA for reasons of scale, location or uncertainty regarding the eventual need for them. BBS advised that diversion of some utilities would depend on construction methodology and the actual location shown in issued for construction drawings. For example, depending upon the position of certain tram stop furniture or overhead poles, it might be possible to avoid diverting utilities. By Infraco Contract signature, it ought to have been possible to know whether, in these limited and identified locations, the utilities needed to be dug up or not. But because the SDS design was underdeveloped and utility positioning was not pinpointed either by preferred bidder stage or by 14th May 2008, provision had to be made for the Infraco to make its own decisions when on site. This resulted in some limited MUDFA scope being transferred into the Infraco contract.

6.73 By SP4 Pricing Assumption 24, as agreed by TIE in simple language and coming from the Wiesbaden agreement terms, TIE re-assumed the entire cost and time risk of the MUDFA works interfering with the Infraco works or programme in any way. This was negotiated by TIE and was not a point that required any explanation by DLA Piper to anyone at TIE or at CEC.

7 INFRASTRUCTURE CONTRACT

7.1 Overview

7.2 My role as lead partner on the Infraco Contract procurement was at the centre of DLA Piper's mandate for TIE. It is worth remarking here that TIE (and not CEC) was the named public sector contracting party and, therefore to all counterparties and to the outside world, our client on all six of the tram scheme major procurements on which DLA Piper advised.

7.3 Our role had begun with: (i) explaining from a legal standpoint how the Infraco procurement would require to be run as a formal negotiated procedure under the EU Directives applicable to TIE as a public sector entity; (ii) explaining how the contract suite would need to be designed to match the procurement strategy TIE had chosen; and (iii) drafting the contractual provisions to reflect the public-private risk allocation model which TIE believed it could achieve using Infraco, Tram Supply, MUDFA, SDS, TSS and DPOFA.

7.4 DLA Piper's Work on the Infraco ITN and the draft contract (and full ancillary documentation) began in earnest in 2005 in order to be ready for the proposed autumn 2006 ITN issue date. Both Sharon Fitzgerald and I worked on this assignment, instructed by Ian Kendall at TIE. CEC were not involved and I do not recall any contact with CEC staff at this stage.

7.5 DLA Piper's aim was to produce a clear, legally compliant and efficient set of ITN bidder instructions and participation rules accompanied by a robust all–embracing contract suite. Looking back, I believe with complete conviction that we accomplished this for TIE at appropriate cost and well within the deadline set by TIE. We had good, market-tested precedents in the MUDFA and SDS ITNs and we adapted and expanded these carefully and economically for TIE. The Infraco Contract itself – with the requirements for novations of the SDS and Tram Supply contracts – was developed with considerable attention to detail over a period of, I would say, approximately four months. Ian Kendall was closely informed by progress sessions and had real interest and input.

7.6 At its simplest, the Infraco Contract was essentially a large infrastructure and systems installation and long term maintenance contract under which the main civils works were to be executed on a predominantly linear, highly visible, mostly publicly accessible and economically important site.

7.7 After the issue of the Infraco ITN in October 2006, I was expecting that DLA Piper's role would evolve as it had on the other three main procurements that is: policing and managing the bidders' clarification process up to initial bid returns, followed by a period of direct engagement with bidders on their responses to contractual terms and related matters prior to BAFO submissions.

7.8 But this is not at all what happened as I recount in 7.41 below. DLA Piper was stood down from Infraco contract negotiations from April to September 2007.

7.9 Following DLA Piper's re-engagement by TIE in late summer 2007, I took on responsibility for the full management of the legal and contractual aspects of the Infraco Contract procurement, supported by the DLA Piper team I have described earlier. After contract signature on 14th May 2008, my advisory role continued intensively until 2010, though when the DRPs began in mid-2009, I had involved specialist DLA Piper contentious construction partners.

7.10 **Infraco Contract – Procurement Phase up to Autumn 2006**

7.11 The Inquiry's Issues List mentions the effect of the May 2007 Elections on the Project. I would comment on this issue as follows: the Infraco ITN was issued to the market in autumn 2006, preceded slightly by the Tram Supply ITN. The driver for the timing for ITN issue at this stage was political. TIE was very conscious that the national election in Scotland was approaching. It was widely speculated that the SNP might well move to cancel either the Project or EARL, or at least place a hold on these projects. If a government review of the Project had been announced, I have little doubt that the Infraco bidders would have only waited a short time before exiting the procurement. Transport Scotland had also given TIE the job of promoting the EARL legislation. There was a competing heavy rail project: the Glasgow Airport Rail Link. Glasgow Council was making noises that the Government could not fund £1.1 billion of projects on Edinburgh across heavy rail and trams, particularly since the question of Edinburgh and Glasgow Airports in competition with one another was live. I formed the view at the time that Scottish political events were unduly influential on TIE's approach to the tram procurement. This view was reinforced by events at the end of that year and into 2008. In the event, the new SNP administration placed EARL under review and that project was then cancelled.

7.12 I made DLA Piper's view to TIE senior management clear that TIE had invested heavily in a clear and strong procurement plan. The troubled delivery position on SDS and MUDFA had undermined this already and I said that the contract award timetable – reliant upon bidder commitment, bid submission, clarifications, BAFO and evaluations – would suffer. To what extent TIE briefed CEC on my advice, I do not know nor was this my direct concern. The tram vehicle supply procurement was in fact somewhat immune to these considerations.

7.13 Timetable delay creates risk because bidders become concerned that the client is not going to manage the process well, they will be exposed to unpredictable delays, additional bid costs and then an award process that becomes less transparent and prolonged. It is also material that UK tram projects had not fared well in public purse and expenditure reviews and TIE and CEC knew that there would be only two bidders; enough for a genuine competition, but vulnerable to a monopolistic bidder should either bidder withdraw because it lost confidence in the process.

7.14 As TIE's Project Director, Ian Kendall took all of this on board. But there was a strong local and central political imperative: TIE wanted to show that the Project was actually in main procurement at the earliest date, so that a central government decision to stop it would become much more

knotty. I do not know what CEC's views were but certainly the Project was subject to a formal "*purdah*" period immediately prior to the May 2007 elections.

7.15 I consider that TIE had its own imperatives for progressing the deal also. It had been managing the Project for around four and a half years and needed to show undeniable progress to real implementation. CEC had spent a considerable amount of money on Bill promotion, and TIE was squarely in the public eye as Project manager, the party acquiring land for construction of the scheme and in charge of protecting third party interests. TIE needed to show results. Royal Assent for the Trams Acts had come in spring 2006, so that CEC, and therefore TIE, had the clear legal authority to proceed.

7.16 **Procurement Strategy**

7.17 As discussed in section 4, the well-settled central idea of the procurement was to de-risk the physical site (e.g. streets and segregated way within the statutory Limits of Deviation) for the main civils contract so as to give the Infraco contractor a clean "landing strip" to do their work, and no excuse for not developing a contract programme that had a clear critical path for construction activity. Rule number one under any construction contract is that a failure by the employer to allow the contractor unimpeded possession of site will inevitably result in claims for prolongation costs and an extension of time. The procurement strategy was intended to avoid these risks and to supress opportunities for contractor contingent and provisional pricing.

7.18 Alongside this went the provision of a substantially completed scheme design issued to bidders with the ITN and the novation of the designer (SDS) at contract award. At the very least, SDS design was to be programmed to match where the utility diversions had been completed so that these sites were available and had design that could be finalised into construction drawings.

7.19 TIE's Project Director Ian Kendall saw the utilities diversions as a key to successful implementation since the contractor's price was directly related to sequential task completion times. It had been shown in Melbourne and Croydon, completed tram schemes which he had worked on previously, that significant track length could be laid in a month given the right conditions with construction teams and equipment leap-frogging each other. With Ian's appointment, I began to have much less contact with Michael Howell, Graeme Bissett and Alex Macaulay.

7.20 When the draft Infraco Contract was issued with the ITN, a clear representation was made by TIE to the interested bidders that the early design and utilities diversions contracts were already underway. The bidders were instructed in the ITN to assume that: the SDS scheme design would be substantially complete prior to the call for BAFO bids, with novation at contract award, and that the utilities diversions would be substantially finished when Infraco mobilised for implementation of the Infraco Works.

7.21 As TIE and CEC well knew, SDS scheme design was nowhere near an appropriate state – either at date of Infraco ITN issue or, even over 18 months and nearly £6 million pounds of extra SDS incentivisation payments and settled claims later, at Infraco Contract signature in May 2008. 87

known SDS design approval packages were still outstanding (see TIE's Close Report) and this did not include any SDS design not yet available for submission.

7.22 It was obvious from a procurement standpoint that the bidders would be seriously embarrassed in terms of preparing a full financial, technical and commercial bid response if they were being asked to programme and price on the basis of ERs to be delivered, in part, by a client controlled scheme design which did not exist for large parts of the Project. And so when TIE issued an ITN with a requirement to price against an incomplete design, it was inevitable TIE would get incomplete and heavily qualified bids.

7.23 By spring 2006, SDS design production acceleration was on the critical path for the Infraco procurement. Since TIE and CEC wished to have the Infraco procurement on foot by the 2007 national and local elections, there was therefore considerable pressure to issue the ITN in sufficient time to permit for bid returns, negotiations, BAFO and, if feasible, a contract award. The timetable for this minimised the chance of an SNP administration issuing an "on hold" decision – at which point bidder interest would evaporate. As to what TIE reported to CEC, I do not know. CEC were clear about the procurement strategy but, as I saw myself in December 2007, CEC senior officials also understood very well what significantly incomplete SDS design and serious MUDFA delay had produced and would mean in terms of increased implementation costs and extended programme risk if TIE could not remove BBS's significant qualifications to their BAFO bid, on the basis of which they held preferred bidder status.

7.24 **Bidders' Responses to the Infraco ITN**

7.25 By mid-2006, there was a new TIE Project Director. Following Ian Kendall's departure, Andy Harper joined TIE. His recruitment was, I believe, handled by Willie Gallagher and Colin McLaughlin as a priority. He remained only about three months. This timing was unfortunate since the Infraco ITN was about to go into in the market Ian Kendall left before the issue of the Infraco ITN and pre–qualified bidders sensed some drift and the SDS design production and approval rate of progress both required immediate attention. Matthew Crosse arrived as Project Director and TIE created a new position: Commercial Director, which Geoff Gilbert took up.

7.26 At this point, there were prequalified two bidders: BBS and Tramlines. There had been only two serious expressions of interest, despite very earnest work in which we were involved to make sure the Project was well profiled by use of PIN Notices and informal presentations to likely interested parties. I recall there were three bidders who responded interest - but one potential grouping did not coalesce and had dropped out by formal ITN stage.

7.27 I am referred in Question 53 to the Supplemental Instructions to Tenderers (CEC01824070) which were issued on 9 January 2007. As noted in this document, TIE was forced throughout 2007 to issue designs to bidders on a piecemeal basis due to the delays in design production and approval. I am asked if any consideration was given to delaying procurement of the Infraco contract at this stage. I do not know what TIE's thinking on this issue was in January 2007 since by this time our involvement in the Infraco procurement was beginning to decrease noticeably. I was

not consulted about my views and DLA Piper had no involvement in monitoring design production or MUDFA works progress. As discussed below[63], I did suggest a moratorium to Geoff Gilbert in October 2007 following DLA Piper having been re-engaged on the Project, and again in January and April 2008.

7.28 DLA Piper had been stood down by TIE from any work on the Infraco procurement before the time of ITN initial bid returns in spring 2007 – see paragraph 7.41. Instructions from TIE in relation to the Infraco Contract procurement generally and specifically with regard to the type of role DLA Piper had played in supporting TIE with bidder engagement on the DPOFA, SDS, and MUDFA contracts dwindled after Christmas 2006. In early 2007, TIE began issuing SDS design piecemeal to the bidders. I do not now recall if DLA Piper was asked to review this supplemental Infraco ITN bulletin on SDS design release for TIE so that its language was consistent with the rules and instructions of the original ITN. I think not. I am not able to comment on, nor do I know about, TIE Project Directorate's thinking, as DLA Piper was not asked about or involved in the decision, but I recall that TIE also adjusted the initial bid submission dates since by this time there appeared to me, from informal discussion in early 2007, to be at least some recognition at TIE that their procurement timetable was in serious trouble.

7.29 I learnt informally from Stewart McGarrity that the two initial bids TIE received in spring 2007 were very heavily qualified in terms of their technical, financial and commercial responses – so much so that they were being referred by TIE as "indicative" or "preliminary", due to the absence of any SDS design for major parts of the scheme and no definitive commitment from TIE regarding MUDFA completion and dates for release of sequential sites. This was not what the ITN had required from bidders: i.e. a complete and coherent technical solution with related pricing and engineering options and construction programme, together with comprehensive responses on main commercial matters and the draft Infraco Contract terms and its precise risk allocations (this included a detailed matrix in which bidders were required to accept and/or comment on the contract drafting).

7.30 The tenders received by TIE, then, were not capable of either proper conventional evaluation or, indeed, any comparison at all in terms of response on contract terms. At this point, DLA Piper had been "stood down" completely by TIE and so I had no involvement in analysing what had been submitted. When we were re-engaged to support the procurement five months later, it was clear that these two initial bids had been rudimentary, to say the very least, and that TIE had engaged with bidders on contractual matters in a manner which had diluted protections and relaxed constraints on bidders without any benefit to TIE (Please see the list of 33 points produced by DLA Piper for the August 2007 workshop given to CEC).[64]

7.31 I do not know whether, during the period between April 2007 and the BAFO bids, in mid-October 2007 consideration was given by TIE to delaying the procurement of the Infraco Contract. I have no idea what TIE was doing in terms of thinking about its rapidly compressing and malfunctioning procurement timetable.

[63] See paragraphs 7.97 *et seq*
[64] Paras 11.31 *et seq*

7.32 I find it interesting that part of SDS's successful £2.86million claim against TIE was for £609,207 client-instructed acceleration costs incurred during April and May 2007. If TIE's Project directorate had wanted to improve SDS design production and approvals in the window January to April 2007, as the Instructions to Tenderers said, how did an acceleration instruction after the end of that time window assist? And had CEC Planning/Roads Authority been informed by TIE that they required to resource themselves properly to service an acceleration on SDS design submittals when, apparently, CEC had been unable to service the normal and programmed design submission rate efficiently for over 18 months?

7.33 **The BBS Consortium**

7.34 The BBS consortium comprised Bilfinger Berger ("**BB**") and Siemens. BB was the general EPC contractor. It became 'BSC' when CAF joined the consortium at Infraco Contract signature. It was to manage the track laying and installation of the main tram infrastructure, depot, bridges, overpasses, track, tram stops, depot, lineside equipment housing, all operational controls systems, power supply, overhead line, supports, building fixings and third party accommodation works. [redacted] was one of the parties with whom Ian Kendall and I had met at the pre-ITN stage when assessing market interest.[65]

7.35 BBS had never been involved in a tram scheme in the UK. During the spring of 2006 I discussed with Ian Kendall the fact that BB UK Ltd was a managing contractor and not a major civils player in the UK market. This meant that they would very likely be using prime subcontractors for bid pricing and execution. I discuss the direct result of this at 7.133 *et seq*. Siemens was supplying the "brains" behind the tram system and its operation; it would deal with all the systems which would allow trams to exit the depot, make the trams obey signalling and interact with CEC's city traffic control system, monitor the location of the trams and control run time as well as transforming electrical supply and overhead line stringing.

7.36 In negotiations in autumn 2007 through spring 2008, BBS did not really operate as a consortium; Pinsent Masons acted for BB and Biggart Baillie acted for Siemens. That made things very difficult negotiating with them. Ian Laing negotiated (at Pinsent Masons, Glasgow) for BB. He also had [redacted] deputy who was a Senior Associate, Suzanne Moir, based in Edinburgh. There was one other junior visibly involved. BB also had a senior in-house lawyer, Daniel Haeussermann on watch. The key individual at BB was Richard Walker, managing director of BB (UK) Limited. For Siemens, the Project lead was Michael Flynn, from Siemens UK, a senior director in the Transportation division. He had previously worked for Bombardier.

7.37 At Biggart Baillie, the contact was Martin Gallagher - latterly a partner, but at that time a Senior Associate. He was the legal negotiator for Siemens on the tram supply and maintenance contracts and the scheme maintenance provisions in the Infraco Contract. Neil Amner was a Biggart Baillie partner who dealt with Network Rail issues. Siemens' principal focus beyond the Infraco contract

[65] See paragraph 4.109 *et seq*

systems installation and long term maintenance obligations was on their interface with the tram supplier, CAF, and also to a lesser extent the DPOFA party, Transdev.

7.38 The consortium members often took differing positions or sought to re-negotiate positions TIE had agreed with the other. For example, we reached agreement on liability caps with BB then Siemens tried to back out of it. I am not sure whether that (within the BBS consortium) was a deliberate strategy or just disorganisation. Sometimes we had meetings where either BB or Siemens were absent or BB did not have a commercial decision-maker which meant that we couldn't negotiate and close out issues against the agenda that DLA Piper were providing for Infraco Contract sessions. This resulted in abortive meeting time and the need to re-cap on points already discussed at previous negotiation sessions. I requested TIE to insist that the consortium use one legal adviser and TIE complained frequently about the lack of unity and DLA Piper being required to meet different law firms, but not much changed. Siemens continued to be separately represented all the way to Close and to operate largely independently of BB

7.39 There had been the obvious hiatus I describe earlier after Ian Kendall's departure, followed by Michael Howell's replacement with Willie Gallagher. Now there was a further spell after Andy Harper's short tenure as Project Director (and his departure) during which the ITN issue date was postponed, I believe.

7.40 **DLA Piper "Stood Down" from Infraco ITN process – April to September 2007**

7.41 After Matthew Crosse's appointment as Project Director, there was a five to six month period in 2007 when TIE instructed me that they wanted to deal with all Infraco procurement matters (and all interrelated issues) themselves, including Infraco contract negotiations with bidders. This was precisely when our main advisory function within the pre-BAFO procurement timetable should have begun after bid returns. DLA should have been involved in engagement with the bidders and their lawyers to shepherd the draft Infraco Contract through to BAFO in the conventional way, so that a strong agreed contractual platform existed for TIE with as much information to evaluate as possible. The decision to stop our involvement meant that the best part of five consecutive and vital months were simply taken away from our time and related ability to advise TIE. As I discuss below, it also meant that proper and key Infraco Contract terms and provisions negotiations (using the basis of where the parties had reached commercially and technically) had to take place with BBS already enjoying preferred bidder status, without any competitive tension and with BBS fully aware of TIE's desire to reach Close quickly.

7.42 This neither matched what had been carefully laid out in the ITN, nor what would be done in terms of the usual legal adviser role and the timing of its key engagement with bidders within any normal formal negotiated procurement procedure conforming to EU Directives.

7.43 Stewart McGarrity at TIE told me privately that this 'stand down' would happen, apparently after a budget review by the incoming Project directorate in early spring 2007. I understood that it was also TIE's expectation that they would handle MUDFA and SDS contractual matters with their internal contracts and procurement team.

7.44 For this five month period, the negotiations with bidders on the Infraco contract were handled by TIE internally, I understand principally Bob Dawson, Jonathan More (a junior in-house lawyer) and Lesley McCourt who had been recruited by TIE. They negotiated with the bidders' commercial teams (and possibly their lawyers). Lesley McCourt was active but did not stay long due, I think, to clashes with Matthew Crosse. This three man team appeared to me, from isolated contacts with them, to operate dislocated from TIE's senior management. This was confirmed to me by Willie Gallagher when he approached me regarding a secondment to TIE.[66]

7.45 DLA Piper's model approach had been to take the lead in ITN process management, including keeping bidders in line under the procurement rules. That stopped entirely when Matthew Crosse became involved and DLA Piper was taken off the Project. TIE itself began engagement on draft Infraco Contract terms and allowed the bidders to negotiate on contract terms where TIE should have taken firmer positions, as shown in the detailed terms matrix. This had gone with the ITN, instructing bidders that certain terms were non-negotiable and recognising that dialogue on others could be necessary. The original aim agreed with Ian Kendall was to have 60% or 70% of the contract's provisions fixed and non-negotiable under ITN rules. Neither BBS nor Tramlines put any credence to that matrix, which was a tool which DLA Piper found useful for clients to inject discipline and competitive tension during bid preparation and subsequent parallel contract negotiations. TIE's five month "go solo" exercise destroyed this entirely.

7.46 During the period that DLA Piper were formally stood down from advising on the Infraco contract, we still received calls from Lesley and Jonathan asking for discrete input/explanations on the ITN and the Infraco contract and on procurement process. Sharon Fitzgerald was asked for advice on MUDFA also. However we had little idea about the "bigger picture" on bid returns at this stage and TIE's approaches to us were *ad hoc*. I was not willing to advise on Infraco related matters for obvious reasons: DLA Piper were no longer instructed and could not be expected to have any responsibility for what TIE were doing with the Infraco Contract. I mention the negative impact of the TIE negotiating team's work elsewhere in my evidence.

7.47 **My Secondment to TIE – September 2007 to June 2008**

Commencement

7.48 Willie Gallagher, the CEO of TIE, came to me personally in late August 2007. He said on a phone call that TIE needed DLA Piper back on the job because they were not managing to handle matters themselves. After making some changes, they were having real trouble with resourcing the procurements adequately and were struggling to land a preferred bidder. TIE needed a legal resource. Willie Gallagher said that TIE's control of the Infraco contract negotiations with the bidders was not working and TIE corporate management had lost track of what was being done. He said that the group of individuals who TIE had hired to undertake those negotiations (Lesley McCourt, Jonathan More and Bob Dawson) had not achieved what TIE needed.

[66] See paragraph 7.48

7.49 Willie Gallagher stressed that he wanted an Edinburgh-based senior person. He said that he would probably need to go to D&W for the secondee if DLA Piper couldn't provide one. That would have been unworkable in my view – both in terms of professional responsibilities and interface.

7.50 He said he would give me a few days to think about it and said that TIE had someone at DLA Piper in mind. I left the meeting pretty certain that person was me. I didn't have time to mess about so I sought approval from my Group Head in London, Michael Burton. A few days later I gave Willie the answer I believed TIE wanted: me on secondment to TIE, on terms to be settled quickly.

7.51 I believe that Willie Gallagher / TIE management had recognised by mid-2007 that SDS Design was so far behind in CEC Planning's approvals and its production programme and MUDFA was so much in delay that the major technical components of the two BAFO bids and, accordingly, pricing and programme were going to be again very immature and very heavily qualified. But so far as the original procurement timetable stood, there was no slack left available to extend the Infraco bidding process. It had all been absorbed in Q2 and Q3 of 2007 - seemingly in a failed attempt to give SDS more time to produce design, CEC Planning/Roads Authority more time to approval outstanding submittals and MUDFA more time to accelerate/pick up their progress on on-street utilities' diversion works. The two bidders had been cherry-picking the draft Infraco contracts. You do not want individual approaches by the bidders as you need ideally to have as close as possible to identical contract mark-ups, otherwise comparison and evaluation is very difficult. TIE's team had been permitting individual changes to the draft Infraco Contract by each bidder and somehow considered this was good practice. It was not, as I explain in below.[67]

7.52 The secondment arrangement came into play formally at the end of October 2007. While on secondment, I was working in both places i.e. TIE's offices and DLA Piper at Rutland Square. Most serious legal drafting work on the Infraco contract was done at DLA Piper's premises. The meeting rooms on the 4th floor in DLA Piper's Edinburgh offices were block-booked for Infraco negotiations due to limited space at TIE's offices. The progress control meetings were all at TIE's offices so I needed to be there for these. There was daily "to-ing and fro-ing" between the offices for me, my team and, less frequently, for some TIE personnel.

7.53 The secondment gave TIE 90% exclusivity on my time. I still worked on other DLA Piper client work, in a partner supervisory capacity for four days a month. The secondment agreement mainly related to money and how much was paid to DLA Piper for how much time at what rate. It did not alter the ambit of what DLA Piper was doing for TIE, the reporting process or the manner in which advice was to be requested or given, which I have discussed elsewhere in my statement.[68]

Delivery of Advice

7.54 During the period in which I was on secondment, I delivered DLA Piper's advice orally in TIE management at 'ad hoc' meetings and during negotiations. We worked in an open plan office. As lead lawyer on the Project, people came up to me and asked me my opinion frequently. The

[67] See para 7.83
[68] See paragraphs 4.17 *et seq*

secondment meant that I was on call to provide senior legal advice. I was not sitting remotely in an office and dictating a memo or a report. I was providing advice live in negotiations and frequently the need for advice or the issues which required my input as legal adviser changed rapidly. I also provided advice between negotiations to those people who asked for and needed it. In my experience, this is the standard nature of project lawyers' work although the secondment intensified this environment considerably.

7.55 During my secondment, since I was present every day for prolonged periods at TIE's offices for nine months, I attended many '*ad hoc*' urgent meetings with TIE senior managers – often in the evening - and, occasionally in Q1 and Q2 2008, with CEC Legal staff on the telephone. There were occasions when TIE's expectations on DLA Piper's response time giving urgent views placed some strain on our ability to advise: I now give examples:-

7.55.1 Each time a successive contract close date was announced in 2008, an urgent flurry of reporting and papers was copied to me by TIE to review or comment. These documents invariably had more than one author and it was not necessarily clear wh(legal advice I was being asked to provide to whom. This interfered with my ability to concentrate on what DLA Piper required to provide under our mandate as legal adviser to TIE;

7.55.2 I also experienced difficulty with TIE's managers' expectation that simply copying me in on chains of emails or documentation under discussion by them was a means of involving DLA Piper and so implicitly asking for input/advice. Unless I was instructed to advise the senior manager or project director involved, I could not respond in writing to all of these communications or, indeed, process them all. I discussed this situation with Geoff Gilbert (TIE's commercial director) and Steven Bell (TIE engineering director and from early February Tram Project Director) with a view to compressing and organising what TIE wanted from me (and from DLA Piper) but the style of simply copying me into documents did not change. I stressed that I would give advice to them - as project directors – when asked specifically and where I was responsible for the legal(contractual part of a negotiation. I made clear to TIE management that offering constructive comment on positions TIE was reviewing, negotiating, rejecting or accepting that involved commercial, technical or financial negotiation or analysis was <u>not</u> DLA Piper advice. My physical presence in TIE's office meant that TIE managers found me for spontaneous input on their work.

7.56 During his tenure as TIE's tram Project Director, I never had a face-to-face advisory meeting with Matthew Crosse, nor can I recall ever being asked for written advice by him or, indeed, being asked directly by him about any aspect of our role in the Project. He was occasionally present when I gave oral advice.

My Position

7.57 During the initial short discussions about secondment (which Willie Gallagher had delegated to TIE's HR Director Colin McLaughlin) there was some discussion about me temporarily being a TIE employee or a TIE Director. That never went anywhere as is clear from the documentation. Ultimately, I went on secondment under a fee charging arrangement. I was never a TIE employee or Director and I had no title within TIE. If I had been, for some reason, a TIE employee or corporate officer, it could not conceivably have been a conventional secondment. The whole idea of a secondment in conventional terms for a law firm is that if an employee/partner goes into an organisation, he remains the property of and the responsibility of the entity seconding that person. That was entirely the case with my secondment.

7.58 I have been asked in Question 10 to comment on the email dated 28 November 2007 (CEC01544715), where Colin Mackenzie advises Sharon Fitzgerald that the recent meeting of the LAC (CEC01500853) had noted that, "*DLA would report to the Council independently of Andrew Fitchie, who would be acting in his TIE Contract Directors role*". Colin Mackenzie (a senior solicitor in CEC Legal) copied in two colleagues, Alan Squire and Nick Smith in 2007. What is written in Colin Mackenzie's email is inaccurate. I cannot recall at this juncture how Sharon or I would have responded to that email which was sent at the beginning of my period of secondment. If Colin Mackenzie thought that the formal relationship involved me being TIE's contract director and somebody else advising CEC, he had completely forgotten the duty of care letters that Gill Lindsay had asked for in late August 2007[69]. Furthermore, he had completely forgotten about the further copy of the duty of care letter that he had requested in October 2007. I am entirely puzzled as to where this incorrect description of my role came from. I have no recollection of talking to Colin about the secondment arrangement. Indeed I have no recollection of talking to anybody in CEC about the secondment arrangement other than: Gill Lindsay who had asked me how would advise CEC after I went on secondment and I replied that DLA Piper was not advising CEC (see para 4.49) and perhaps Donald McGougan, the Chief Financial Officer; I recall that shortly after the secondment commenced I met with Willie Gallagher and Donald McGougan. Donald appeared very happy that the secondment had been arranged but there was no discussion about DLA Piper's advisory role changing in any way or me becoming an officer/employee of TIE.

7.59 I did not attend the LAC that is quoted in the email on the Monday that week. As is clear from the minutes, which record my apologies. By this point, I was handling the Infraco main terms negotiations with BBS and Tramlines. That was essentially what TIE were worried about at this time. They were worried at the end of August 2007 that their team had not produced a cogent set of contracts that could be used and evaluated at BAFO, which was less than a month away.

7.60 It was true that in some of TIE's organograms about resource that my name appears in boxes. However, that is not an indication that I was an employee of TIE. It was TIE's choice to put my name in these diagrams, as opposed to DLA Piper's. If one looks at the entirety of the minuted actions throughout the Project, i.e. when there is an action for something to do with the Infraco

[69] See paras. 4.33 *et seq*

contract or something to do with the SDS contract, it might occasionally state my name. In the vast majority of cases, it says DLA.

7.61 I was given a TIE email address. I never used it once in the nine months of secondment. If any party or individual involved in the Project wanted to communicate with me, they consistently used my DLA email address. I do not remember whether the email address at TIE was actually activated. I remember TIE HR believing, for their own reasons, that they had given me a PC, which they had not. I recall spending two weeks trying to convince somebody in HR that I had not purloined a PC. I worked on my own DLA Piper laptop when at TIE.

7.62 I did not have an allocated office at TIE. I predominantly used a small meeting room within TIE's second floor offices at City Point. There was a lack of space in TIE's offices. The entire lower floor was devoted to the co-located SDS, CEC and TIE planning approvals and design team. That space was occupied with design documentation, GANTT charts and CAD machinery and other printing equipment. I understood that part of the process of SDS Edinburgh design production and approval was undertaken on that floor, as well as in different offices of PB (e.g. Manchester).

7.63 It was not particularly convenient for me to be a squatter in an office at TIE. There were many occasions when it was far easier for me to work at DLA Piper's offices. I spent much of my time in DLA Piper's offices anyway, doing TIE work under the secondment, because there was such a problem with space. Many meetings in 2008, e.g. the Infraco main terms negotiations and some of the SP4 negotiations, were held at DLA's offices in Rutland Square.

CEC's Interests

7.64 I am asked in Question 7 how the interests of CEC were protected while I was on secondment. As far as my role as TIE's legal advisor was concerned, when TIE instructed me specifically to share our advice or views to TIE with CEC Legal, then DLA would do that in accordance with what it is written in the duty of care letters. It was not my or DLA Piper's function, as TIE's legal advisor, to provide advice spontaneously to CEC. That was not the mandate. That is completely clear from the documents. That was DLA Piper's position and method of working from day one. The protection of CEC's interests was, in my view, handled or dealt with by TIE. TIE was CEC's Project delivery agent and it was their duty to keep CEC fully informed as to what was happening. Various mechanisms were provided for that (the exact design and functions of which were not part of DLA Piper's role) which I discuss elsewhere.[70]

7.65 Very shortly before I went on secondment to TIE, Gill Lindsay, CEC Legal, raised with me on the telephone the issue of who at DLA would advise CEC. I explained to her that DLA had been and was advising TIE and there was no requirement for us to advise CEC separately, nor would we do so unless expressly told to by TIE. The subject was never raised with DLA Piper again.

7.66 It has been suggested to me in Inquiry Question 8 that my email dated 17 December 2007 and attachment sent by to Gill Lindsay (CEC01500974 and CEC01500975) which advised on the draft

[70] Paras 11.44 *et seq*

contract suite as at 16 December 2007 were strange as I was by then a Director of TIE. I believe that I have answered this above. I do not regard writing a letter and sending it as an attachment to CEC legal as strange. I was the lead partner at DLA. I was not a Director of TIE, as I have explained, I had been directly instructed by TIE to provide a letter of this sort, in this form, to CEC Legal. I had discussed the content of this letter with Gill Lindsay as to whether or not it would meet CEC's requirements as to what they needed to see in terms of what TIE's legal advisor was reporting. I discuss this and other similar letters in full detail at paras. 11.48 *et seq.*

7.67 I have been asked in Question 7 what use was made of Sharon Fitzgerald at DLA Piper during my secondment. Sharon remained a senior member of the DLA team. She was my right-hand woman for the Project, and had been since she joined DLA in early 2004. When I was on secondment at TIE I needed to separate my daily business from the tasks and jobs that I was delegating back to the rest of the team at DLA. Unless it was absolutely necessary, I did not want TIE personnel contacting individual team members. If that occurred then it would have become extremely difficult to manage my team. That was understood by TIE, but Sharon Fitzgerald was the exception to this rule. Sharon and I undertook the first procurement together (the DPOFA). She dealt with TIE's contractual enquiries about MUDFA. She also had some involvement with SDS. She was an absolutely key legal resource for junior members of my team. Sharon worked very closely with Ian Bowler. Sharon was my alter ego sitting in the office when I was on secondment. She dealt with many ad hoc requests from TIE. It is a normal project team position to have a partner and a senior associate. Subsequently Sharon became a partner, as I have said.

Charging Arrangement

7.68 The charging arrangement between TIE and DLA during the secondment is shown at (CEC00114231) which is an email from me to Stewart McGarrity dated 28 April 2008. I am asked about this in Question 12. There was a monthly fee of £27,300 which covered 21 days of my time at the partner rate for a fixed fee of £1,300 a day. From memory, the partner rate for this project was £165 per hour at that point. This was subject to a maximum overall charge of £282,550. That was simply a multiple which covered secondment from mid-October 2007 to the end of June 2008.

7.69 The charging arrangement included three milestones for a 15% incentive payment. The dates for those milestones were: i) full Council approval for the Project; ii) the Infraco contract award; and iii) BBS mobilisation. I cannot now remember, without looking at DLA's invoices for the secondment and TIE's corresponding payments, how the third of those milestones was in fact assessed in terms of DLA being paid.

7.70 The email from me to Stewart McGarrity shows that there was a fixed fee, but also that I had been recording additional project time at DLA to show how much time over the secondment arrangement I had been spending on the Project. The email is towards the end of my secondment at TIE and is me reporting to Stewart McGarrity, as TIE's finance director, and to TIE's HR director who had been responsible for TIE's negotiations of the secondment agreement, that DLA Piper actually had an additional £285,000 unbilled time beyond the fixed fee of the secondment. This was more than the agreed maximum charge, i.e. the lump sum, and was significant time overage

on the secondment. I was explaining the reasons for this and requesting that we discuss with a view to how the additional fees should be treated since the level of my involvement had far exceeded the original secondment parameters.

7.71 As a result of this at the end of the secondment a further £114,000 payment was agreed with TIE. I had worked something like 1,750 hours on TIE business over and above the eight hours a day, 21 days a month envisaged in the secondment agreement. This is recorded in Graeme Bissett's email of 1 July 2008 (CEC00114232) at the end of my secondment which concluded the agreed charging agreement and reverted back to the original on demand services arrangement for DLA Piper advice.

Bonus

7.72 In early April 2008, Willie Gallagher, CEO of TIE, asked me to join him in his office for a private discussion. He said TIE wished to award me a personal bonus in recognition of my work for TIE on the Project. He said the recommendation was with the TIE Remuneration Committee and that the amount would reflect TIE's appreciation for my work. I told him that accepting a bonus while on secondment to a client was something for which I would need clearance from DLA Piper management. I also said I would revert to him as soon as I was able to. I sought approval from what I considered to be the appropriate management level within DLA Piper and after taking tax advice I asked that TIE pay the bonus to me direct after my return to DLA Piper from secondment. I declared the bonus in the normal way. To my best recollection, on 9th April 2008, Willie Gallagher told me that the TIE Board had approved a bonus of £50,000, handing me a letter signed by him to that effect. He said that the Remuneration Committee comprising TIE senior executives and CEC officers had recommended this. I remember being overwhelmed when thanking him at the time – a combination of me being tired by the intensity of the work load at that point and this very direct formal recognition of the level of professional and personal commitment I believed I had given and was continuing to give to the Project for over five years. I had provided that commitment in my capacity as a DLA Piper partner and I was not a TIE Director or employee or individual consultant to TIE at any point. The bonus was not connected to the milestone achievements detailed in the secondment charging arrangement.

Conclusion

7.73 DLA had agreed my secondment into TIE was for a fixed term of nine months from October 2007 until the end of June 2008. It ended at that point. After initially asking for a proposal on **an extension**, TIE did not take up the option to extend the secondment by a further three months. I understood from discussions with either Stewart McGarrity or Colin McLaughlin or both, that this was because TIE Corporate and Project Management considered that: (a) TIE was adequately resourced internally for the implementation of the Project post-Infraco contract signature on 14 May 2008 without a continuation of the secondment; and (b) TIE considered it would be more cost-effective to return to the terms of the original DLA mandate. Those terms were essentially on-demand retained legal services at fixed hourly rates as set out by me in a proposal in June 2008 and agreed by TIE in the 1 July 2008 email (CEC00114232).

7.74 **DLA Piper Re-Instructed on Infraco – early September 2007**

7.75 In addition to my secondment, this discussion with Willie Gallagher in August 2007 also led to DLA Piper being instructed to resume conduct of the main legal negotiations on the Infraco Contract, as well as related contractual issues such as SDS novation, MUDFA and the Tram Supply Contract. There was no formal written instruction to DLA Piper. We simply began working as we had been before, but with me present (more or less every day for lengthy periods at TIE's offices) for TIE meetings, project meetings and oral advice when not in meetings or on team briefing or drafting turn-around at Rutland Square. As I have explained I also had other client work to supervise and DLA Piper commitments during the month as was envisaged by the terms of the secondment.

7.76 One of the first tasks I was engaged in upon re-instruction was running a workshop on extremely short notice on 30 August 2007 to take CEC Legal and CEC Finance through TIE's procurement strategy again[71]. Prior to this I had been asked, out of the blue, by CEC Legal (Colin MacKenzie) in late August 2007 where the Infraco contract negotiations had reached and I had had to say that DLA Piper was not working on this component of the Project anymore and that he should speak to TIE about this. This was the first occasion that I had had any contact with CEC Legal on the Infraco Contract procurement.

7.77 In the short period from early September to mid October 2007, my negotiations on the Infraco contract terms were frequently frustrated by the bidders simply not wanting to engage with it. What we did try to do, and what I advised Geoff to do, was to get as much information on what I would regard as the large commercial issues in the contract. As examples: we tried to get an agreement from both bidders to the level of performance bond that they would offer; we made sure that we had negotiations around TIE's requirements for liquidated damages, liability caps and indemnities; we made sure the bidders knew and accepted that they would be taking on important third-party agreements, especially utilities and major commercial entities and that they would be providing TIE with prime subcontractor collateral warranties and a PCG; and we reminded them of the SDS novation and, at that point still, the CAF novation. These were some of the big commercial issues that sat within the Infraco contract terms.

7.78 The idea at this point of nailing down, for example, what precisely would be in the DRP clause was not possible. I had to prioritise quickly on what would be looked at in order to attempt to lock bidders into a BAFO offer position. I may not have been present in commercial negotiations and I have no knowledge of any of the technical discussions. I was present at the straight financial discussions, such as they were or on pricing. The construction pricing for the contract did not emerge in any case until post-Wiesbaden in early 2008.

7.79 When DLA Piper came back on the job in September 2007, I observed a lack of clarity in communications between TIE's Project Director (Matthew Crosse), Commercial Director (Geoff Gilbert), Finance Director (Stewart McGarrity) and Engineering Director (Steven Bell). This lack of communication was mentioned by TIE managers privately to me and on several occasions in TIE

[71] See paras. 11.31 et seq

project management meetings during January, February and March 2008 and also on several occasions by Willie Gallagher. It had been something he said personally to me was going wrong at TIE when he asked for the DLA Piper secondment.

7.80 I do not believe that Geoff Gilbert or Matthew Crosse as the TIE new Project directorate had paid much attention to the draft Infraco Contract itself until DLA Piper re-appeared in September 2007. I said to Geoff Gilbert that TIE needed to address urgently the fact the bidders were drifting apart on the contract and to force some resolution on big commercial matters if TIE wanted to evaluate the BAFO bids in a way that at least partly meshed with the stipulated ITN evaluation methodology and protected the most important risk allocations –by bidder formal acceptance of the draft Infraco contract terms. I said to Geoff that after five months with little achieved, there was precious little time and that we would have make the bidders really focus and commit on key issues.

7.81 Geoff then engaged on this with me. Once DLA Piper was re-engaged, I had instructions from TIE to use a one month period to BAFO in October 2007 to kill as many issues as possible to get the Infraco contract commercially advanced e.g. insurance, bonding arrangements, indemnities, maintenance period, limitation period, liability caps and LADs. It had quickly become clear that the bidders would, if allowed to, simply use up all the available time if they were asked to focus on more detailed contractual issues. This is where I needed direct specific instruction and input from TIE and it was slow in coming until Geoff Gilbert began to become involved. Both bidders immediately took advantage of this waiting period to stall. I advised TIE management specifically about there needing to be as little risk transfer erosion or major pricing changes caused or agreed to by TIE (or CEC) as possible once a preferred bidder was appointed.

7.82 Clearly DLA Piper had no role or responsibility in keeping the draft Infraco Contract up-to-date during the phase when DLA Piper was not instructed from April to September 2007. TIE had dealt with negotiations direct with bidders. DLA Piper had no instructions to update the Infraco contract with reference to the bidders' bulletins (information releases to bidders) and changes after Infraco ITN had been sent out in early 2006. There was a six or seven month bid period scheduled from ITN issue to the initial Infraco bids coming in. That period had been extended to allow for the opportunity for some development to the SDS design. This meant that we required to invest more time understanding what TIE had agreed to in terms of amendments to the draft Infraco Contract.

7.83 The structure of the Infraco contract was the same when DLA Piper was re-appointed in September 2007 as it had been in the draft issued with the ITN, but there had been numerous individual changes inserted. Pinsent Masons and Tramlines (who negotiated in autumn 2007 with in-house legal support from Bombardier only) complained when we were re-instructed that we (DLA Piper) were reneging on points that TIE itself had already conceded. I explained to TIE that some of the changes that had been allowed just could not be accepted, partly because of the need for a coherent suite of documents. My impression was there had been lots of small, piece-meal changes. These had been unhelpfully negotiated separately with each bidder and gave them the opportunity to say that DLA Piper was changing what had been already "*agreed*" by TIE.

7.84 Here are four examples of changes negotiated by TIE during that period (these were all pointed out to TIE and to CEC personnel who attended at the August 2007 workshop):

7.84.1 TIE agreeing a surprising and unexplained serious dilution of the Infraco's main performance security (as required by the ITN) from an 'on demand' bond to an 'adjudication' bond. This was corrected and re-negotiated to an 'on demand' bond in early October 2007 before BAFO;

7.84.2 TIE agreeing a global Infraco liability cap of 10% of contract value without any of the usual carve-outs and without TIE having any knowledge of an actual Infraco contract price at that point. This was corrected and re-negotiated before BAFO to twice that amount, 20%, an industry norm, and with proper carve outs;

7.84.3 TIE agreeing a 15% cap on LADs when TIE had not even begun to consider how the Infraco Contract LADs for sectional and substantial completion would be calculated and what contractual trigger mechanism would be set; and

7.84.4 TIE agreeing to an additional defined Compensation Event (for MUDFA events) without TIE having any knowledge of what the Infraco construction programme critical path would be.

7.85 The real damage was the irrecoverable loss of 5 months of negotiating time and that bidders had formed the impression that TIE was not serious about standing by the instructions issued at ITN stage that only certain contract provisions were open for discussion.

7.86 What was apparent to me by mid October 2007 was that neither bidder had been made to engage on key Infraco Contract terms in a systematic manner in order to expose clear outstanding commercial points and evaluation differentiators. Rather, the bidders had sensed an opportunity to override the ITN rules which had been written to exclude negotiations of certain important risk transfer provisions and to shepherd bidders into positions on the draft Infraco terms that could be evaluated objectively. TIE's approach was to permit two different draft Infraco contracts to evolve; one with each bidder.

7.87 This wasted spring and summer 2007 period in the end, seriously impacted DLA Piper's ability to negotiate on TIE's behalf properly in the way the ITN procedure had been set up to achieve. What had resulted was "open season" for the bidders to comment on and attempt changes to the draft Infraco Contract and, latterly, for BBS to re-open anything it could. And there were instances of commitments given after direct negotiation being withdrawn in the next session.

7.88 Geoff Gilbert knew about this. He was leading some of the commercial/legal discussions with BBS. He knew that I was trying to change back/salvage positions from changes that had been made whilst DLA Piper were off the Project. Bombardier later complained in their 2008 debrief that DLA Piper had caused problems by not being properly instructed when we re-appeared as TIE's lawyers in mid-September 2007. Our concern was that the suite had been drafted so that it functioned together i.e. SDS fitted with Tram Supply, which fitted with Infraco and the ERs, which

fitted with DPOFA, which fitted with MUDFA. That was especially important regarding the two planned novations.

7.89 When Siemens instructed Biggart Baillie to do "due diligence" across the two Tram Contracts this led to lots of individual changes back to the original language or new proposed language. That in turn led to BBS negotiating on price or qualifications at a later stage due to the changes they asserted that TIE had introduced after their BAFO bid.

7.90 DLA Piper had been asked by TIE to help design an effective and competitive procurement process: an important part of the answer was to enforce the ITN rules. TIE decided to manage the Infraco ITN returns itself. I recall trying to check at a later stage what the bidders had sent in by way of clarification requests on the draft contract suite; TIE did not appear to have a coherent record of this – or if there had been such a document, it did not survive Lesley McCourt's departure.

7.91 Phil Hecht in my team was in charge of the draft Infraco contract issues list which grew, shrank and grew, according to negotiation progress. The Issues List was updated following every major session. It was shared with CEC Legal at intervals to show what was being discussed and when. I felt that this would assist CEC for any issues it wanted to discuss at the Legal Affairs Committee and address TIE's complaint that it would be asked – randomly –by CEC Legal for information about that status of the draft Infraco Contract. To my best knowledge, CEC Legal never commented back on it or showed particular interest in its use.

7.92 Geoff Gilbert was present at most, if not all, of the key Infraco contract negotiations. For many of the meetings, as would be the norm on a project this size and negotiations of this intensity, there were no minutes; the parties took away tasks and the result appeared in the next round of drafting, if the principle had been agreed. Geoff took notes on occasions but I imagine that many of these went with him when he left TIE. Geoff was in 95% of the 2007/8 contract meetings where contractual and linked commercial/financial matters that I believed to be significant were being discussed and we had detailed updating Issues lists. That included any clauses with a financial impact, performance sanctions or risk transfer, for example: consents, design control, change provisions, liability caps, indemnities and performance security. As I discuss below, Geoff Gilbert negotiated the commercial and contractual components of SP4's PA1 and the specific language in it, as well as the redraft of Clause 80 (TIE Change) which became the version finally adopted on TIE's instruction for the Infraco Contract.

7.93 **BBS Confirmed as Preferred Bidder – October 2007**

7.94 BBS was confirmed by TIE as Preferred Bidder in October 2007. As preferred bidder, BBS just dug in more behind its qualified bid and indicative pricing and began to resist and exert control on TIE's programme to Infraco Contract award. TIE's aim in creating urgency about Infraco contract close out was, in part, to force BBS to "come clean" on issues that were sticking. In fact, this approach had the opposite effect. BBS continued to exploit its increasingly secure position in order to extract more money and improved contractual positions from TIE. The only obvious – and fairly remote –

risk for BBS was their irrecoverable bid costs if the Project was shelved entirely. Otherwise, BBS was very comfortable in trying tactics to dictate issues on programme to close, the pace of negotiations but above all in maintaining its consistent position on risk limitation and protections from MUDFA and SDS and its heavily qualified pricing and construction programme.

7.95 As preferred Bidder, BBS were the masters of the situation to a significant degree because of TIE's need for an approved business case. I believe that for political and public perception reasons, TIE viewed it as essential to obtain approval for the business case at the last full council meeting of 2007. This pushed TIE to down-select Tramlines too early and removed important competitive tension. This decision was also a key trigger for the timing of the Wiesbaden negotiations and the negotiating leverage that BBS then began to enjoy.

7.96 **Moratorium / Extension of Procurement Programme**

7.97 While the BAFO submission evaluations were on-going in October 2007, I suggested to Geoff Gilbert that TIE could call a moratorium, while SDS were instructed to retrieve delay by accelerating their design drawings production and CEC Planning and Roads mobilised to match this with their approvals team and MUDFA pushed to complete work in order to clear identifiable sequential sites. He said that the political imperative for progress towards contract award was too great to insert a pause in the ITN process for the Infraco Contract, even though TIE was entirely at liberty to notify bidders that this was going to happen. My perception was that he was worried that a procurement hiatus would have exposed TIE to serious questions about the management of the procurement. They would have been asked what had been happening since they went to market in 2005 and appointed a designer and what had been happening for a year with the MUDFA contractor on the streets in Edinburgh. My opinion – and I said this to Geoff – was that it was unlikely that either bidder would have withdrawn simply because they were instructed to wait out a defined period for given and cogent reasons.

7.98 I again raised the idea of a procurement moratorium with the TIE management group in the first management meeting post-Wiesbaden on 8 January 2008, on my return from annual leave (see para. 7.221). My perspective focused on what I was seeing from BBS in terms of engagement on the Infraco contract terms and the fact that TIE no longer had the leverage of competitive tension. Neither an extension to the procurement programme nor a procurement moratorium seemed to appeal to TIE due to: (i) TIE's perception of mounting political pressure for announcements about contract award and when trams would be running; and (ii) I believe, the fact that a procurement prolongation would have directly exposed TIE's own shortcomings in project and procurement management and CEC's performance on design consenting. There was also CAF patiently waiting, with its contract price and terms agreed but possibly less flexible as regards delayed supply in order to accommodate the infrastructure contract - clarity on which was not really relevant for CAF - whereas material purchasing costs and related risk of inflation over time were.

7.99 I recall TIE had been making a number of media announcements prior to full Council approval in terms of the Project being "on target' for PSCD. Those service commencement dates had engendered a lot of discussion with BBS, who were saying "you have said that in public, but that is

not what our programme – as it stands now with qualifications - is going to deliver". TIE had an immediate dilemma where they had gone public about trams running on Princes Street on 'x' date. BB, in the meantime, had not actually produced an unqualified construction programme by mid December 2007, because they could not based on the SDS design they had been given by TIE and the status of MUDFA.

7.100 An extension to the procurement programme would have given TIE time to have a rethink on the whole novation strategy for SDS. There could have been a decision to say "ok, we want SDS simply to work up to this point and give you this scope. You will take that design as yours and from then onwards you are going to produce your own design. We will accept it will take you more time and there will be a price for that, but it will be a clean break. Here is a design that we have. You do your design and you re-bid on that basis against the ERs".

7.101 I also discussed this with Geoff Gilbert after a 16th January 2008 (I believe the date is exact) SDS meeting.[72] I was involved in the bid evaluation process, but only the legal component with the BAFO bids evaluation that was presented to the TIE Board. What I said in that discussion (October 2007 was that these bidder positions were barely capable of evaluation and differentiation, given the very truncated period that had been available to engage with the bidders on the Infraco main contract terms and their studied avoidance of any real commitment. I raised with Geoff the issue of extending the procurement programme, given the well known status of the SDS design and because the proposals, pricing and scope were immature, to allow SDS Provider time to accelerate design production so as to service both MUDFA and Infraco bids. I advised Geoff Gilbert that TIE had got two interested and invested tenderers and, in my opinion, they were not going to drop this Project because the client asks to extend the contract award programme for a quantified further time period. It is not that unusual for a client to require more time and the tenderers would have understood entirely that there was an issue with the design and that dealing with it would improve the quality of their bids and their own abilities to understand the project scope better. There was no reaction to my suggestion.

7.102 I was also aware that to close out the contract in less than a month – TIE's planned contract clo date at this stage was 28th January – was impossible in terms of producing the technical, financia and commercial information to complete the then 42 Infraco Contract Schedules (the EAL Schedule 43 arose later because CEC had forgotten to close out an important matter at the airport). TIE could not complete that information without co-operation from BBS and BBS would only co-operate on their terms. This was exactly the issue for TIE in terms of the strength of BBS's negotiating position.

7.103 I discussed the issue of a moratorium for a third time in the meeting on 9 April (discussed at paras. 0 -). This followed a meeting with BB where they had come back for more money, and I advised TIE that they had to put a stop to these demands. I advised that one way of stopping would be to put a hold on the procurement and stabilise the problems. Another way would have been to tell BB that under the ITN rules, TIE was at liberty to down-select them as a preferred bidder because that

[72] discussed at paragraph 7.229

was the third or fourth time that BB had come into the room and wanted more money. This was me, as the legal advisor who has been helping TIE prepare a procurement strategy, saying "your procurement strategy is in serious trouble. This is now a point of no return and you need to be careful about being confident that you can just bundle through this and sign a contract and everything will be ok."

7.104 I have no knowledge of whether TIE ever discussed an agreed pause in the procurement with CEC or Transport Scotland or directly with BBS, CAF and/or SDS. The CAF tram supply contract had been completed and initialled in readiness by TIE and by CAF for several months at this point in early April and I believe CAF may have already started long-lead item production runs.

7.105 In my opinion, If TIE had introduced a waiting period in the procurement to allow SDS to accelerate design approvals and improve the completed scope and quality of design production and for MUDFA to deliver sites with the logic for a sequential construction programme, this could not have failed to reduce the compounding delay and the massive contract cost increase caused by the entirely unmanageable number of Notified Departures claimed by BBS under Pricing Assumptions in particular PA 1 in SP4 within a few weeks of Infraco contract signature. BBS would have had an improved design picture of the scheme to price and a site for which TIE could have insisted that BBS draw up a construction programme with a proper critical path. TIE would also have had an improved factual platform from which to resist further BBS contingent pricing and risk protection demands and more SDS design with which to address the MUDFA blockage.

7.106 TIE knew perfectly well what the financial, commercial and programme consequences of proceeding with seriously incomplete and, in some cases, deficient SDS design and an irretrievably delayed MUDFA were going to be. Willie Gallagher summarised and explained these to CEC senior staff on the 12th December 2007 at a meeting I attended[73]. TIE management's responsible and most senior executives simply decided to gamble by accepting responsibility for those consequences plainly set out in the agreement they had reached in Wiesbaden. They did so by transferring those consequences and their obvious major related time and cost risk back to TIE by way of the technical, commercial and contractual protections for BBS, and the permitted scope, programme and pricing qualifications stated in the Wiesbaden Agreement and incorporated into Infraco contract through SP4.

7.107 **Bid Evaluations in October 2007 and the Construction Price – early 2008**

7.108 The financial, technical and commercial components of the BAFO bid evaluations were central project procurement tasks that were carried out by Geoff Gilbert and Matthew Crosse in isolation from other TIE management. I understood that many of the two bidders' technical solutions were indicative only, since very significant parts of the scheme were not designed at all, many designs were outline stage only and no design had been done by SDS at all for the Siemens component of the scheme –systems installation.

[73] See paragraph 7.146.

7.109 It was explained to the TIE Board that the two bids had been massaged by something that was called "normalisation" in order to produce comparable capital expenditure outcomes. A key cost differentiator used in the evaluation was reported to the TIE Board as the pricing requirement for Network Rail tram power electrical immunisation works: BBS had in some way expressed a willingness to share/value engineer this cost. Tramlines had not. In terms of its overall insignificance within the scope of the infrastructure works, this appeared to me at the time to be a questionable choice of pricing differentiator. In terms of the legal evaluation, BBS's position by the deadline although very much a product of the extremely limited time (less than a month) we had had to set meetings and force out agreements. Despite BBS own lack of engagement, their offering was more cogent than Tramlines. Tramlines had failed to give responses to various key financial contractual points, in spite of being given more time to get Canadian corporate counsel's input.

7.110 I was given no real insight into the BAFO commercial, financial and technical bid evaluations by TIE, except what I had heard from both bidders during those contract negotiations in the time left before BAFO: that their BAFOs would be technically very significantly incomplete and heavily qualified as to price, scope and construction programme. And that is exactly what TIE encountered.

7.111 The bid evaluations and selection of BBS as preferred bidder were followed by the Wiesbaden Agreement and SP4 which, in essence, significantly undermined that very short autumn 2007 period of DLA Piper work attempting to settle main Infraco contract terms and changed the course of the Infraco contract procurement. There was no equivalent of SP4 in the original ITN contract suite documents, nor was there when BBS was selected as the preferred bidder. Nor would I have expected there to be a completed pricing schedule at this stage in a procurement. I discuss my perspective on the Wiesbaden Agreement and SP4 in detail later.[74]

7.112 **Impact of SDS and MUDFA Delay**

7.113 I have already discussed the prime importance to TIE's procurement strategy of the SDS and MUDFA contracts being performed to programme to give a clear "landing strip" for the on street infrastructure installation works to the Infraco contractor and the consequences of this not having been delivered.

7.114 TIE, as SDS's contractual client and CEC, as both planning authority and the statutory Roads Authority, had complete factual and technical visibility into how the SDS contract was progressing. TIE also had TSS expertise on hand to support analysis. By early 2008, in addition, TIE had BBS's views as its preferred bidder on the status of the SDS design.

7.115 DLA Piper did not need to explain to TIE (or be instructed by TIE to explain to CEC) that the design production and design approvals and utilities diversions were late and that this would impact the Infraco's construction programme, resulting in potential major financial consequences for TIE and CEC. Those two contracts – SDS and MUDFA- were being managed on a day-to-day basis by TIE

[74] . t Paragraph 7.177 *et seq.*

themselves and CEC was intimately involved in the SDS design processes in its role as contractually nominated primary design approval body and Roads Authority. The links and direct dependencies between the SDS design delivery programme, the MUDFA utilities works programme and the Infraco master construction programme and sequential mobilisations had been central in TIE's scheme procurement and engineering plan for over 4 years.

7.116 CEC had direct visibility into both the contract management processes through Duncan Fraser, their liaison officer seconded to TIE, and through Andy Conway in charge of CEC Planning's role in the SDS design review – which was to ensure that CEC planners' requirements on the many aspects of scheme design were accommodated and prior approvals granted. TIE was feeding information to the bidders by means of "bidder bulletins".

7.117 I believe it is entirely reasonable to assume that the relevant individually and collectively responsible CEC personnel must have known by early 2008 about these central failures in TIE's procurement strategy and CEC Planning/Roads Authority key role in those failures. Any other view about CEC's knowledge would simply not be credible on the facts –particularly in light of the 12th December 2007 meeting I had attended. It was certainly not a legal mandate function for DLA Piper to step in and fill that knowledge void. It was for TIE to report to CEC on the progress of its two major advance works contracts in the Project's long-established procurement strategy (MUDFA and SDS) including regarding any delays. The BBS proposed dates for Infraco contract practical completion and public service commencement were still moving six months after preferred bidder appointment, and that was manifestly because there was insufficient design and no clarity on MUDFA sites release.

7.118 In discussions with CEC Legal following DLA Piper being reappointed to lead the Infraco Contract negotiations in September 2007, I told Gill Lindsay in CEC Legal that I could not advise at that point if the Infraco Contract, in particular, would be fit for signature by the end of that year – which appeared to be her focus. This was because both the bidders were already pushing out the boundaries set by the ITN which TIE had not enforced systematically. I stressed again, as I had done at a workshop meeting in late August 2007 attended also by CEC Finance (Alan Coyle and possibly also Rebecca Andrews, I believe) that: (i) SDS was chronically late and that MUDFA was also late/in difficulty and (ii) these factors would almost certainly result in qualified bids and negotiations around amendments – at that point not quantifiable – to the Infraco Contract public-private risk allocation, as set out in the draft contract issued to bidders at ITN. TIE's approach on the draft contract negotiations during April to September had already affected this.

7.119 BBS was effectively handed the advantage of being able to say: "if you want me to use your SDS designer's drawings to deliver the ERs and you are giving me that design piecemeal, fine, but then I will price the work piecemeal. You must take the cost risk of any of that design changing by development or in some cases being created after contract signature from what I have priced using BDDI. Additionally I cannot give you a clear construction programme with critical path activities and a firm completion date because you are not able to show me where MUDFA has completed". BBS

repeatedly made the point that construction crews needed to work sequentially; leap frogging each other as overhead support installation and line rigging and installation followed track laying.

7.120 Siemens appeared obsessed with hidden risk and instructed Biggart Baillie (Martin Gallagher) accordingly. I advised both Steven Bell and Geoff Gilbert to take a firm stance with BBS and SDS and say that the novation was simple and already part of the pre-agreed package. But we ended up in very detailed negotiations due to the state of the design (late and only partial) and, frankly, the way that the SDS contract had been loosely managed by TIE from its signature in 2005.

7.121 The factual situation on the two major advance works contracts had created a post BAFO stalemate. Instead of firming up its technical and commercial bid proposals, its construction programme and pricing, BBS simply sat with a heavily qualified and partially priced offer. TIE attempted in vain to extract commitment from BBS to remove qualification and offer a lump sum fixed price. BBS refused, with consistent reasoning and Richard Walker made it clear that his German senior management were controlling what BB would commit to. From my perspective and following the 12th December 2007 meeting with CEC, this lead directly to TIE's decision to say(BBS that TIE wished to engage with BB Wiesbaden.

7.122 **The intervention of BB Germany (Richard Walker) – December 2007**

7.123 I had had a conversation with Richard Walker, managing director of BB UK Limited (who was the Consortium lead) which I would place in early December 2007, in the first floor Telfer/Isambard Kingdom Brunel meeting room at TIE's City Point offices. The main meeting had broken out for some reason, but in the room with the two of us was a Pinsent Masons junior lawyer (his name escapes me now) and I think Ian Laing of Pinsent Masons may have also been in the room but on his mobile to his Glasgow office. At any rate Richard spoke directly to me.

7.124 The conversation went something along these lines: RW: "Andrew, I hope you realise how much more this job is going to cost them" AF: "what do you mean – in variations?" RW: "No, I mean because we cannot price the job properly and we are not prepared to take the risk of the SDS design being so rank and so late." Richard used quite graphic language and I recall in this meeti(he had referred to the subsurface under Leith Walk as 'tinkers' shite'. AF: "So how much, then? " RW: "£80 million or thereabouts". I reported this conversation to TIE management later that afternoon.

7.125 I was taken aback by the bluntness of what Richard was saying to me, an adviser as opposed to a principal, but I realised he had sort of blurted this out because of the intense pressure he was taking from BB Aktiengesellschaft head office Wiesbaden not to take on the Project without cast-iron protections, when the true scope of the civils and the real (as opposed to assumed) programme constraints caused by MUDFA were very hard indeed to define.

7.126 Indeed, long after the Infraco Contract was under way, at the formal event held at Edinburgh Castle to celebrate the M80 Project Financial Close in 2009 (a project on which DLA Piper had acted for the lending bank club), I sat at a table with Richard Walker and his wife. He

repeated to me how he had stressed to TIE in late 2007 that their publicly visible budget was not going to be anything like enough and that he had never been authorised by his head office at Wiesbaden to provide a fixed price – in fact, the exact opposite. His wife told me that the situation in 2007 (when TIE had its own pressure point of requiring a fixed price against a seriously incomplete design and a chronically late MUDFA) had come close to ending Richard Walker's career at BB UK Limited. I told TIE (David Mackay, I believe) about this conversation but by then the battle lines were drawn.

7.127 I met with Daniel Haussermann, BB's in house counsel, with TIE's approval at this 2009 dinner event which he also attended. This was at the height of the impasse over BBS refusing to mobilise - Daniel Haussermannand I had enjoyed a sensible rapport due to meeting him in Vienna on another unrelated German roads project opportunity and working on the other side on the M80 financing. He asked for a private informal meeting. This was to see if a door to reach compromise could be opened. Having cleared this with TIE management, I had breakfast with Daniel the following morning at the Caledonian Hotel. He told me that BB were not going to back down and that they were confident of their rights. He told me that this had been a BB Wiesbaden senior management standing instruction (due to the state of the SDS design at BAFO and based on what TIE management had agreed in Wiesbaden) and would not change. I told him that TIE would continue to use the Infraco contract to oblige BBS to mobilise properly and proceed with the works. I also said that reputational damage for BB was inevitable, no matter how strong they saw their position but that TIE might be prepared to be conciliatory, if BBS showed good faith and real intent by starting meaningful works and halting the stream of Notified Departures. I said from what I knew of the figures, what BB appeared to want was simply unattainable by TIE for the Project. We parted amicably but with no sense of having opened a door. I reported back to TIE and that ended my involvement in this approach.

7.128 Returning to the Telfer/Isambard Kingdom Brunel room in December 2007: I had no instructions at the time to react in any way to the information referred to at paragraph 7.124 and I was not responsible for negotiating commercial or financial matters for TIE. I do recall telling Richard Walker that if what he said was correct the Project – not just TIE – had a very serious procurement problem indeed.

7.129 I reported my conversation with Richard Jeffrey and my views on it to TIE senior management pretty much immediately in a management meeting later that afternoon. I do not recollect what type of TIE meeting this was in or whether minutes were taken. But it was in part effectively a debrief on the meeting with BB that had taken place. I cannot now be absolutely sure but I may have also told Stewart McGarrity and/or Geoff Gilbert beforehand. I am pretty sure that, given this information from Richard Walker who was still in the building, I looked for the most senior TIE executive present and available and reported my conversation with RW privately 'verbatim'. I was there to give TIE management my views on information that I had received on the spot. I was not waiting for some formalistic process to pass this information on. We were in live meetings with BB and we were coming up to imminent work stream deadlines, within the entire compressed Infraco procurement programme.

7.130 My memory is that the reaction from TIE was a mixture of disbelief and mild derision. But pretty soon after this date, TIE must have engaged on more direct and urgent pricing discussions, culminating in the Wiesbaden trip by Willie Gallagher and Matthew Crosse in December 2007, which I discuss in paragraph 7.177 *et seq* below. There is every reason for my belief that this was TIE's effort in trying to reach last minute agreement on price, programme, scope and the effect of design status and MUDFA. All of these matters had been firmly reserved and qualified in the BBS BAFO bid and were very clearly still alive, judging from some correspondence from BBS to TIE which I was shown by Willie Gallagher very shortly after my conversation with Richard Walker.[75]

7.131 That short conversation in December 2007 with Richard Walker highlighted to me again the fact that TIE and BBS still had no agreement regarding the construction works price and that BBS were still concentrating on the fact that the SDS Design and MUDFA positions prevented them from pricing and programming their proposals – whether TIE liked this or not. This was approximately two months after BAFO and after appointment of BBS as preferred bidder.

7.132 I am asked if I made anyone at CEC aware of my conversation with Richard Walker as describ(at 7.124 to 7.129. I did not and my answer is the same as my answers to all questions about DLA Piper relaying information to CEC. CEC Legal, my counterpart, expressed no interest in being involved in any Infraco negotiations. My conversation with Richard Walker had been part of that process and I advised and reported to TIE and I considered, and still consider, that I was entitled to assume that TIE would provide CEC with all the information that CEC required. This was in fact commercial and financial information about project scope, cost and pricing given to me informally by the BBS consortium's most senior executive - and I reported it immediately to senior TIE management. It was not appropriate at all for me to become involved in somehow reporting this information separately to CEC. I recall having a further conversation with Richard Walker on similar lines to the one I refer to at paragraph 7.123. I discuss this at paragraph 8.51 below and I reported that to TIE management also.

7.133 This nervousness and intervention by BB Germany was for a number of obvious reasons – all of which TIE management knew and on which I also stressed my view to them at the time once I h(realised that Bilfinger Berger Aktiengesellschaft was controlling the bid by its UK subsidiary:

7.133.1 all the tram civil engineering works were going to be done by UK based subcontractors, none of whom had signed a proper subcontract at this point, so their subcontract pricing was heavily qualified and largely indicative only since there were limited approved drawings for BB to give to its proposed subcontractor's estimators. BB (UK) Limited was completely reliant on the prime subcontractors to price scope. I do not believe that many quality subcontractors in the UK had direct experience of full scale engineering works for a tram project and even fewer in the Scottish market;[76] BB UK had completed a Scottish schools project, I think, and was bidding for the M80

[75] Discussed at paragraphs 7.123 - 7.125

[76] BAM perhaps did – but Siemens, not BB, for overhead installations, had subcontracted them. The serious claims/cross claims on the Nottingham tram project were well known: the track layout/overhead line/tram pantograph had not aligned so that when a tram went round a curve during trialling, there were power pick-up problems.

Stepps-Haggs Project I had doubts that TIE understood just how important the subcontracting chain was. I told Dennis Murray, Geoff Gilbert and Steven Bell about the problem and I raised the issue at TIE management meetings. I insisted that TIE break off the main terms negotiation so that BBS told the truth.

7.133.2 Pinsent Masons eventually phoned me to say their subcontractors, as at mid/late-April were on letters of intent only and therefore no collateral warranties were available and there were no key subcontract for TIE to see. I advised TIE exactly what I believed BB had done at BAFO: what they had done was to use very basic subcontractor pricing build ups from the Scottish contracting market. I advised them that if TIE did not provide the subcontractors with a design or Bills of Quantity, then BB UK would only provide TIE with indicative prices. And I advised TIE that this is why BB Wiesbaden had suddenly weighed in after BAFO – they had an overseas project where the pricing had been produced based upon non-binding estimates from local subcontractors. BB was a managing contractor: they had no UK work force or real presence. They had no UK based ability to price tram installation work themselves and Bilfinger Berger AG in Germany was not at the time involved in any new European tram schemes. They were relying on a subcontract chain to tell them what the civil engineering costs would be (in other words, those subcontractors' quantity surveying resources looking at SDS designs and the ERs). Indeed, as is clear from the Wiesbaden documentation, BBS's BAFO bid construction programme and its revisions were compiled and presented by an external programming consultant, not by BB itself. TIE knew this. See also CEC00619254 where I advise TIE that BBS were sensitive about their subcontracting arrangements.

7.133.3 And so: with seriously incomplete SDS design at BAFO and continuing thereafter, BBS had not been able to provide subcontractors with enough information for programming, pricing materials, quantities estimation, labour, plant and build methodologies. They had no other reliable conventional means of pricing the construction works required to deliver the ERs. BB Wiesbaden, having audited the post BAFO bid position of its UK subsidiary - in order to prepare for a Bilfinger Berger AG main Board approval for the Project - was controlling this situation and, as I understood later in 2009 from Richard Walker, had at this point in 2007 imposed an absolute bar on BB UK agreeing any kind of lump sum price with TIE. I had a good idea how BB Germany would be approach an overseas bid from my five years working in Frankfurt at a major German construction concern and I advised TIE senior management about my views - which were consistent with what BB UK was writing and saying to TIE.

7.133.4 the Project scope was not detailed out by a complete SDS design. Various important structures were missing and BB's due diligence had already found fault with SDS design quality and BB were required to novate the designer. Wiesbaden's Kalkulationsabteilung (Estimators) would have looked at the pre-bid report on SDS design and reported that they could not verify the construction price for BB AG main

Board approval. I told Willie Gallagher and TIE management my views on this, again based on my experience working at BB's main German domestic market competitor, Phillip Holzmann AG, for five years in Frankfurt;

7.133.5 BB as a Group had never been the main construction partner in a consortium building a complete light rail scheme in the UK. BB UK Limited itself had been in existence for around 10 years with limited track record;[77]

7.133.6 BB was aware that CEC had attempted a £50 million guided bus scheme in the past – out near the airport - and this had collapsed. Balfour Beatty was the contractor on that project; and

7.133.7 MUDFA was in serious delay and this was very evident.

7.134 And so: TIE's solution to project scope uncertainty was to agree to take back an unmeasured and unpriced consequence of incomplete scheme design and MUDFA delay/interference risk and then somehow count on being able to sort out the overall time and cost outcome post-contract awa But in the Wiesbaden Agreement in December 2007, BBS compounded TIE's problem by ensuring that any such solutions would always be entirely on their terms, as was very obvious from SP4, which followed directly out of the Wiesbaden Agreement and which TIE developed itself.

7.135 **Lead-up to Wiesbaden Agreement**

7.136 As introductory background to what I say below about a series of key meetings: I became aware from TIE management meetings (following the BAFO bids evaluation in October 2007) that BBS's BAFO bid was seriously deficient as regards its approach on pricing and construction programme for a complete scheme and that it contained a fully reserved position as to the production of a master programme for construction, systems installation and vehicle testing, with a coherent critical path to substantial completion – effectively the end date for tram trialling - at which point the tram scheme could begin the process to reach authorised PSCD. I understood that the immature state of the BBS BAFO bid was the direct result of the lateness, quality and unavailability of S design, as well as the MUDFA works situation also compounded by missing SDS design.

7.137 I recollect, as I have mentioned earlier at para 7.130, Willie Gallagher showing me some letter correspondence (plus some e-mail exchanges, perhaps) - between BBS and TIE (Richard Walker and Scott McFadzen to Willie Gallagher) in which BBS was making the point to TIE that BBS had not been able to, still could not and would never fix price and programme against immature or non-existent design and incomplete work scope. This position was reaffirmed in emails again from Richard Walker to Geoff Gilbert on 19th and 20th December 2007 which I have now seen (see below at paragraph 7.191).

[77] I knew its first CEO, Gerhard Becher, who was a personal friend from my time in Germany in the 80s. He was an early enthusiast for BOT or PFI-PPP, as was called in the UK.

7.138 This was also evident to me from what BBS had been raising in the limited number of Infraco Contract main terms meetings we were able to arrange from September and to mid-October which I was managing, instructed by Geoff Gilbert.

7.139 It was no surprise in answering the questions which have now been put to me to see this affirmed in CEC01482234, BBS's letter of 12th December 2007 to TIE, providing an update about their BAFO submission. From this, I now understand why the CEC-TIE meeting on 12th December 2007 at Wiesbaden played out the way it did: TIE and the CEC Project Executive Group understood with clarity from BBS's letter that BBS were: not offering an identifiable lump sum price attached to a defined scope of works nor were they offering an unqualified and complete construction programme with build methodologies and system and tram vehicle testing regimes for a fixed PSCD. Little had moved essentially from their BAFO bid position - although contract terms negotiations had happened and resolved various sticking points.

7.140 As time moved on towards the date for the last CEC full Council meeting in December 2007, I became aware that TIE was in very urgent discussion with BB, in particular in an attempt to get some form of commitment on a construction price and committed construction programme, although DLA Piper played no part in this. My impression from what TIE managers told me was that these discussions were on-going at CEO/Project Director level but were not productive and that BB Wiesbaden was now controlling matters, not BB UK Limited. BB was not going to move on its heavily qualified bid, reservations and indicative pricing. Internal due diligence on the state of the SDS design had, BB were saying, reinforced this position. As had, I am sure, their discussions with SDS concerning the reasons for the lack of prior approved design: CEC Planning and Roads Authority performance. I had the impression that Willie Gallagher was speaking to CEC senior officers about the situation but I was not involved.

7.141 On 11 December 2007, I attended a TIE management meeting chaired by Willie Gallagher. The agenda covered: TIE's need to have formal sign off in hand (before CEC officers sought Full Council approval for the Project proceeding) from TIE's executive management committee, TIE's Board and the Tram Project Board.

7.142 Willie Gallagher said that Phil Wheeler, the Lib. Dem. CEC transport convener and a TIE Board Member, had raised concerns about BBS' reluctance to commit to a clear construction programme. Willie Gallagher said that BBS had now told TIE that they were revising their indicative programme to account for: Traffic Management (e.g. street closures and issue of TTROs); serious MUDFA delay; SDS design production and approval delay and SDS design quality; and emerging major fresh assumptions.

7.143 Indications were that the PSCD was moving out to March/April 2011 because the BBS construction programme was extending. This, he said, would need explaining to CEC carefully. He was due to have an update from BB's Richard Walker later that day at some point.

7.144 I think I attended only part of this meeting, due to conflict with my need to address contract drafting/issue analysis following the last BBS Infraco contract terms session.

7.145 On Wednesday, 12th December 2007, two back-to-back meetings took place. Following a short meeting at TIE's offices I describe below, I attended a meeting at CEC offices. At this CEC-TIE meeting, I provided CEC's Project Executive Group with my views as part of TIE's briefing regarding: SDS design risk transfer and MUDFA delay and their impact on pricing, programme and the procurement strategy's risk transfer. TIE and CEC discussed how the status of the Project would be reported at the Full Council meeting in order to achieve approval for TIE to negotiate the transaction to Infraco Contract award and how this tied into grant funding approval from TS. I return to this CEC-TIE meeting below but first I discuss a prior meeting of the TIE executive management group.

7.146 I attended a TIE executive management group meeting on 12th December at City Point, chaired by Willie Gallagher. The meeting was in preparation for a briefing to what seemed to be called the CEC "Project Executive Group" – not the TIE Board, not the Tram Project Board and not the Tram subcommittee. This was my first involvement with this group. Willie Gallagher gave a summary to his managers of where TIE thought the Infraco procurement had reached.

7.147 Infraco Contract terms would need to be settled for Close. No date was discussed. I explained briefly where I believed TIE had reached with BBS and that BBS were holding back and using their consortium's preferred bidder status, with Siemens not really engaged at all – they had not attended several main contract terms meetings.

7.148 Willie Gallagher said that BBS had "screwed up" their pricing and their programme. Richard Walker had now told him that £498 million was no longer feasible and that BB Germany's Wiesbaden group management was involved in re-thinking this after an internal review had raised significant concerns about the BBS BAFO tender submitted to TIE and project risks.

7.149 There was, Willie Gallagher said, a new serious issue with MUDFA at the Haymarket-Dalry Road–Maitland Street– Grosvenor Street–Morrison Street intersection.

7.150 Willie Gallagher then talked about 'deal parameters'. I took this to mean TIE's strategy to get BBS to remove qualifications from their pricing, construction programme and PSCD for trams. He said that the CEC staff report to be submitted by 14th December 2007, in two days' time – prior to the Full Council meeting – would have to be qualified as to scheme scope, design delivery/risk (transfer) and BBS construction programme. I understood from this that TIE would not – and could not - be reporting a fixed price for construction to CEC and Transport Scotland.

7.151 Willie Gallagher then reported that BBS had already put back the PSCD to March 2011 and that this date still required various assumptions that could have cost and time implications for TIE and CEC if they fell. He said this was a concern because TIE had already given media briefings about: *"trams on the street in late 2010."* I do not recall discussion about what the new BBS assumptions were at that point:

7.152 CAF needed to be kept informed of the revised PSCD because of tram production and shipment.

7.153 SDS were already saying that the chronic delay on design production and CEC prior approvals of their scheme design might cause SDS concern over their novation to BBS due to the unanticipated scale of remaining design to be produced with BBS as their client.

7.154 Because of serious ground condition problems under Leith Walk and the decision not to lay track down to the Foot of the Walk, the Piccardy Place tram turn-around concept was now a scheme change that SDS were saying would be a significant variation under their design mandate.

7.155 Willie Gallagher then said that he would be meeting personally with Andrew Holmes, CEC Director of City Development, as well as with others at CEC to discuss: how the CEC report would be written to capture the existence of these "risks"; what the authority delegation from CEC to the Director of City Development and then to TIE would be and; what "services menu' TIE would be authorised to deliver for CEC under a revised Operating Agreement.

7.156 To assist Willie Gallagher in his discussion with Andrew Holmes, the meeting looked at the delegation of authority for TIE to enter into the Infraco Contract – essentially to avoid the need for any formal return to the Council, prior to Project Close. There was a connected project governance paper being prepared by Graeme Bissett.

7.157 I did not have any direct instructions on what role I was to play at the meeting with CEC. After probably 45mins, we then left in taxis from City Point to CEC new premises at Waverley Court, which had opened in April that year.

7.158 The meeting with CEC officers was held in a large modern glass-windowed conference room overlooked by the old Scottish Executive building on Waterloo Place. The attendees were to the best of my recollection: Andrew Holmes, Gill Lindsay, Rebecca Andrews (CEC Finance), Willie Gallagher, Graeme Bissett, David Mackay (who was at that time, I believe, Chairman of TEL and succeeded Willie Gallagher as CEO of TIE in November 2008), Stewart McGarrity and me.

7.159 Andrew Holmes explained in opening that a CEC officers' report would be going out on Sunday night, 16th December. Its purpose was to brief Councillors before their vote on the Project. Gill Lindsay said that the Council would also know that a CEC guarantee of TIE's obligations would be required. On TIE's instructions, I had already prepared this as a draft some time earlier. It still remained under review by CEC Legal for sign off. I believe I mentioned that the approval should not be totally specific to the draft. (This was because we had been unable to provide it to BBS, pending CEC Legal's indication that they were satisfied with the principles and the language).

7.160 Andrew Holmes then said that: CEC officers had voiced concern on the level/number of project risks entailed. CEC would need to be satisfied about the status of these and that TIE was eliminating/managing them correctly. CEC was relying upon TIE to do this. Willie Gallagher replied that TIE was aware that risks could be a "show stopper" for CEC and that these would be handled in line with the Operating Agreement, within a detailed TIE report. I do not recall either seeing or hearing about such a report again. I said at this point that the conditions of the TIE Operating Agreement were still being re-settled with CEC and that the agreement would need to be in place

to ensure that TIE's authority to contract with all Project counterparties was not challenged on technical legal grounds later.

7.161 Andrew Holmes went on to say that by Monday 17th December, basically four days away, CEC officers (and I understood this to mean those in the room) needed confidence that: all major risks were closed out and any remaining risks were capable of being closed out in a reasonable period of time. I recall thinking that given what had just been discussed earlier at TIE and the previous day, the first part of this was an impossible assignment. I believed then and I believe now that everyone in the room on TIE's and CEC's side knew that it was impossible that "major risks" would be closed out since these were the very things that stood in the way of BBS (and specifically BB Germany) agreeing to a clearly priced scope and a construction programme without its current very clear, extensive contractual qualifications and reservations.

7.162 Willie Gallagher then summarised various risk issues in headings: Pricing, Utilities (MUDFA), Design (SDS), Consents (planning approvals) being on the list. He said that all of these could change with cost or time impact on CEC/TIE. Gill Lindsay mentioned a list that Colin McKen; (CEC Legal) was compiling for the CEC report - this turned out to be to do with various papers required for the delegated authority and the actual formal CEC Resolution (which I had told Gill would be scrutinised by BBS' lawyers). At this point, I said that CEC/TIE needed to be confident that it could deliver site access to BBS e.g. no other public works on street, Traffic Regulation Order management issues cleared and no MUDFA works constraints to complicate or compromise BBS' construction and system installation programme and construction methodology. I said that if this was not so, it would result in immediate prolongation and disruption claims from BBS and reservations on mobilisation.

7.163 Willie Gallagher and Andrew Holmes then discussed the possibility of a "high level"/summary report that could be given to Councillors. There appeared to be consensus on this as a result of earlier discussion. I do not know what this document was or who was going to produce it.

7.164 Willie Gallagher then went over a list of individual issues. There was a lengthy discussion abo[illegible] First Scotrail, as the operator of Haymarket station and Network Rail, as the infrastructure owner. These issues were essentially site access constraints at one area on the tram route.

7.165 This triggered a general discussion about BBS's indicative construction programme and the various assumptions underlying it. Andrew Holmes asked what TIE's backstop plan was if BBS would not fix its programme. Willie Gallagher said that: TIE was carrying out a risk assessment and that BBS's programme could well entail increased cost through variations and prolongation. In fact, I recall that agreeing to an extension to BBS's programme with a later PSCD in exchange for fixing construction price became part of TIE's approach. But BBS did not sign up to this.

7.166 Other third party arrangements were then discussed, all with potential to cause delay and disruption. Again, the most prominent was Network Rail, where CEC had status (recognised by the Office of the Rail Regulator) as a public body carrying out necessary infrastructure works which TIE might require to use if Network Rail was intransigent. BBS of course knew from the ITN that

they would be required to work under a Network Rail's regulatory regime near the operating railway.

7.167 Any notion that this set of formalistic arrangements could be closed out in four days, with BBS's agreement to related risk transfer and Network Rail's requirement on indemnity, was pure fantasy. Everyone knew that any dealings with Network Rail were always turgid, painfully slow and often replete with problems with different Scottish and national approval levels – as it was already the case here. And so: it was quite clear to TIE and to CEC that BBS would reserve their position on the time and cost effect of this and that TIE were only beginning the process.

7.168 Willie Gallagher asked me to speak about SDS novation. I said that there was a significant risk to novation as originally planned: SDS design was extremely late, as TIE was aware having been project managing SDS for well over two years. At this point, I had not been informed by TIE what was happening with the two claims that SDS had submitted to TIE: two fully documented 40 week, £2,856,724 million acceleration and contractual disruption and prolongation claims.[78] BBS had already pointed out that the issue of novation was now a commercial problem for them and had flagged that their on-going due diligence exercise was finding serious issues with the state/quality of the SDS design and the CEC planning approvals process.

7.169 I made it clear to the meeting that I believed that BBS would continue to defend the qualification of their construction programme and construction price and, if SDS design was still both unavailable and still evolving at contract close, BBS would seek contractual protection for this in the Infraco Contract change mechanic, as well as a cost buffer. I said, in short, that the MUDFA and SDS design situation had a direct, major negative impact on TIE's procurement strategy on risk transfer. I do not recall any further discussion on what I said.

7.170 Andrew Holmes then came back to what CEC officers needed by 17th December, namely:

7.170.1 Their own report;

7.170.2 Tram Project Board approval;

7.170.3 Their remaining "due diligence" (by Legal, Finance and City Development); I do not know what this entailed;

7.170.4 A resolution to empower TIE to complete negotiations and enter a contract; and

7.170.5 Endorsement of the Final Business Case by CEC Finance.

7.171 There was more short discussion about: (1) linkage between SDS design state (and BBS reaction to being asked to fix a price and settle a programme) and BBS actual price being heavily qualified (2) if, for CEC reporting purposes, this complex unsettled commercial position could be encompassed by using a financial contingency. I do not recall any action or desired outcome for this being stated in the meeting.

[78] Paras 5.178 *et seq*

7.172 There was a short exchange between Gill Lindsay and me on the subject of the TIE Operating Agreement. I was concerned that the Operating Agreement had an express financial limit on TIE's commitment authority (from memory, £500k). This generated instead a general discussion about project governance (which I considered would very likely confuse BBS' lawyers about TIE's authority to enter into contract and elicit questions).

7.173 Andrew Holmes closed the meeting saying that CEC Project Executive would await TIE's report and further updates. What update and when TIE gave it, I do not know. There was the personal meeting that Willie Gallagher had mentioned earlier in the day he would have with Andrew Holmes but I never heard further on this. Within four days of this TIE-CEC meeting, the Wiesbaden visit took place.

7.174 On 14th December 2007, Geoff Gilbert sent me a copy of a briefing that he had apparently given to CEC staff, including Director of Finance, I believe. I had not played any part in this. Reading it, it did not contain anything which showed that TIE was about to compromise its procurement strategy in order to try and obtain a construction price from BBS which would appear to match the availal(Project funding envelope. I do not recall Geoff Gilbert attending the 12th December 2007 meeting which I discuss above.

7.175 What was still absent on 20th December 2007, eight days later, was the complete set of technical, financial and commercial schedules to the Infraco Contract, as well as a committed BBS construction programme with a critical path and end date. It was not impossible for me to envisage moving the Infraco Contract terms and conditions to a conclusion within a reasonable period of time. But assembly of all the technical and financial information required from both TIE and BBS to populate the contractual Schedules methodically and quickly was entirely dependent on TIE and BBS reaching all the necessary agreed positions and on BBS instructing its legal/commercial team to engage and co-operate in closing out issues, not raising new ones.

7.176 **The Wiesbaden Agreement – December 2007**

7.177 The Wiesbaden meeting in December 2007 was TIE's response to its dilemma: no fixed price, (construction programme and a technically immature and heavily qualified BAFO bid from BBS. My observation of what CEC senior officials knew about this situation themselves in December 2007(as informed by TIE and by DLA Piper) is very clear from the set of meetings I have discussed immediately above.[79]

7.178 The driver for the Wiesbaden Agreement was the need for a final CEC staff report (informed by TIE's recommendations) to the Council in December 2007 and TIE's report to seal Transport Scotland's approval of the Final Business Case and agreement on grant funding. CEC officers needed to present a formal report to support the City Council's vote on 20th December 2007 on approval for the Project. DLA Piper was not asked to play any role in these reports. Though I recall seeing a draft of CEC Legal's report on CEC delegation to TIE. I did not know – and nor was I

[79] At paragraphs 7.145 *et seq*

asked by TIE to comment on – how TIE would report to and satisfy CEC personnel following the 12th December meeting, or how the CEC Project Executive Group would respond to TIE's report.

7.179 Those CEC staff and TIE reports had to verify, in essence, that TIE had firm agreement from BBS on pricing and programme, in order to ensure that the Project continued with all round confidence that it could be delivered within funding budget and by a committed end date. DLA Piper was not asked to play any role in these reports and I did not in fact see them in any form before they went to CEC. I was not asked by TIE to consider how TIE would report to CEC following the 12th December meeting or how the CEC Project Executive Group would use that TIE report to satisfy their requirements.

7.180 DLA Piper played no role at all in the Wiesbaden Agreement. I was not consulted about the Wiesbaden visit, though TIE knew that I had worked for five years as in-house international counsel to a major German contractor, and spoke fluent German and personally knew a very senior BB German executive. I was not instructed by TIE about expected outcome or about DLA Piper's involvement in that nor do I recall being told in any TIE management meeting about TIE's approach and objectives for Wiesbaden. None of my colleagues at DLA were consulted about this either. I recall hearing that that TIE executives might be flying or had flown to Frankfurt but was neither informed about the meeting in advance nor asked to input into the drafting of the document that became known as the Wiesbaden Agreement. I do not know why DLA Piper was not instructed to assist with the Wiesbaden negotiations and the agreement in December 2007, given our central involvement in TIE's procurement strategy.

7.181 I understand that those from TIE who went to BB's head offices in Wiesbaden in December 2007 were Willie Gallagher and Matthew Crosse. Though he did not travel, Geoff Gilbert drafted parts of the Wiesbaden Agreement and, importantly, was instrumental in settling the exact wording of PA1, which dealt explicitly with the transfer back to TIE of SDS design development and post BDDI creation risk. I have no knowledge of what Matthew Crosse and Willie Gallagher told Geoff Gilbert about the Wiesbaden meeting itself.

7.182 There is a set of detailed e-mails on TIE's archives that I recall seeing much later in early 2010 (during McGrigors' inquiry and the meetings for their written report to TIE) that show this with clarity. Geoff Gilbert was neither an engineer nor a designer.

7.183 Stewart McGarrity, TIE's Finance Director, did not go to Wiesbaden. I believe that he phoned to ask me if I knew what was happening. I have no first-hand knowledge of who was there for BB and Siemens. It is possible that Siemens were not present. I believe that BB's in-house counsel, Daniel Haussermann, may have been in the background and that BB presented language which had been in part pre-prepared by, or had had input from, Pinsent Masons.

7.184 Alastair Richards at TEL, who dealt with the tram supply, called me regarding the Wiesbaden meeting; probably shortly before he sent me his e-mail after the meeting had taken place. He asked me if I knew what was happening and I said "*no*". And so; on the 18th December, it was

Alastair Richards, not Mathew Crosse or Geoff Gilbert or Willie Gallagher, who sent me an e-mail attaching an unsigned and incomplete version of what seemed to have been discussed.

7.185 I did not know at this point who had been to Wiesbaden. I had a good relationship with Alastair who I do not think trusted what Matthew Crosse, Geoff Gilbert and Willie Gallagher had said. He expressed concern, as did Stewart McGarrity, on various occasions, both before this email and afterwards, about how he was being kept in the dark. Alastair was a secondee from TEL and was extremely diligent. He was one of the only people in TIE who had straightforward light rail experience, having been involved in the Copenhagen Light Rail project in a key capacity.

7.186 Alastair Richards had no set role at TIE in the Infraco Contract procurement and no role in Wiesbaden, as far as I was aware. I found it extremely strange that this document, which TIE had discussed and apparently agreed at Wiesbaden, had been sent to me by somebody at TIE who did not have senior line managerial responsibility for the Infraco Contract procurement.

7.187 My inability to reply in any detail –or even attempt to give legal advice - is clear from my email ear that afternoon, I could see what the document's intention was but it was nothing like complete and I had no background to it at all. I asked if TIE wished to meet to discuss it but I did not get an answer from TIE to allow me to think how I would deal with this before I departed on leave the next day. I received no instruction from anyone. I did not know what TIE management's expectation was and I could not have commented on the design development language in any event – for the simple reason I explain below.

7.188 TIE had known for three months that I was going on leave to the Far East on 19th December. I do not know when exactly the Wiesbaden Agreement was concluded, but I was sent it on the 18th December (in incomplete form and with no briefing offered by the TIE management). I asked what TIE wanted me to do with the draft document. I would remark that I am not able to retrieve this draft document itself in the form which I received it from Alastair Richards on 18th December 2007 but I have seen a draft document sent by Geoff Gilbert on 19th December 2007 and believe this is the same, save for the minor revisions marked by Geoff. The version of the Wiesbaden Agreement which I received on 18th December does not contain the language which subsequently became PA1. This is confirmed in an email from Stewart McGarrity on 17th February 2010 as part of TIE's internal review of Wiesbaden, which cites clause 3.3 in the draft. Consequently: this central PA1 language was inserted before the Wiesbaden Agreement was finalised. DLA Piper did not have sight of it under 6th February 2010 (on first receipt by DLA Piper of the draft SP4 from Bob Dawson), well after TIE had agreed this important language with BBS.

7.189 TIE's investigation two years later into Wiesbaden headed by McGrigors and interrogated by Tony Rush established beyond doubt for TIE's new CEO, Richard Jeffrey –as I knew already - that DLA Piper played no role at all in the Wiesbaden Agreement. I discuss this below.[80]

7.190 As far as I was aware, Steven Bell, who became the Project Director when full negotiations for the Infraco Contract and SDS novation were on foot in February 2008, had had little to do with the

[80] Paras 7.383 *et seq*

Wiesbaden Agreement, which was in turn the genesis for SP4. There was an uneasy relationship between Geoff Gilbert and Steven Bell as a result – I think because Steven Bell felt that he had been tied to agreements over matters such as: Base Case Assumptions and BDDI. I do not know if a planned and detailed handover took place from Matthew Crosse and Geoff Gilbert to Steven Bell, as from my perspective, Matthew Crosse simply disappeared in March 2008 and likewise later in early May, Geoff Gilbert left with little ceremony, no respite and no replacement.

7.191 At this juncture, I am not certain if I ever in fact saw a full copy of the Wiesbaden Agreement signed by the parties. What I saw at first - on 18th December 2007 by email from Alastair Richards - did not speak to me as a document which had "fixed price", as I summarise below. In one sentence: it contained a price cloaked with detailed qualifications, exclusions, assumptions and reservations and it seemed to present three different Infraco works completion dates, all subject to price qualifications. I note that on 20th December 2007 at 06:07am Richard Walker wrote to Geoff Gilbert:

> "...we still have issues accepting design risk. We have not priced this contract on a design and build basis, always believing until very recently that design would be complete upon novation. With the exception of the items marked as provisional which we have now fixed by way of the 8 million we cannot accept more [design] development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution."

7.192 Here was BBS making its position utterly clear to TIE and reinforcing its need for what was agreed in the final Wiesbaden Agreement and ultimately became PA1.

7.193 Given that the arrangement was dealing with price and risk transfer as well as various significant city centre work scope, I assumed that TIE management must have been discussing this (prior to travelling to Wiesbaden) at appropriate authority levels with CEC - the CEC personnel whom I had met on 12th December. I simply did not and do not know.

7.194 I should add that I never was told whether Siemens had been present at the December 2007 Wiesbaden meeting but they signed the final agreement. Given Siemens' behaviour seeking additional money and other separate concessions from TIE in February 2008 I surmised, at that time, Siemens might not have been not present in Wiesbaden. That is why I advised tie (see para 7.451.4) to tell Siemens that they needed to seek their price increase intra-consortium. tie ignored this advice. And so the hasty visit to Wiesbaden resulted in TIE also facing a later claim for more money from that other consortium member – which TIE and CEC agreed to.

7.195 I responded to Alastair Richards the same day by e-mail at 14:21 in the afternoon (CEC01430872) and I copied my response to Matthew Crosse, Geoff Gilbert, Steven Bell and Stewart McGarrity. I heard nothing back from TIE and there was no instruction of any kind to DLA Piper as regards a revision of TIE's procurement strategy following Wiesbaden. As I say in the email, I was not in a position to give advice in this email. I was reading the document in a very short period of time. I offered to sit down and go over the issues list if it was required and I stated that I was "*not sure this*

would be the most productive use of time at present, given the collective level of tasks that need to be completed, initiated and moved on". I also stated "*this is not intended to be a legal view and I can only comment with any factual competence on 3.6.*" The fact that I state "*This is not intended to be a legal view*" shows I was not providing legal advice to TIE. I am commenting on something they have sent me in the quickest way that I can. What is entirely clear to me is that if TIE had wanted legal advice from DLA Piper, the document would have come to me, presumably from one of the people who had been at Wiesbaden or were responsible for negotiating that document (which was not the case with this email) with an instruction requesting a legal view on it. The document was not sent to me in that manner, either before Wiesbaden or after it was signed by TIE.

7.196 What I felt at that moment - the day before I was due to go on planned leave - was that I had been completely blindsided by my client's senior project management. This time it was at a critical moment in the Infraco procurement post BAFO stage. I was ambushed by this and I was quite angry about being totally excluded. I had known nothing about how TIE management had intended to approach this Wiesbaden meeting, other than that they had gone there in an attempt to bring a head the matters I had heard discussed with CEC on the 12th December 2007 and to find an acceptable resolution to report to CEC. The document I was sent was not a report to CEC. The document contained a range of qualifications and exclusions expressed in language I had never seen and that was very clearly meant to have contractual effect. It mentioned further reservations attached to particular Infraco works and related pricing and commercial matters in appendices I had not been sent and did not know about.

7.197 I was simply not in a position to advise properly on this without an explanation from TIE management on what they had intended - and I said as much in my e-mail response. I had no idea how TIE saw this matching the Infraco Contract terms and conditions that directly linked to the contractual responsibilities, novations and risk allocations set by TIE's procurement strategy and the draft Infraco Contract terms which TIE itself had been discussing with bidders for nearly six months. I never got that explanation from anyone at TIE. I was essentially left to work it out *ex post facto* and I do not know what conversations or meetings took place between TIE and CE about this document to enable CEC staff to complete their report that Andrew Holmes had stated on the 12th December 2007 was a pre-requisite to CEC going forward with approval for TIE to enter into contractual arrangements for implementation of the Project.

7.198 The version of the Wiesbaden agreement, I believe, sent to me by Alastair Richards was entitled "Agreement For Contract Price". It is roughly four pages long and has six works item scope and arithmetical appendices, each cross referring and containing costing breakdowns and further reservations. One runs to numerous pages. This alone indicated to me that whatever this construction price was, BBS had qualified it heavily. And most certainly, they had - using an expression called "Basis of the Price". In summary:

7.199 The construction price quoted for Phase 1a was £218,262,426. This was an increase from the BBS BAFO indicative construction price in October 2007 of £208.7 million. However, even his figure was heavily qualified. The "Basis of the Price" was that this new construction price::

7.199.1 Listed provisional sums (i.e. where the scope and duration of work is at the very least uncertain or unknown); Value Engineering (itself subject to factual and technical assumptions and restraints and further agreements on scope and technical matters was still to be discussed and reached); and a version of the ERs (which was about to and did change at TIE's instance);

7.199.2 Only included the "price for civils works for any impact on construction cost arising from the normal development and completion of designs based on design intent for the scheme as represented by the design information drawings issued to BBS up to and including the design information drop on 25th November 2007" Normal design development in this context excluded "changes of design principle, shape and form and outline specification". This date was what became known as Base Date Design Information – "**BDDI**") covered by the express (and subsequently controversial) exclusionary wording regarding normal design development that then appeared in SP4. It caused a material transfer of SDS design production and development responsibility back to TIE.

7.199.3 A completion date of 11th August 2011 with a statement about working together to bring this forward to 11th February 2011 on the basis of a variety of further assumptions. This was, in turn, all qualified by a clear statement that BBS had not priced any extension of their works programme beyond March 2011. So that there was actually no price linked to a committed programme. My understanding of this is: (i) the 11th August 2011 completion date was subject to the reservations and qualifications in the document; (ii) the 11th February 2011 earlier alternative completion date was, in addition, subject to various further assumptions (which could fall); and (iii) that the completion date stated as 11th August 2011 was not, in fact supported by pricing for the 5 months construction activity and presence beyond 11th March 2011.

7.199.4 A comprehensive list of five or six categories of important engineering works expressly excluded from the Infraco works scope covered by the Price – some had not even been designed in outline by SDS at that point - e.g. roads and drainage at Picardy Place gyratory; and

7.199.5 The exclusion of any works due to unforeseeable ground conditions using as the base assumption, not what TIE or an expert consultant acting on TIE's behalf had established, but rather what BBS itself had reported in late November and early December 2007 (i.e. excluded, site-wide, from BBS priced scope and construction methodology and programme were any Infraco Works required as a result of unforeseen ground conditions – not as defined in the draft Infraco Contract terms

issued at ITN - but rather using BBS's own site investigations post-BAFO to define what was 'unforeseeable'.).

7.199.6 It also included the two express works scope exclusions (one in fact naming Princes Street and this became part of BBS' arguments for working on demonstrable time and cost basis under the March 2009 Princes Street Supplemental Agreement)[81].

7.200 The above was, then, what TIE's management presented to their colleagues and to CEC staff on or about the 19th December 2007 before and at the Tram Project Board meeting (see para 7.205et seq. below) as encapsulating and securing a fixed BBS construction price and a stable construction programme. I note in passing that there is a mention in one of the appendices to the effect that, subject to the "Basis of the Price" i.e. all the exclusions, reservations, assumptions and interlocking and listed key qualifications, restraints and provisional pricing, the price is 95% fixed. In my view the reference to "95% fixed" is meaningless - without the background I have highlighted which expressly qualifies it. Before anyone reading the Wiesbaden agreement reaches that Appendix reference, they encounter the main terms of the arrangement that set out the enti range of qualifications and exclusions on price and programme. On a simple, proper reading, no one could reasonably conclude from the Wiesbaden Agreement that BBS had agreed to a fixed construction price. To report that this document commits BBS to a fixed construction price with a clearly linked construction programme to completion date would be very misleading indeed, in my opinion.

7.201 The result was most definitely not - and neither BB nor Siemens ever did anything to pretend that it was - a fixed price. The price that TIE reported as being a "fixed price" was in fact only a price for the Infraco scope of work BBS had presented in their BAFO Infraco Proposals. That scope of work was based upon the substantially incomplete SDS design as at 25th November 2007 –BDDI.

7.202 As I discussed above, the draft of an Agreement on Contract Price sent to me by e-mail on 18th December 2007 was 4/5 pages long, without its Appendices. The 20th December 2007 signed version is 200 pages long (CEC02085660). It also contains on page 4, an initialled manuscript amendment in Geoff Gilbert's handwriting dated 21/12/2007, one day after its signature. The attachments/appendices contain various emails and a BSC construction programme. These show, *inter alia,* that:

7.202.1 TIE had begun the amendment of the ERs in July 2007 and that this was still continuing on 12th December 2007; and

7.202.2 at pages 198 et seq: BSC was using an external organisation, Construction Programme Solutions Limited, to produce its construction programme, based on SDS design programme, v22. TIE was in direct communication with that party on 12th December 2007. This was the day Willie Gallagher told the TIE management meeting that BBS had 'screwed up' their construction programme. But BBS had not screwed up their programme.

[81] Paras 8.109

7.203 BBS's construction programme sectional and overall completion and projected PSCD dates were based upon what they had been reporting to TIE as BBS formed its views on SDS design, CEC approvals status and MUDFA. This short extract from Construction Programme Solutions email - sent to Tom Hickman, Susan Clark, Steven Bell and Bob Dawson at TIE on 13th December 2007 confirms this:

> I am sorry, but I do not understand this point.
>
> E,
>
> This programme is our latest revision and supersedes previous issues. As you are aware this programme is driven by SDS issue for construction dates, MUDFA and some remaining junction constraints. If the combination of these constraints were not as severe, as was the case in our previous submissions, earlier completion dates would be achieved.

The email contains no apology for mistakes. It simply says that this latest BBS construction programme remained subject to already stated Key Assumptions. Nor does TIE respond to this by contesting the programme revision as erroneous. If it had been, why would TIE's Project Director and Executive Chairman have agreed that these emails and this programme document - and all its assumptions - should be included in the Wiesbaden Agreement? Tom Hickman was TIE's Infraco contract construction programme manager, I believe.

7.204 **Tram Project Board Meeting – 19th December 2007**

7.205 As discussed below[82], Stewart McGarrity had thought that I had drafted the Wiesbaden Agreement. He was surprised and apologised when he found from TIE's own records (and I had confirmed myself) that DLA Piper had had no involvement in it at all.

7.206 Seeing now what Willie Gallagher, Stewart and Steven Bell are minuted as reporting to the Tram Project Board on 19th December 2007, I understand Stewart's surprise all the more. I was not present at this meeting but I have read the minutes which I do not recall seeing at the time (I was away on leave when they were issued and I did not regularly receive Tram Project Board documentation. I never attended these meetings. It is reasonable to assume that based on how he had been briefed by Matthew Crosse and Geoff Gilbert, Stewart McGarrity gave the TIE Board a construction price update that essentially said that: the BBS qualifications in the Wiesbaden deal on construction price were covered by an "existing contingency".

7.207 Based on the information that I knew of at that time and what the Wiesbaden Agreement says, this does not seem possible to me, since

7.207.1 the scope and cost impact of SDS new design production and design development post 25th November 2007 was unknown, MUDFA was still all over the streets and was now entirely at TIE's risk and BBS had refused to fix its construction programme due to MUDFA delay (this construction programme and its PSCD was still moving and not committed well into March 2008);

[82] Para. 7.393

7.207.2 Value Engineering had been accepted by TIE. But BBS had clearly not accepted –and never did accept - Value Engineering as an obligation because these potential 'cost savers' were still being negotiated and in fact eliminated in February through April 2008;

7.207.3 The Infraco proposals were to a significant degree unpriced and not scoped because of missing SDS design; and

7.207.4 TIE was still in the process of amending the ERs to Version 3.02 which resulted in significant further price increase.

7.208 The TIE Board minutes show – in answer to two questions from Andrew Holmes (Director City Development) about whether design delay risk had been allowed for in the Project cost estimate – that Willie Gallagher reported that normal design risk passed to BBS through the SDS novation and a potential six month delay in programme (caused by delay in design production and approval process) was covered by risk allowance. But BBS had not fixed its construction programme at th point and there was no Project documentation available which showed an assessment of TIE's exposure to responsibility for SDS design development post BDDI.

7.209 Steven Bell – not DLA Piper or TSS – is minuted as being given the action to provide further detail on design risk transfer. Since I was not asked to attend this meeting specifically as I did not attend Tram Project Board meetings and I was on annual leave (nor was anyone else from DLA Piper requested by TIE to attend in my place) or advise afterwards, I cannot say what detail may have been provided –presumably to CEC – by TIE. The next day, the Full Council met and approved the Project.

7.210 Based on what is minuted, Willie Gallagher's statements ignored the terms which he, Geoff Gilbert and Matthew Crosse had agreed in the Wiesbaden documentation. Both BDDI and Wiesbaden had brought a material part of the SDS design production and approval and MUDFA works cost and time responsibilities back to TIE in relation to any SDS design not complete by or developed after 25th November 2007 (the date for BDDI) and in relation to all incomplete and/or not designed or approved MUDFA works. As I have remarked earlier, this risk allocation shift is not hidden deep in the Wiesbaden agreement. Furthermore, in my view, a six month delay in programme would have resulted in a prolongation and disruption claim from BBS, let alone re-arming their continued inability to price and programme a complete scheme against ERs and immature/non approved SDS design - the root cause of TIE's problems.

7.211 Steven Bell is minuted at the 19th December 2007 meeting as reporting that there were "considerable risk allowances for MUDFA included in the project estimate". But what does not seem to be reported was the fact that (i) MUDFA, on its own, was preventing BBS from producing a priced-related construction programme with a critical path. I have no knowledge as to whether this risk contingency took account of the MUDFA contractor's emerging significant disruption, variation and prolongation claims (ii) the MUDFA claim was based in part of the unavailability of SDS Design critical to the MUDFA works programme.

7.212 I have seen an internal TIE-CEC (draft) report dated 20 December 2007 headed "Edinburgh trams contract acceptance". I did not see this at the time since I was not given TIE-CEC reporting. There is a final section on risks. It shows clearly that TIE and CEC had full understanding of the need to nail down certainty on design production approvals and quality and project construction price on which BBS had given no fixed commitments and that there was- at the very least - cost and programme risk from MUDFA being late, the SDS design being very incomplete and Value Engineering not happening. This CEC report was written immediately after the Wiesbaden Agreement. But, in marked contrast, TIE management had presented the Wiesbaden agreement as having captured a substantially fixed price contract, safeguarding the Project funding budget.

7.213 **Post-Wiesbaden Negotiations**

7.214 From January 2008 through to eventual Infraco contract close on 14 May 2008 there was an intense period of commercial, technical and contract negotiations:

7.214.1 The Wiesbaden Agreement was directly translated into what became SP4;

7.214.2 At the same time the parties were dealing with the consequences of TIE's unilateral decision to amend the Employer's Requirements;

7.214.3 Negotiations took place over the commercial and technical aspect of the novation of SDS;

7.214.4 Discrete negotiations took place over various sections of the Infraco contact including: subcontracting and warranties; intellectual property rights; Clause 80 and the contractual change provisions; Clause 4.3; Ground Conditions, the Network Rail interface, Consents, SDS novation agreement, the DRP provisions and indemnities

7.214.5 The wasted 5 months in 2007 had a direct negative effect on TIE's ability to control post-BAFO contract terms negotiations.

7.214.6 During this period BBS made four further successful moves to increase the contract price, two resulting in what became known as the Rutland Square Agreement and the Kingdom Agreement.

7.215 From my perspective, following the Wiesbaden Agreement BBS became much more aggressive about the terms of the Infraco Contract and their approach on SDS Design and the novation. I suspected that Pinsent Masons had told BB that they had a very strong position as preferred bidder and they should exploit it.

7.216 I have found it instructive to refresh my memory using contemporary documents on the timing and outcome of the four separate BBS construction price increase demands, all post BAFO and preferred bidder appointment in October 2007. As I explain later, I was involved in support for TIE in two of these and not at all in the two others. The following figures all come from TIE's contemporary Project papers:

7.216.1 BBS BAFO indicative construction price October 2007: £208.7 million

7.216.2 BBS Wiesbaden construction price 20th December 2007: £218.3 million

7.216.3 Increase One 7th February 2008: between £1.6 and £3.2 million and settled at £2.7 million, I believe. (Rutland Square). It is unclear to me if this amount was in fact subsumed in the subsequent agreement noted below.

7.216.4 Increase Two: 7th March 2008: £8.6million (Citypoint)

7.216.5 Increase Three: 9th May 2008: £9 million (Kingdom Room, Citypoint) [83]

7.217 So that: on 20th December 2007 after Wiesbaden, BBS's still heavily qualified construction price had risen from the BAFO price of £208.7million by just under £10 million pounds to £218.2 million. By 14th May 2008, the BBS construction price had risen by a further £21 million to £240.6 million. But this total figure reported by TIE:

7.217.1 did not include the £3.2million TIE agreed to pay BSC for Phase 1b; and

7.217.2 relied upon achieving £13.8 million "savings" through Value Engineering. As can be seen from the language of SP4, none of this Value Engineering was supported by enforceable contractual obligations on BBS. TIE knew this because BBS would not commit contractually in any way to undertaking the Value Engineering work and made this clear throughout all SP4 technical and commercial discussions over a two month period.

7.218 At contract signature on 14th May 2008, then, the real Infraco construction price which TIE was reporting, still contractually heavily qualified by SP4, was approx. £254 million, representing a 22% increase on the BBS BAFO bid received in October 2007. This does not take into account the separate Siemens price increase and it did not include the £3.2million compensation for Phase 1b estimate under Clause 85.1, any pricing for the outstanding SDS design, the £2.5 million TIE agreed for BBS's protection against SDS design quality issues/CEC approved delay or, it appears, inclusion of the very significant incentive payments given to SDS under the 13th February 2008 agreement.

7.219 An unfortunate feature of the TIE – BBS negotiations was the distrust and animosity that crept in. The root cause of this was TIE's anger at the way BBS appeared intent on ransoming the Project at every opportunity. Richard Walker and Michael Flynn were heavily criticised. Later BBS retaliated by attacking Steven Bell and others post contract award but it had started in February 2008. I believe that this hostility played directly into the hard line instructions given by parent company Bilfinger Berger Aktiengesellschaft headquarters in Wiesbaden to the BB UK Limited project directorate and site staff post contract award.

[83] See TIE's "Final Deal Paper"

7.220 **Post-Wiesbaden Discussions – December 2007/January 2008**

7.221 The first TIE management meeting after Wiesbaden was, I believe, on the 8th January 2008. I had returned from a holiday in South East Asia (which I had notified to TIE in October 2007 when I agreed the secondment arrangements). My passport shows that I left Hong Kong on the evening of the 7th January which means that I arrived in Edinburgh via London Heathrow sometime on the 8th January. Susan Clark of TIE had produced a draft formal note and programme leading to a Close date of 28/29th January 2008. I said immediately in that first Project meeting on Tuesday 8th January 2008, that I thought that this timetable was not achievable because: (i) there was no price agreement, (ii) no completed design, (iii) MUDFA delay and (iv) approx. 85% of the contract's numerous financial, technical and commercial Schedule Parts of the total 43 Schedule Parts still did not exist beyond the pro-formas and place-markers issued with the ITN, even in first draft form). Nothing had happened because BB UK Limited and Siemens were not motivated to progress (sitting as preferred bidder and without competitor). BB had received their internal report on the state of the SDS design and express instruction as a result from Wiesbaden. Furthermore, SDS Provider now took its stance against novation as I have explained in paras 7.229 et seq. In addition, given BBS's attitude in negotiations I could not advise TIE with any confidence at all that the Infraco main contract terms could be closed out in now what was less than a month, given that nothing had moved since 16th December 2007.

7.222 Susan Clark said that they did have a price agreement – it was the Wiesbaden Agreement. I said I had seen a skeleton draft version of that pre-Christmas but asked exactly what it is and how it fits with the rest of the Contract. Nobody seemed able or willing to explain it.

7.223 I note that at a Board Meeting the following day, 9 January 2008, TIE management advised its Board that Infraco Close was scheduled for the end of January 2008. I am minuted as an attendee but I have little recollection of this – possibly because I was not in fact present for the entire meeting due to clash with Project meetings. Since I was neither a TIE executive nor a Board member, my attendance was only by express instruction. If I had been present for the full Board meeting on 9th January I would have spoken to the matters which were listed as my responsibility in the previous Board minutes of 19th December: Parent Company Guarantees and Liquidated Damages – neither of which are centrally relevant to pricing and risk transfer, as is erroneously noted in the Minutes.

7.224 I have also reviewed minutes of the previous Tram Project Board meeting on 19th December 2007 at which TIE management reported on various matters concerning the outcome of Wiesbaden and the status of MUDFA. I disagree with these minutes now and would have taken issue with them then, had I been requested to attend that meeting.

7.225 During January 2008, Stewart McGarrity, TIE's Finance Director, was commenting frequently in TIE internal meetings about the lack of information coming from Matthew Crosse and Geoff Gilbert. I recall several tense meetings where he made it plain he was struggling with their assessment of Project cost. Since he was responsible for TIE liaison with Transport Scotland, he was having to

protect the fact that costs were creeping upwards. I sensed he felt personally exposed because he had not been involved in Wiesbaden and now was trying to catch up.

7.226 Up to March 2008, it was my impression that only Matthew Crosse and Geoff Gilbert actually knew what the commitment from BBS on Construction Price had been. Post Wiesbaden, there were a number of Project management meetings I attended where it was clear that internal communication on this subject was being restricted or was, at best, imperfect (Stewart McGarrity was openly vocal about this.

7.227 I also would cite Willie Gallagher's email to Matthew Crosse in February 2008, nearly two months after Wiesbaden saying: "It is MANDATORY requirement that before I go to CEC tomorrow I have a good understanding on outcome of Price, Programme, Commercials & Contracts. Warm feelings is not sufficient, you must communicate this at every meeting with BBS & CAF etc." Early that day, I remember Matthew Crosse had emailed that there was a great deal to do and some warm feelings might be possible though he did not wish to be gloomy.

7.228 **Discussions with SDS Post-Wiesbaden – January 2008**

7.229 I attended a meeting with SDS on 16th January 2008. The participants were: Geoff Gilbert and Damien Sharp (TIE), Steve Reynolds (PB Senior Director), Chris Atkins (PB Commercial manager) and Jason Chandler (PB Edinburgh design team lead). TIE's objective was to flush out SDS' position on not being willing to novate. I have discussed the significance of SDS to TIE's procurement strategy above, and summarised the impact of SDS design production and CEC approvals delay on Infraco.[84]

7.230 Steve Reynolds said that novation would result in SDS "*inheriting some nasty risks*" because it had never been contemplated that SDS would novate to then carry on significant design production and delivery with BBS (as opposed to TIE) as its client. I responded by saying that PB had taken the mandate on the explicit contractual promise that they would novate to the Infraco and they were bonded for £500k to do so. Chris Atkins immediately disputed this and said that the SDS contract was not that specific – which it unarguably was, in fact – and because of the way the commission had panned out, PB did not regard themselves as bound on this anymore.

7.231 Geoff Gilbert intervened to say that we wished to hear all PB's issues, and not just have an argument over the contract terms at this point. Steve Reynolds continued:

7.231.1 SDS considered BBS Infraco Proposals (the BAFO bid essentially) too basic to allow SDS to design the Siemens component of the ERs (e.g. control systems, signalling, on street traffic interface, OHLE, depot layout). This issue of SDS not being able to produce any design for Siemens scope resulted directly in BBS demanding and being

[84] Paras 7.113*et seq*

paid an additional £2.5 million under the Rutland Square Agreement in February 2008.[85]

7.231.2 The Consenting process (CEC Planning and Roads Authority approvals) meant that SDS design produced and/or developed, refined and approved after BAFO might very well not match BBS pricing as shown in their BAFO;

7.231.3 TIE unilaterally changing the ERs to V3.02 had introduced a change to the basis on which BAFO had been submitted which was a risk to both SDS work post novation and to BBS price and programme;

7.231.4 BBS's price was missing material elements because no SDS scheme design existed (or was still being developed), including in particular Siemens scope; this situation would "damage" the construction price BBS had put forward;

7.231.5 BBS had included priced proposals, which did not fit with SDS design already prior approved: an example being the tram stop shelters; and

7.231.6 SDS scope of services under the SDS contract clearly did not include for some of the work they had been instructed by TIE to carry out (I do not now recall what -or whether this was mentioned by Steve Reynolds in any detail) and this, as well as all their other existing claims, required settlement by TIE.[86]

7.232 I do not know how TIE assessed these views in terms of their relevance to the procurement programme timetable. Why didn't TIE push Infraco contract award and signature back in these circumstances? I discuss the possibility of a moratorium or extension to the procurement process above.[87] In my opinion it was because TIE and CEC wanted to remove the threat of a central government 'hold' on the procurement (with the resultant audit) and to move on to sign a contract and announce success. They were possibly relying on a degree of consensual approach and partnering co-operation in the implementation of the Infraco Contract with BBS post-Close which never came. Before the Infraco contract and the SDS novation were signed, senior level relationships were damaged by BBS' aggressive price attacks and SDS's brinksmanship and TIE and BBS had already exchanged words (and possibly writing) about integrity. In part, this animosity and breakdown of trust lay behind the subsequent claims culture adopted by BBS and the hard-nosed attitude of BB in particular in administering the contract.

7.233 **Schedule Part 4 ("SP4") Negotiations – February 2008**

7.234 The Wiesbaden Agreement translated directly into SP4 of the Infraco Contract, including Pricing Assumption 3.4.1 ("**PA1**") which dealt with design production and development time and cost responsibility post BDDI, 25th November 2007. This assumption's language never changed from what TIE had agreed in the Wiesbaden Agreement.

[85] See paragraph 7.434 *et seq*
[86] Paras 5.178 *et seq*
[87] At paragraph 7.97 *et seq*

7.235 The SP4 discussions which I knew of at the time went on for around two months from the first full week in February 2008. TIE-BBS had in fact been discussing SP4 from mid December 2007. The basic principles set by the Wiesbaden meeting and the documents that came from it never changed and sit within SP4, including the language for PA1, 3.4 on design development. TIE's Project management was controlling, exchanging drafting and negotiating the provisions of Schedule 4 (as TIE named it) with BSC and with Pinsent Masons.

7.236 One central purpose of SP4 was BBS's protection through the entitlement to a variation for time and money in the event of design development, the impacts of new designed scope on engineering and construction programming and cost, given that the scheme design was grossly under-developed at preferred bidder appointment and the MUDFA utilities diversions in the city were nothing like as far advanced as had been envisaged under the procurement strategy and the ITN issued in October 2006. In fact, so far behind the intended schedule that TIE was unable to release any on-street section of the tram route sufficient for meaningful sequential construction activity until March 2009.

7.237 The contemporary e-mails on the inquiry's archive show Scott McFadzen of BB sending draft SP4 to Bob Dawson at TIE on 4 February 2008. It is described as "*our*" (i.e. BB's) document. It is then forwarded to me on 6 February 2008 by Bob Dawson (DLA00006341). I note that attached in that train is BBS's email sent to TIE on Monday 4th February (not copied to DLA Piper) stating that they look forward to discussing the attachment – version 2 of SP4 "tomorrow": that is Tuesday, 5th February. As I discuss below, there was a meeting on 5th February 2008 which I attended but SP4 not discussed at any length.

7.238 Bob Dawson's communication on the morning of the 6th February 2008 gave me 25 minutes to consider this 18 page draft document (and a mark-up of it) – the Infraco Contract's proposed core pricing document – before a meeting with BBS to discuss it, of which I had been given no notice at all. I had no instructions from TIE regarding its content and its exact purposes, what TIE Project Management thought about it or if TIE had discussed it with CEC. When this e-mail arrived, I was not in TIE's offices. I was at my desk in DLA Piper's offices, preparing, in fact, for a different a important meeting with BBS and Pinsent Masons. I had no opportunity to discuss the draft document with anyone before the meeting.

7.239 In my email response to Willie Gallagher on 6th February 2008 (DLA00006341) reacting to seeing the draft SP4 for the first time, I describe it as a "*contract within a contract*". I could see that the document sent to me by Bob Dawson contained definitions and provisions which were new. They were not part of the Infraco Contract main terms which DLA Piper had been discussing with BBS since the turn of the year 2007/8. I could also see the language was crafted to introduce the concept of automatic client variations based on a set of assumptions that I knew nothing about. They were not part of what DLA Piper had been discussing in meetings with BBS which I had attended at any point up to then. At first sight, none of this appeared to be linked to the existing and extensive variations provisions in the draft Infraco Contract (Clauses 79 to 84). I had no time to produce any more comment at this point, as is clear from what I say below. My email was

DLA00006341 should be DLA00006343

intended simply as a marker that I had been caught entirely unawares by TIE. I received no comment back.

7.240 I asked Ian Laing of Pinsent Masons where the specific PA1 wording came from. To my best recollection, he said that it had come from a precedent in another BB contract and that his instructions were that TIE senior executives had seen and agreed to it at Wiesbaden. I discuss this meeting in more detail at paragraph 7.248.

7.241 I didn't like any of SP4, but particularly PA1 and the wording, "For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification." I made my views on this and what it had done to risk allocation clear to what I believed were the relevant TIE senior management – and more than once as I explain.

7.242 DLA Piper's involvement – such as it was - began in February 2008. TIE's engineering and quantity surveyors team in fact spent far more time on this than on the main Infraco contract terms, on which I worked with Geoff Gilbert if he was not engaged on SP4 or other matters. TIE itself handled the drafting discussions and settling of SP4 language, including PA1. This is quite clear from the contemporary documents. Geoff Gilbert and Bob Dawson were leading this with their counterparts at BBS and they were corresponding direct with Pinsent Masons. Assumptions came in at various sessions because SDS design had been given to BBS or, BB in particular had carried out more site due diligence on technical aspects and third party requirements. Fresh assumptions were introduced – some of which were commonly understood as likely to fall, triggering a client-side variation and therefore would cause a mandatory client change order known as a Notified Departure.

7.243 I recall going to two initial meetings on SP4 (6th February and 11th March 2008), when I anticipated risk allocation principles were going to be discussed. At the outset, I had intended to have robust discussions with Ian Laing at Pinsent Masons on the SDS design development time and cost responsibility (i.e. what was PA1). Despite raising the issue I got nowhere and I reported this to TIE at the time. There were few changes we managed to make to SP4 but none to PA1 language. It then became very much a technical, engineering and quantity surveying set of discussions. Pinsent Masons/BBS simply refused to re-open the principle of PA1 on the basis that it had already been agreed between the clients' senior representatives at Wiesbaden. It represented BB Wiesbaden's absolute starting point, not a negotiating stance. TIE's Chairman, Project Director and Commercial Director had agreed it before I ever saw the language and nearly two months before it reappeared as a part of the first draft SP4.

7.244 When new items or assumptions were added to SP4, early on I had some influence over discussions on those to the extent that proposed language might be biased or wrong (see the Rutland Square Agreement, for example).[88] But part of the core of SP4 was BBS's position on SDS design development, which underpinned the adjudication award losses subsequently. This

[88] See paragraph 7.434 *et seq*

proposition was non-negotiable from the outset having been agreed by TIE at Wiesbaden. After early February 2008, the meetings moved forward onto the other technical and factual assumptions and their mechanics and content, not the core principles of how SP4 was to operate, which TIE never challenged.

7.245 Where I was copied in on the various iterations of SP4, I believe TIE's purpose was simply to make me aware of how their discussions were progressing. E-mails that appear as simply copied to me – without other instruction from TIE - do not mean and did not mean, for me, that somehow DLA Piper was being asked by TIE to take action or provide advice and DLA Piper did not.

7.246 I am asked if I considered that there should be discussions between solicitors over the terms of SP4 and in fairness to BB, I recollect that Ian Laing said that I ought to have been involved in the Wiesbaden discussions. I remember an email from me on 12th February 2008 thanking Ian for a call he made to me suggesting I made time to attend a planned meeting. He knew that I was due to be negotiating the main Infraco Contract terms with his colleague, Suzanne Moir that day. TIE had not told me in advance about the SP4 meeting. I had no reply to make to Ian's observati since TIE seemed to have chosen not to involve me.

7.247 As I say, I attended a first session on 6th February 2008. As far as I recall on TIE's side Steven Bell, Geoff Gilbert attended and Scott McFadzen, Richard Walker and Ian Laing were there on the BBS side. I do not recall if Siemens were represented – frequently they were not in this phase. I had no time whatsoever to collect my thoughts on the draft or to communicate with TIE about it. All I could do was give notice that DLA Piper wanted to look at the contractual language because I had been sent the 18 page document for the first time about 25mins before the meeting. I had not had the opportunity to discuss SP4 with anyone at TIE and had not been informed at any point that they had already been negotiating and/or settling the language and mechanics of this document with BBS since early January 2008.

7.248 Ian Laing began to lead the discussion. He essentially explained again the need for the language of SP4 to protect BBS from all post BDDI SDS design production and development time and cost responsibility through an automatic client variation order. Discussion then began on the Assumptions, naturally with PA1.

7.249 I recollect it was soon after the start of this session that I asked Ian Laing for a private meeting. We left the main meeting for small meeting room 4 adjacent to the reception area. I told him that I was very uncomfortable indeed with the language in PA1 and the entire concept of automatic contractual client variations, known as Notified Departures. I said that I was not certain where the language had come from but that I did not know under what authority it had been settled. I recall Ian going slightly red when he responded: he said in short "it's been agreed by your client's CEO and Project Director two months ago and the language has been vetted by TIE's Commercial Director, so it's simply not open for discussion". We returned to the main meeting where BB were essentially presenting and justifying their extensive list of SP4 factual and engineering Assumptions to Steven Bell and others.

7.250 I needed to understand quickly what TIE's integrated commercial and engineering view of SP4 PA1 was. I had no idea at this point that the language had been drafted / amended by Geoff Gilbert - so Steven Bell was the person I wanted to talk to about PA1. I discuss my discussions with Steven Bell at paragraph 7.286 *et seq* below.

7.251 From this point onwards, I knew from Ian Laing that SP4 PA1 was set in stone from BBS's perspective and I reported this to Steven Bell and to Geoff Gilbert.

7.252 My initial reaction was to reject the draft SP4 document entirely because it had not been in the ITN procurement package, nor had it been evaluated when BBS were selected as preferred bidder. No one at TIE ever explained to me why the language of SP4 (or the Wiesbaden agreement which preceded it) was not shown to DLA Piper before TIE agreed to its core principles and language: TIE would take post BDDI SDS design development, time and cost risk and and the entire consequences of MUDFA delay. I can only assume that Mathew Crosse and Geoff Gilbert treated it as an entirely distinct commercial proposition and decided not to show DLA Piper. Why Willie Gallagher would not have wanted DLA Piper to review the Wiesbaden agreement before it was agreed, I do not know. He was TIE's most senior corporate officer and answerable to the TIE Board and to the tram governance bodies and to CEC.

7.253 At this point, Matthew Crosse was leaving or had already left TIE (Steven Bell had been announced as Project Director elect in January 2008). TIE itself (Geoff Gilbert and Steven Bell principally with Bob Dawson and Dennis Murray in support) took daily and ongoing responsibility for SP4, both as to technical and commercial matters and actual drafting.

7.254 **February 2008 Discussion with Richard Walker – Inquiry Question 106**

7.255 In February 2008, I had a further conversation with Richard Walker along similar lines to that in December 2007 which I discuss at paragraph 7.123 *et seq* above. Richard asked me again whether TIE had enough money because he thought they would need it. This is the conversation mentioned in my e-mail to Graeme Bisset of 21 September 2008 (CEC01213251) that I am asked about in Question 106.

7.256 I draw the Inquiry's attention to CEC00941819 which I have been asked about. This is Stewart McGarrity's note of a TIE management meeting with BSC on 10th February 2009. At point 8 in the note, he reports Richard Walker as saying in that February 2009 meeting that there had been: *"...general acceptance by TIE pre-contract that the project would cost £50-100 million more than was in the contract at 15th May 2008."* This remark from Richard Walker over a year later is entirely consistent with what Richard Walker had said to me in early December 2007 (which I relayed to TIE management, as discussed above) and with what he repeated to me in February 2008.

7.257 Whether or not Richard Walker was accurate in saying TIE had "accepted" this additional cost (mainly attributable at that time to incomplete and underdeveloped SDS design) and MUDFA delay) does not detract from the fact that BSC was being clear to TIE that the Wiesbaden

Agreement had very definitely not somehow absorbed this very significant missing cost – however much members of TIE management may have wished that it had.

7.258 I wish to be very clear that TIE wanted to and did take control of responding to BBS on SP4. Following the 6th and 7th February meetings, TIE had not been happy that Pinsent Masons had taken the lead role for BBS in explaining SP4. TIE (Geoff Gilbert and Steven Bell, I believe) had a conversation with BBS counterparts and requested that SP4 discussions took place without lawyers being present. This is evident from many contemporary TIE emails and the fact that traffic is sent by BBS to TIE Project Management, not to DLA Piper. And so it was that Geoff Gilbert and Bob Dawson dealt with the SP4 commercial negotiations (including all language drafting) and Steven Bell, Dennis Murray and, latterly, Jim McEwan dealt with BBS on technical and engineering matters.

7.259 Numerous communications on this subject during this period were not copied to DLA Piper, nor was I asked for advice. That drafting was debated and reviewed by Geoff Gilbert (and other personnel at TIE) at the time of Wiesbaden in December 2007 and discussed and became fixed(the e-mail exchanges between TIE and BBS in January 2008 before the issue of SP4 as a working draft by BBS in early February 2008.

7.260 I saw these e-mail exchanges between TIE and BBS on TIE's archives for the first time in early 2010 during the TIE internal inquiry into Wiesbaden, which I discuss below.[89]

7.261 Consistent with what I say above, there is not one draft of, or set of substantive comments on, SP4 between January 2008 and 20th March 2008 that was prepared or issued by DLA Piper. There were in fact two different documents moving back and forth between TIE and BSC/Pinsent Masons at one point: BBS' draft "Schedule Part 4" (e.g. CEC01449876) and TIE's different draft "Schedule 4" (e.g. CEC01450182).

CEC01449876 should be CEC01449877

CEC01450182 should be CEC01450183

7.262 The following documents illustrate (as examples among this documentation) TIE's approach:

7.262.1 On 12th February 2008 Geoff Gilbert emailed Richard Walker with discussion poi(regarding SP4 which TIE wished to discuss, and had been discussing direct with BBS and Pinsent Masons, that entailed a pricing discussion that Richard Walker asserted was closed. Again: DLA Piper is not copied on that e-mail and took no part in those discussions;

7.262.2 CEC01447445 is an email from Bob Dawson on 13th January 2008 to Geoff Gilbert that reports "as per earlier email" that he has prepared a version of SP4; a draft is attached (CEC01447446). There is no involvement of DLA Piper and no copy sent to me. The earlier email is CEC01495585 dated 13th January 2008 in which Bob Dawson e-mailed Geoff Gilbert (copy to Stewart McGarrity) to report that, as asked, he has imported Wiesbaden deal figures from an email of 9th January 2008 into a document he has prepared. Bob's email shows that he was working on drafting for what he called

[89] Paras 7.383 *et seq*

"Schedule 4", as directed by Geoff Gilbert on the basis of the Wiesbaden deal set out in an email to him from Geoff Gilbert dated 9th January 2008. DLA Piper played no role in this because TIE did not tell me this exercise was proceeding;

7.262.3 CEC00592608 is an email from Bob Dawson on 16th January 2008 to Geoff Gilbert, Dennis Murray and to BBS (Michael Flynn and Scott Mcfadzen) sending out his draft Schedule 4 for "a meeting on Friday", the 18th January. There is no mention of DLA Piper involvement or participation in this meeting. No copy of the documents or the email was sent to me or anyone at DLA Piper;

7.262.4 CEC01448861 is an internal email from Bob Dawson to Dennis Murray on 14th February 2008 in which he states he has incorporated Geoff Gilbert's notes (CEC014478862) into the drafting. There is no mention of DLA Piper involvement or TIE's need to consult them. These notes also disclose that Geoff Gilbert attended a meeting on 12th February 2008 with Richard Walker and Scott McFadzen of BSC to discuss various noted points. Interestingly, his notes show intention to include the Base Case Assumption 3.4 language from Wiesbaden. Again, there was no involvement of DLA Piper in any of this; and.

CEC014478862 should be CEC01448862

7.262.5 Bob Dawson's email of 3rd March 2008 and Geoff Gilbert's email on that day: "the Schedule will be discussed tomorrow between commercial reps and then with legal reps at 3pm tomorrow at City Point with respective lawyers." Essentially, DLA Piper was to wait for TIE to instruct that we should give legal input to ensure that language in SP4 aligned effectively with the Infraco Contract. But even this was ultimately influenced by TIE's own redraft of Clause 80 (see paragraph 7.518et seq).

7.263 I am asked in the Inquiry's Question 71 about Andy Steele's email of 6th February 2008 (CEC01448355/356). I had no idea what prior involvement TSS had had in this draft SP4 document. This was the first communication I had seen from TSS on any Infraco matter. I found it profoundly odd that Bob Dawson, TIE's procurement and contracts manager, seemed to know little about this draft Schedule Part which was the central pricing document for the Infraco Contract. It is clear that Andy Steel and Bob Dawson both recognised that TIE was at risk for SDS design changes after BDDI.

7.264 It is ironic that the one intervention from TSS which I saw (and took part in the follow-up) was absolutely on point and critical to TIE. Andy Steel made the point that significant design development time and cost responsibility was being passed back to TIE. His e-mail stated that he was going to come immediately to discuss this with Bob Dawson, TIE's procurement manager. Bob reported to Geoff Gilbert and the point was discussed by them as e-mail traffic shows. DLA Piper was not involved.

7.265 I rarely saw Andy Steel of TSS and never saw any other correspondence between TSS and TIE at the time. Looking now at Andy's mark up, he had comments on most, if not all, of the Pricing Assumptions. Andy gave me the impression of being an experienced and conscientious engineer

and, as I mention, his email said he was coming to see Bob immediately. He had concerns and I believe I heard these first hand in a meeting with Steven Bell. In among many comments on factual situations and technical issues that were being discussed is his telling comment on Base Case Assumption (a) (ii): "*Given that a substantial amount of design requires to be presented, this clearly will not happen.*" The assumption in question was that the SDS Design would, "*not, in terms of design principle, shape, form and/or specification, be amended from the Base Date Design Information.*"

7.266 That is to say – that it would not happen that there would be zero amendment to the SDS design available as at 25/11/07. This is TIE's TSS engineer saying to TIE that SDS's design production from then on in would be likely to produce numerous Notified Departures from design development post BDDI.

7.267 I notice that there is comment from Bob Dawson in the draft using the word "*open ended*" more than once and on one section he writes: "*can't just be any (notified departure) or all risk will come back to TIE*". Clearly, Bob Dawson had understood the intent of this document in his position (TIE's procurement manager. This e-mail exchange shows TIE (Geoff Gilbert and Bob Dawson) discussing SP4 in detail.

7.268 If Willie Gallagher, Matthew Crosse, Steven Bell and Geoff Gilbert had all misunderstood PA1, SP4, why was there no reaction from them to what Bob Dawson and Andy Steel were discussing in early February 2008 in order to correct them? And why did TIE not challenge BBS about this? As discussed in more detail below, I discussed with them, I advised – consistent with what Andy Steel was saying – what I believed PA 1 meant in terms of contractual effect (and that there were problems with the language), its clear and significant risk allocation erosion - and that I had been told by BBS's legal adviser that the core commercial principle of TIE taking design development time and cost responsibility post BDDI was not negotiable. TIE simply moved on.

7.269 TIE's Project Directorate's internal work on SP4 PA1 long before DLA Piper even saw it means that it is axiomatic that TIE knew with precision what the meaning and effect of SP4 and especially PA1 was: it permitted BBS to seek time and cost protection for events caused by the incomplete state of SDS design and, very arguably, by all design development after BDDI and for the continued significant presence of MUDFA on the streets, as well as many other unresolved engineering and technical issues, some due to missing design. At what point all of this knowledge on cost and time risk re-allocation became commonly understood by other TIE Project executives –as opposed to sitting with Willie Gallagher, Geoff Gilbert and Matthew Crosse – was not something I could influence and was not DLA Piper's responsibility.

7.270 The TSS (Andy Steel's) email to Bob Dawson represents TIE's only independent engineering consultant raising a series of questions about the content and impact of SP4. Matthew Crosse, Geoff Gilbert, Steven Bell, Dennis Murray, Bob Dawson and Jim McEwan were responsible for TIE's position.

7.271 I had no involvement in any immediate internal commercial engineering meeting on 6th February (if there was one) convened by TIE to discuss the points Andy Steel was making. However, since he wrote that he was coming to see Bob Dawson, who in turn reported direct to Geoff Gilbert, it is reasonable to assume there must have been at least one meeting and I took it that its views would be raised with Geoff Gilbert and Matthew Crosse. It was they who had agreed SP4's PA1 as part of the Wiesbaden Agreement, presumably confident that they understood its legal and commercial meaning very well since they had negotiated it without DLA Piper's input. And it was Geoff (and possibly Bob) who appeared to have been taking this forward during January 2008. I did not know.

7.272 And so: BBS had initially considered that Pinsent Masons (Ian Laing) should present their draft of SP4 on 6th February 2008 and he did so. But TIE, following the pattern established for the Wiesbaden meeting in December 2007, wanted these discussions and negotiations to be handled by its senior commercial team: Geoff Gilbert and Bob Dawson – that included responding with proposed drafting – and by its engineering team: Steven Bell and Dennis Murray. I do not know what role Matthew Crosse was playing at this point in terms of decision-making as Project Director. I never saw any written input from him on the drafts of SP4 and as I have said I know of only one meeting on SP4 that he attended in early February 2008.

7.273 My instructions from TIE were to represent TIE on the Infraco Contract main terms negotiations. I did not attend SP4 meetings unless specifically asked to by Geoff Gilbert or Steven Bell. TIE requested that I provide a lawyer to take the job of handling SP4 travelling redrafts - but not to provide advice since TIE wanted to restrict legal input from Pinsent Masons or Biggart Baillie at these meetings.

7.274 I recall that after the early February meetings on SP4, both Steven Bell and Jim McEwan voiced strong opinions about Pinsent Mason's involvement in explaining and leading discussions on SP4. As a result, BBS put Pinsent Masons more in the background and Scott McFadzen led the discussions. This caused difficulties on both meeting and response times occasionally, since by this time Scott was BB bid director for the M80 project in tender phase. That is one reason why, I believe, BB had asked Ian Laing of Pinsent Masons to lead for them. In any event, as is clear from the contemporary exchanges and draft documentation, Pinsent Masons continued to be BBS' focal point for document dispatch/review on SP4.

7.275 I am asked in Question 71 to comment on whether this was a situation where it would be relevant to consider if the state of CEC knowledge was the same as TIE's. DLA Piper was not advising CEC and had, in any event, no means of gauging what CEC's state of knowledge was, having only just seen SP4 itself for the first time on the morning of 6th February.

7.276 CEC Legal had made it clear to DLA Piper they did not wish to be party to or attend the negotiations and this document was part of contract commercial and engineering negotiation which TIE was handling, not DLA Piper. Nor was DLA Piper instructed by TIE to report to CEC Legal on this issue – which was not something within DLA Piper's advisory remit. Given the numerous governance communication channels which TIE had with CEC, me contacting CEC Legal direct on a commercial matter about design development was not a course of action that either

recommended itself or had any precedent whatsoever. TIE was CEC's Project procurement manager and TIE reported to CEC on pricing, technical and commercial matters, absent any independent financial and technical advisory input. TIE was managing the SDS contract and the intimate relationship within that contract with CEC Planning and Roads Authority.

7.277 I have discussed the restricted duty of care which DLA Piper owed to CEC earlier in my statement. DLA Piper was retained and paid to provide legal advice to TIE, not to intervene between TIE and CEC or second guess what was being reported or instructed between them. It was certainly not my role to start – and DLA Piper would not have been paid for – interrogating TIE management about their reporting to CEC.

7.278 It is however impossible, in my opinion, that CEC somehow remained ignorant of the very underdeveloped state of the SDS Design and were wholly dependent upon someone else to tell them about it. Over and above TIE's duties to report to CEC about the Project's progress and specifically any price variations/claims, CEC (Planning and Roads Authority) (i) was the contractually named and single most important Approval Body in the SDS Contract and in the draft Infraco Contract for all SDS Design being produced and (ii) had asked the Tram Board on the 9th January 2008 for an additional £633,000 to cover CEC's design approval process resources. I discuss CEC's knowledge of the SDS design delay in more detail earlier in my statement.[90]

7.279 Philip Hecht was my number two in terms of meetings on SP4. He sat through the TIE - BBS SP4 negotiation sessions and would report back to me on new developments. He was involved in the meetings on SP4 to flag up anything which would have a direct impact on the terms and conditions of the main part of the Infraco Contract. On TIE's instruction (I had discussed this specifically with Steven Bell and with Geoff Gilbert after Rutland Square in early February 2008), he was not there to draft or advise on drafting. He may have made interventions himself, but anything more significant he would flag to me on TIE's instructions. Phil's function was to progress agreed language and be available to TIE in the SP4 meetings – not to advise on the spot, since TIE handled drafting discussions and meetings were for the large part exclusively engineering, design or commercial in content. I revisit this at paragraph 7.466.

7.280 Examining the progress of the Infraco Contract through its various drafts: originally, there was a schedule headed "*Pricing*" in the ITN suite as a blank schedule to be completed and there was a complete list of Schedules at the Invitation to Negotiate stage, many of which, as would normally be the case, were necessarily blank because they needed to be bid or completed by the client when the relevant technical, financial or commercial information was provided and settled. The Pricing Schedule was never populated at BAFO stage or in the months following because the Infraco Proposals were not priced in a comprehensive manner.

7.281 The final version of SP4 was around 500 pages long. There is an initial 14 or 15 pages and the rest is Bills of Quantity that were the responsibility of Dennis Murray and, I assume, Bob Dawson before him. I doubt DLA Piper ever saw the finalised Bills of Quantity part until shortly before

[90] Paras 5.139 *et seq*

contract signing. Much was still outstanding well into May 2008. We certainly had very little time to cross check these as a contractual language diligence exercise. They had been and remained TIE's responsibility.

7.282 **DLA Piper's Advice and TIE's Understanding of Schedule Part 4 ("SP4") and Pricing Assumption 1 ("PA1")**

7.283 I delivered my advice to TIE on PA1 (as well as many other Pricing Assumptions in SP4) through a combination of: (a) discussion during initial February 2008 meetings (when I was instructed to be present) with TIE and BBS, where points were: (i) agreed by TIE and taken into documentation as it evolved, (ii) rejected, or (iii) reserved for more negotiation after discussion within TIE; (b) several specific meetings with Steven Bell as Project Director, with on at least one occasion Dennis Murray and possibly Andy Steel of TSS; (c) discussions with Geoff Gilbert as to how SP4 would sit with the Infraco Contract; (d) TIE management being updated daily by me at both TIE Project and corporate management and TIE executive management meetings; and (e) CEC Legal received oral summaries of negotiated or unclosed positions when/if they attended Legal Affairs Committee meetings.

7.284 I explain this point to put SP4 in proper context: it sat alongside the BBS construction price (at whatever increased level BBS managed to negotiate with TIE). The Schedule contained the essence of BBS's powerful and very obvious qualification of its construction price: BBS took little or no SDS design production or development time or cost responsibility post BDDI and held the entitlement to apply for the additional cost of constructing to any SDS design which evolved from where it stood at 25th November 2007 (the date by reference to which BDDI was fixed) and the time impact of constructing SDS design that had not existed at BDDI, as well as being paid for the time and cost impact of any one of the 43 Assumptions not holding true post contract signature.

7.285 At contract signature, TIE already knew that a number of important Assumptions were untrue, triggering BBS's immediate right to claim under the contractual change mechanism. Pinsent Masons also flagged this direct to TIE. It was, in short, again, a fantasy to regard the Infraco Contract as fixed price post-Wiesbaden or at contract signature and TIE's management were fully aware of this. In exchange for a heavily qualified construction price –not a fixed one- and a construction programme with assumptions and conditions, TIE's most senior corporate executive and at least two members of its Project Directorate had agreed the key principles of SP4 Pricing and then participated in the drafting and settling of its language.

7.286 Once I had had a proper opportunity to study the document sent to me by Bob Dawson by email on the morning of the 6th February and after the first round of SP4 meetings, I took action to give TIE my views on SP4. Since TIE had agreed this document themselves without any input from DLA Piper, my natural starting point was that TIE management knew what its purpose and effect was. I do not know if Matthew Crosse was available at this time but he was certainly in the process of leaving the Project. Since Steven Bell was the Project Director elect and, in the first meeting on February 6th, Matthew Crosse had appeared to accept *verbatim* what BBS's lawyer had explained about SP4, I spoke at some length with Steven Bell – in his capacity as Project Director -

about the principles and meaning of SP4 and specifically the PA1 language one evening in his own office. My best recollection is that this would have taken place on Friday 8th February 2008. If not then, given the work load on other contractual matters at that time, in the week commencing 11th February 2008, that is, as soon after the Rutland Square meetings as I could see Steven. BBS had been set a number of tasks by the Rutland Square meeting, so that further planned SP4 meetings awaited these.[91] At this point, I was unclear who at TIE was the senior Project executive in charge of SP4. It emerged very quickly that Geoff Gilbert had full knowledge of it. At this point I did not know that he had been speaking/writing to BBS about it since early January 2008

7.287 When we met, Steven was sanguine about the PA1 language. He had seen Bob Dawson and Andy Steel's email exchange by this point on what the language in PA1 meant so far as design development time and cost responsibility transfer was concerned.

7.288 I asked Steven whether the purpose of SP4 was to try and close out on price, despite the SDS design being still woefully incomplete, MUDFA late and the Infraco Proposals immature and replete with qualifications. He said that it was. There followed from then on the parallel negotiations regarding the Infraco Contract itself and SP4.

7.289 It was implied but never said directly in Steven Bell's comments (both then and in some tense discussion with Tony Rush and McGrigors in 2009 and 2010) that he had had nothing to do with the PA1 language; he was managing a bad situation which he had inherited. Perhaps he did believe at the time in February and March 2008 that TIE would be able to moderate the effect of the Assumptions in SP4 but in my opinion, then and now, it was not a realistic belief, given the situation at that time: TIE was already fighting against a rising tide of new insertions and candidates for "Assumptions" in SP4 and both TSS and TIE's legal advisers had expressed their concerns about SP4 and PA1 and how BBS would use these protections.

7.290 I do not recall Steven Bell giving me his view at the time in early February 2008 on where PA1 had come from. But I had made it clear to Steven by that time that it had not come from or ever been agreed by DLA Piper. I had reported to TIE that Pinsent Masons had told me that TIE senior executives had agreed it at Wiesbaden. Steven did not contradict this information. His ultimate view was that: what was or was not normal design development would be relatively easy to agree, if everyone was pragmatic. I believe Dennis Murray may have been present and that Andy Steel of TSS joined us for part of this discussion and that, in essence, he repeated the TSS' views that he had expressed in his 6th February e-mail to Bob Dawson.[92] We discussed some examples of what could be caught by or escape the language. We discussed what might be understood by design development, design principle, shape, and form and outline specification and we discussed the words themselves.

7.291 My intent in the discussion was to bring home the point that the language was not at all free from doubt on how it could be construed. If it came to a difference of opinion with BSC, it depended, I said, on how an engineer's, QS's and designer's minds would view it, based both on its literal

[91] For discussion of the Rutland Square Agreement, please see paragraph 7.434 *et seq*
[92] See paragraph 7.445 below

meaning and upon industry practice. I believe that my verbal advice on this was very clear: it introduced obvious blunt transfer back to TIE of cost and time implications from SDS design development post BDDI. At this point, it was left that Steven would consider this and discuss it with Geoff Gilbert and then Scott Mcfadzen of BB. This was because DLA Piper were not involved in the genesis and development of SP4. I do not know if either of these discussions Steven planned took place. But at this point, or if not, within a few days, TIE knew explicitly from me that BB's lawyer had told me that BBS were not willing to revisit the principles enshrined in the language, in particular the provision dealing with how design development post BDDI would be treated.[93] The principles and language for this had been settled by the Wiesbaden meeting and (unknown to me then) TIE's exchange of emails in January and early February 2008; and TIE's Project Director, Commercial Director and Executive Chairman had agreed it.

7.292 At the same time as this first meeting on SP4 had happened, I was also advising TIE as regards the legal implications of Siemens' demand for more money - in the afternoon on the same day. As I describe at paragraph 7.464 *et seq* below, in the context of drawing up the Rutland Square agreement, I had advised TIE management about the effect of SP4 and in particular PA1. I needed to do so, because I was trying to impress upon them the need for TIE to stiffen resolve and to give me instructions to negotiate and salvage anything that I was able to - in exchange for the payment I could see TIE were going to accord BBS: between £1.6 and £3.2million, as well as in exchange for TIE's continuing complete acceptance of the principles enshrined in SP4. I focused also on Clause 10 and Schedule Part 14 as the mechanic to give TIE leverage to make BBS accept what was in the contractual drafting without watering it down[94].

7.293 I had already written to Willie Gallagher immediately on receipt of the draft SP4 saying that "*it was a contract within a contract*".[95] I repeated that view to him at a break-out during the Rutland Square discussions while I was taking instructions from Steven Bell on drafting the protocol itself. I told him that SP4 carried, in my opinion, currently unquantified time and cost consequences for TIE because of the incomplete and unapproved state of a significant part of the SDS scheme design. But he seemed preoccupied with solving the immediate threat to TIE's Infraco contract close timetable coming from BBS's financial demands.

7.294 It appeared to me that, from an engineering and design production management standpoint, TIE was trusting there would be a collaborative and partnering approach to managing the entire issue of novated SDS completing the underdeveloped, missing and/or non-consented SDS Design. Nearly all of this design, TIE (and CEC) knew, could not reach Issued for Construction status until well after Infraco Contract award. It appeared that TIE was trusting that there would be a collegiate approach in managing the impact of the entire missing design component of the Infraco Contract post novation.

7.295 Steven Bell considered that with "normal design development" a contractor would expect and include for some elaboration of design in the journey to 'Issued for Construction' drawings. In the

[93] Para 7.445
[94] See paras 7.550 et seq
[95] Para 7.239

industry, he reasoned, this would rarely be considered to be design development of the sort that PA1 was written to capture. – We identified there were different ways of reading the language on normal design development in PA1 and I gave my view that BBS were likely to exploit this. As I discuss above, Steven appeared comfortable that this would not, in practice, create issues and the discussion ended. It was left that he would discuss it with Geoff Gilbert, who it appeared had overall responsibility for negotiating SP4.

7.296 I was not in a position to gainsay Steven's view as an engineer – but I knew that due to Germany's risk aversion that BBS were going to be adversarial in operating the contract and I said so. I believe that it was reasonable for me to have assumed, as I did, that TIE and TSS would discuss the issue and come back to me if they required DLA Piper to take it up with Pinsent Masons. But TIE did not. I also asked what level of confidence he had in SDS not to produce design that caused issues and in this context, I raised again (and we discussed) the importance to TIE and CEC of Schedule Part 14 and Clause 10 as post novation protection – not for the first time. I discuss those aspects of the contract further below.[96]

7.297 I sent a specific e-mail about SP4 to Jim McEwan on 31st March 2008. Ian Laing at Pinsent Masons was pressing for confirmation in relation to the application of SP4 to a design delivery programme version change. Ian Laing may well have thought that I was telling TIE to draw breath in relation to SP4. He was right. I had had a further discussion with Steven Bell at around this time concerning SP4 and SDS design development; this resumed after Rutland Square and I explained that we had secured agreement to remove certain limbs from PA1[97] but I still had serious misgivings about how post-BDDI SDS design development time and cost responsibility now sat squarely with TIE. I believe that this would have been around the time that TIE had agreed to pay BBS a further £8.6 million in early March 2008.[98] This was dealt with by Jim McEwan and Steven Bell. Steven told me that he had not managed to talk with BB about this nor with Matthew Crosse (who I think had left TIE by this point). As I have said, I do not know if he spoke with Geoff Gilbert or Willie Gallagher. But Steven did indicate to me at that point that he accepted what I had said about BB not being open to any adjustment to the PA1 language and that TIE would have to live with it. Time had completely run out and I could see his focus had turned to the increasing of engineering assumptions and issues BBS had been bringing to the table at SP4 meetings, held to tackle these engineering and technical matters.

7.298 Jim McEwan emailed me on 31 March 2008 asking for my advice. He said that TIE were "*working to minimise the impact* and *variance between critical path items*". I recall there had already been several emails from BBS and/or Pinsent Masons to TIE about this SDS V.26 to V.28 issue. He acknowledged that the SDS design delivery programme version change (from v.26 to v.28) would be a Notified Departure (this in itself was very significant in my opinion and I did not know how TIE was estimating the financial and programming consequence) but Jim said that they were "*concerned to ensure that there will be no gaming of this position by BBS, and that only where the*

[96] See paragraph 7.550 *et seq*
[97] See paragraph 7.445
[98] Para 7.469

change can be shown to materially change the Infraco programme critical path should we be liable for potential additional charges".

7.299 Only SDS could say objectively what the true impact of the version change would be on their work and give a specialist's view on how it would affect BBS (and MUDFA). TIE had the right and ability (using the contractual scope of SDS or TSS under their consultancy mandates) to verify this, using the two consultants. TIE could then have discussed this with BBS and sought to control how it was managed post-novation by using Clause 10 and Schedule Part 14 in the Infraco Contract. But Jim McEwan's reference to "*critical path*" puzzled me. In meetings I had attended with BBS, TIE had not sought to link Notified Departures to critical path. I do not, at this point, remember if BB had a construction programme that showed a critical path – largely because they were still asserting, with justification, that MUDFA delay and shortage of sequentially completed SDS designs prevented this to an appreciable degree.

7.300 I responded in some detail and said that, "If the situation is that if at this point SDS is unable to produce a design delivery programme which is reliable and static at V26 – and that is indeed the situation that SDS have articulated – and that this programme will need to be varied immediately post contract award, TIE needs to endeavour to negotiate with BBS now the specifics of what is or is not to be permitted as a variation to the Infraco contract and its master construction programme, otherwise the Notified Departure mechanism is too blunt and will permit BBS to include everything that they estimate going to affect them to be priced and to be granted relief. That Estimate is bound to be all encompassing and conservative".

7.301 And so it was for several hundred Notified Departures post contract signature, sadly.

7.302 I went on to say that, "The only approach open to TIE, in my opinion, is a factual one, not a contractual one (since the mechanism for Notified Departure puts the advantage with BBS by creating an automatic TIE Change): to capture as many identified key changes that TIE knows will be required and to attempt to fix them and agree their likely programme and / or cost impact with BBS prior to contract award, or at least identify the reasonable range of programme and cost impacts. TIE can still monitor / evaluate what are the elements of this specific Notified Departure for which Infraco will assert claims for additional cost and time, but TIE has no ability to prevent there being a TIE Change, other than going to DRP".

7.303 I conclude by saying that, "This is one where Steven [Bell] and Geoff [Gilbert] must, I feel, have a better sense of how factually to restrict BBS's ability to exploit this. After this review, we might be able to go about trying to structure acceptable controls in the Infraco contract."

7.304 This advice made it clear that I did not think Jim McEwan's reference to a "*critical path*" change was relevant to the approach that TIE had accepted as early as Wiesbaden and that any design change post-BDDI, whether on the critical path or not, could be captured and potentially claimed by BBS. It also makes it clear that TIE's initial response needs to be factual in bottoming these issues out, not contractual – given the approach fixed in the language of SP4.

7.305 I sent the email to the senior manager who was asking the question (Jim McEwan) and copied in the Project Director (Steven Bell). I also copied in Geoff Gilbert and Graeme Bissett. My understanding was that Geoff, Steven and Dennis (not Jim) were in charge of SP4. I sent it to Graeme Bissett also so that he was informed about my view on the SDS design delivery programme version change triggering Notified Departures. Nine years on I cannot be certain, but I seem to remember being slightly surprised that Jim was writing to me about this – given that Steven Bell and Dennis Murray had been and were (as well as Geoff Gilbert and Bob Dawson) in charge of SP4. Matthew Crosse had left at this point.

7.306 In short, I was saying that TIE needed to have the fight now if it was concerned about BBS and SDS taking advantage of Notified Departures after the contract was signed. I do not know what state the BBS construction programme was in at this time – others within TIE were handling this (Susan Clark and Tom Hickman, I believe) - and I do not recall seeing any written reply to my email or having any specific further discussion with Jim about it.

7.307 Geoff Gilbert replied by e-mail that day saying essentially that TIE needed to act with BBS and SDS to agree what the impacts of V28 were, which was in accordance with the overall practical / factual approach which I had recommended. I do not know who at TIE Geoff considered would do this or by when he believed it would be done.

7.308 And so: The TIE Commercial Director recognised, and told his colleagues, there was a means for TIE to understand and mitigate the impact of V28. I repeat here what I have said above about SDS Provider's contractual responsibility within its detailed scope of services to provide TIE with regular programme updates, criticality analysis and financial reporting and forecasting on precisely this kind of circumstances – major movement on design and consenting delivery dates[99]. There were still six weeks before contract Close for TIE to instruct the SDS Provider to produce this information for TIE to support TIE's Quantitative Risk Assessment ("QRA") and discussion with BBS.

7.309 I did not receive any other response from TIE in relation to my advice. I heard nothing further on this - which would have been for the TIE and CEC design-checking team's task to co-ordinate and report back to TIE management what they saw as definite major Notified Departures. I do not know when, if or how TIE identified the time and cost implications of Notified Departures flowing from V28 before Infraco Contract signature. What I do know is that this had still not been agreed with BSC in February 2009 (see my response to Inquiry Question 127 limb (l) and the 16 documents I am asked about). I raised the matter again on 9th April 2008 directly with TIE senior managers and my contemporary note shows this as I have explained at paras 7.320 *et seq.*

7.310 It was a commercial, design, engineering and quantity-surveying task (not legal) to take this forward and put time and cost estimates against this and the various Pricing Assumptions, which were SDS design, technical and engineering based issues in SP4.

[99] See my answer to Inquiry question 30 in particular at paragraphs 5.26 et seq; *5.41 et seq*; 5.56 *et seq*; and 5.66 *et seq*

7.311 If this exercise had been carried out, it would, I assume, have had to appear as a detailed part of TIE's QRA and setting of budget contingency for open issues. DLA Piper was not involved in TIE's QRA and I have never seen a copy of this document or papers connected with it. At various intervals close to contract signature I saw comments and references to this process being managed by TIE. As TIE's legal adviser, I would not have expected DLA Piper to play any role whatsoever in setting contingency budgets or allocating money to risk or contractual assumptions. I was not party to any TIE internal discussions about this exercise and had no visibility into how it was derived and who was managing this. It was not until February 2009 that I learnt that TIE in fact still had not completed a time and cost analysis of SDS design delivery programme version changes and that BBS was asking why not[100].

7.312 I had been instructed by TIE management that TIE had carried out their QRA exercise and that it had been and was a continuing process since at least 4th February 2008 (see for example the management instruction/description of why TIE is producing a Close Report 2008 as per CEC01429681).

7.313 In that connection, I draw the Inquiry's attention, as case in point, to the Tram Project Board/TIE Board and TEL Board Papers for the meeting of 23rd January 2008. Within that package, is a TIE document called ETN Preliminary Risk Register Dec. 2007. This document shows some basic description and analyses of approximately twelve project risks. Each risk has: a nominated owner from TIE personnel, not DLA Piper: Geoff Gilbert, Bob Dawson, Stewart McGarrity, Graeme Bissett, Susan Clark, Tony Glazebrook; and some indications of likelihood, consequence and severity of impact. This is a basic risk analysis matrix and is being handled exclusively by TIE. It was perhaps something which followed on from the original TIE Project Risk Register that Mark Bourke had been maintaining until he left TIE.[101] But this ETN Preliminary Risk Register shows that TIE controlled what project lawyers would regard as a Client risk register and appeared to want to use it for close reporting

7.314 In similar fashion to the financial, commercial and technical evaluations at BAFO, DLA Piper were not involved and were not privy to the results of this QRA analysis. DLA Piper was neither TIE's financial adviser, programme manager, nor its project risk analyst or cost projection modeller. TIE had a specific contractual obligation under section 2.22 of its Operating Agreement to report to CEC and the Tram Monitoring Officer on delay, overspend and relevant mitigation. Two independent advisers to TIE had the express contractual advisory remit to support TIE in this exercise: TSS and SDS Provider, and specifically to go beyond the standard reporting obligations if TIE so instructed. And the SDS Provider - in fact - had a direct and stated obligation to report to TIE about the cost ramifications of delay to its design –if TIE instructed it to do so pursuant to SDS Contract.

7.315 I was very clear in my advice to TIE's management that BB Wiesbaden was dictating how the bidder was functioning and this would very likely continue post contract award – i.e. an aggressive approach to claims and to contract interpretation. As TIE knew, Richard Walker had told me in the

[100] Please see my reply to Inquiry Question 127(l) at para. 8.191.9.2 - 8.191.9.3
[101] See paragraph 4.126

early December 2007 conversation that he was under direct and heavy personal pressure from his German management to make sure BB did not take any price, time or scope risk whatsoever that arose from the way TIE had managed SDS and MUDFA.[102]

7.316 There was a specific negotiation session I believe in late February 2008 where SDS performance quality and design production and development delay post novation to BBS were discussed. Geoff Gilbert and Richard Walker led this session, attended by Suzanne Moir and myself. After considerable negotiations, a somewhat cumbersome mechanic was agreed whereby BBS could recover LADs up to a certain cap from SDS and thereafter TIE itself would require to sue SDS. As I recall, TIE never did pursue SDS nor require BBS to operate this provision. In addition, on 7th March 2008, TIE agreed to put a further £2.5 million into the construction price to protect BBS from SDS default.

7.317 It could not have been clearer to TIE's Commercial Director and other managers what BBS in essence were saying yet again: "we will not accept quality, cost or time risk from emerging, immature or non-existent SDS design that we cannot price ((constructability/materials/programme) or risk on design production programme". Nor could it have been clearer that TIE accepted and were continuing to accommodate this position, which contradicted the original novation concept. This was not a legal nicety. It was a factual and commercial position.

7.318 The final version of SP4 had 43 Pricing Assumptions. Many were known by the parties to be going to prove untrue. Indeed, the wording of SP4 acknowledges this and reminds parties that there will definitely be Notified Departures when it states:

> "*It is accepted by TIE that certain Pricing Assumptions have been necessary and these are listed and defined in Section 3.4 below. The Parties acknowledge that certain of these Pricing Assumptions may result in the notification of a Notified Departure immediately following execution of this Agreement. This arises as a consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply.*"

7.319 I discussed the effect of PA1 directly with TIE once more at the latest on 9th April 2008 (with TIE management personnel), after SP4 sessions finished on or around 20 March 2008, immediately after TIE had been confronted by a further serious price increase demand off the back of Network Rail immunisation works. I wanted to alert the responsible TIE managers again to the magnitude of the change in risk allocation plus the demand for more money (in spite of the commitments in and

[102] I refer to my discussion at paragraph 7.123 *et seq*

payments under the Rutland Square Agreement).[103] I said that TIE should consider stopping the procurement. They understood what I was saying and I repeated that advice to a full TIE management meeting if not that day, 9th April, in the next TIE management meeting – probably Monday 11th April.

7.320 I am asked about this 9th April meeting in Question 83. My file note of this meeting (DLA00006319) would have been prepared from my handwritten notes of the meeting. I am not certain now why there are blanks in it; I may not have had time to review it. I recall the meeting very well since I remember that the TIE personnel did not like what I was communicating. I recorded that I advised that SP4 contained numerous "*arguable risk allocation points*". This was precisely what I had advised TIE at Rutland Square and at the various meetings I had with TIE managers and Project Directorate as I have described above.[104]

7.321 My concerns at this meeting were exactly what I had given as advice to Jim McEwan eight days earlier, in an email that I copied to all TIE's responsible management personnel: that if TIE had carried out any kind of assessment exercise on the likely incidence and magnitude of Notified Departures resulting from missing or immature SDS design scope and the impact of V28 on BBS's programme, let alone what was or was not going to emerge as post BDDI design development, TIE must have arrived swiftly at the conclusion that the Infraco's true and complete construction price was in fact not calculable as represented by a fixed price concept.

7.322 There was ambiguity in the language of PA1 at 3.4. The ambiguity remained in the final version of SP4 and I had raised the matter with Steven Bell, Geoff Gilbert, Dennis Murray and, I believe, Jim McEwan. I wish to emphasis here that the SDS contract required the design to pass through three distinct stages (see para 5.59) and to justify full stage payments. So that the fact that an SDS design drawing existed in some form did not mean it was fit for submission for Planning and Roads Authority approval or for use in conversion to Issued for Construction status.

7.323 This was DLA Piper, on the 9th April, advising TIE senior managers to stop making further concessions to BBS beyond Rutland Square and the obvious strict qualifications on pricing which sat in SP4 and which TIE had itself negotiated.

7.324 **Base Date Design Information**

7.325 The BDDI was defined in para. 2.3 of SP4 as being "*the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H*". Appendix H did not contain any list of drawings, but instead referred to *"All of the drawings available to Infraco up to and including 25th November 2007".* This language did not, to the best of my knowledge, result in ambiguity or trigger significant disputes. The approach of both TIE and BBS in SP4 was that there was a list of design information drawings. But it transpired that there was not. Neither TIE nor BSC had such a definitive list either in paper or electronic form.

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[103] For discussion of the Rutland Square Agreement, see paragraph 7.434 *et seq*
[104] Para 7.500

7.326 The language used was specifically given to me - by Dennis Murray of TIE - as the only practical way TIE had to deal with the complete absence of any agreed physical record of what design drawings the Infraco Proposals at BAFO had been based upon.

7.327 By late April 2008, DLA Piper had been asking TIE at intervals for at least two months for the three parties' agreed and complete BDDI list, so that Appendix H could be populated.

7.328 I pressed on this issue, advising TIE management that it needed to be dealt with. SDS had not been able to help either. I recall Dennis Murray telling me a version of events when we were inquiring, not for the first time: that CDs containing the BDDI data from SDS had been lost, but eventually this was found to be incorrect and that what was on the CDs he had mentioned was partial only. My advice was that the language left it open to BBS to deny that some part of SDS design at BDDI had been "available to them", but TIE had no solution.

7.329 By Infraco Contract close, no one – SDS, TIE, or BBS – had created or held a complete listing fixing the design drawings status as at 25th November 2007. Scott McFadzen of BBS arrived w[illegible] and provided five or six large cardboard boxes full of drawings which he asserted to me comprised what BBS regarded as BDDI – approximately 35mins before the signing ceremony on 14th May 2008. I reported this to Steven Bell and Dennis Murray who were in another meeting room. I do not recall their response. I refer to my email to Graeme Bissett (CEC01213521) where I relate the above events. The absence of any agreed list of SDS Design issued to BSC as at 25th November 2007 indicated to me a failure of basic management tasks: secure tracking and knowledge of what TIE had released to its two bidders and to BSC in the period up to and immediately post preferred bidder appointment.

CEC01213521 should be CEC01213251

7.330 **Clause 4.3 of the Infraco Contract**

7.331 BBS, through Pinsent Masons, argued for Clause 4.3 to assert the primacy of SP4 over the main Infraco Contract terms to fully protect its entitlement to additional cost and time arising from Notified Departures and all other concessions made by TIE in the schedule.

7.332 I negotiated back and forth for several days with Suzanne Moir about the precedence language to be put into the Infraco Contract at Clause 4.3 and I tried to dilute this without success. It was at this time that I made sure that Schedule Part 30 had language connecting it directly to Design Management Plan in Schedule Part 14. I took specific instructions from both Geoff Gilbert and Steven Bell on TIE's acceptance of the ultimate wording for Clause 4.3 (because it gave SP4 precedence over the main contract contractual terms) and explained why BBS wanted this and what it meant and got their sign off, in Steven Bell's case by phone.

7.333 I recall explaining this to Richard Keen QC in 2009 who said he read "tension" in the language. TIE sought Richard Keen QC's advice in relation to the complete Infraco contractual impasse reached in late 2009 / early 2010 due to BBS' insistence that they could not work because access to sequential and efficient working areas remained seriously compromised. In this context and in

conference with Senior Counsel, there was a discussion about how BBS were using SP4 and its position within the contract terms[105].

7.334 What I explained to both Geoff and Steven, in summary, was that BBS now wanted to ensure the absolute contractual primacy of the Notified Departure triggers and mechanic contained in SP4 and how these would operate through Clause 80. I reported that I had been attempting to dilute what BBS wanted - but that Pinsent Masons' instruction was definitive: there must express language in Clause 4.3 saying that nothing in the other contract terms could override an entitlement to a Notified Departure. In these discussions with Geoff, I stressed again my view that the new Clause 80 removed TIE's ability to instruct BBS to progress the required works, pending agreement on the BBS estimate of time and cost implications of the Mandatory TIE Change (Notified Departure). I asked Steven Bell if he was still comfortable with PA1 and the gist of his response was that at that stage TIE would need to live with it.

7.335 **Inquiry's Remaining Questions Regarding Schedule Part 4**

7.336 I now answer those parts of the Inquiry's Questions about SP4 which have not been addressed as part of the above discussion.

7.337 I am asked in Question 74 why I think Ian Laing sent a draft SP4 direct to Geoff Gilbert and to Bob Dawson, copying me by email dated 22nd February 2008 (CEC00149876). This is a question for Ian Laing. In my opinion though, he sent it direct to them because TIE themselves were negotiating SP4, both as to its commercial and technical content and its language. I was copied because Ian wanted me to be aware he was engaging with TIE. Whether he was concerned about being in breach of the normal professional rules is a question for Ian, not me. However, I very much doubt that Ian had any concern for this practical reason: it is, in my experience on large infrastructure schemes, not at all unusual for advisers to communicate direct with principals, if instructed to do so. Clearly Ian had instructions from BBS to do so since he effectively led the first BBS-TIE discussion (I knew of) on SP4 in early February 2008. It would have been unrealistic in a project of this nature and during an intense period of discussions to be bound by formal rules of etiquette, more appropriate for litigious matters or property transactions. I do not consider any lawyer active in the field of projects or project finance would disagree with my view. In any event, TIE had already decided – and communicated to DLA Piper - that it would engage direct with Pinsent Masons on SP4 from the beginning of February 2008

CEC00149876 should be CEC01449876

7.338 I am asked what I did about this direct communication. The answer is that there was nothing for me to do, since TIE had invited this. BB had made Pinsent Masons the point of contact for TIE on SP4 discussions; part of the reason was that Scott McFadzen was becoming less available, due to his increasing parallel commitment as BB's bid manager on the M80 Project and, as far as I saw, he did not have a well-prepared deputy (TIE had told me that they had reservations about Tom Murray of BBS who sat at some of the meetings). I recall mentioning to TIE management that part of BBS's preferred bidder commitment was its key personnel (ultimately Schedule Part 12) and

[105] This was part of the consultation on remediable termination notices discussed at paragraphs 8.189 *et seq*

that TIE could object under the ITN rules. Nothing happened. TIE's urgency was to move matters to finish under the work product timetables it now imposed.

7.339 The question put to me then erroneously states that the 22 February 2007 draft introduced an idea about change if an Assumption was not correct and also removed a materiality requirement. It is put to me by the Inquiry that these changes "*reflected a major shift in the balance of risk*", but I do not agree with this. The concept of change on the fall of an Assumption was not novel; the drafting simply clarifies what had already been fixed. As far as the materiality point was concerned, this was not a change, since TIE had never secured the position on materiality in the first place – in so far as I see from reading what TIE was negotiating and reading what had been sent to me on 6th February 2008 by TIE as BBS's SP4 document. I was aware from seeing email traffic and draft Schedule Parts that Geoff Gilbert/Bob Dawson had been attempting to introduce this materiality provision and that BB had always been and were still resistant to it. There was no such provision in BB's initial draft. This is also clear from Geoff Gilbert's email exchanges with BBS in December 2007 and January 2008. I saw these papers much later from TIE's archive which Stewart McGarrity shared with various parties during Project Challenge in 2009. I had already advised T(directly on or around 6th February 2008 that BBS would not accept any dilution of their right to seek a variation if any SDS design was developed from BDDI. Introducing materiality would have been such a dilution.

7.340 At this point in late February 2007, I became puzzled by the documents that TIE were releasing which seemed to be two versions of SP4 and so I attempted a comparison. It appeared to me that the version of SP4 which Geoff Gilbert had been discussing with BBS in January 2008 (which BBS were using) had not been given to Bob Dawson who was working from another document. I said specifically in CEC01449710 and CEC01449711 that I had not been involved in the development of SP4 because DLA Piper had not been.

7.341 On Friday 22nd February 2008 (see CEC01449710 and chain), an e-mail arrived from Pinsent Masons (addressed to TIE, copied to DLA Piper). It attached a marked-up version of SP4 – in fact a version which I had not seen before. This was in response to a version of the document that B(Dawson (19th February, not copied to DLA Piper) had sent to BSC and Pinsent Masons. Geoff Gilbert had then sent a further version to BSC (and Pinsent Masons). He later copied to DLA Piper, but did not send it to any TIE management). Bob Dawson had commented in his email to BSC:" I think we need to resolve practical issues between ourselves before you involve your lawyers this time."

7.342 The reason I forwarded this 22 February email (from Pinsent Masons and copied to DLA Piper) to Steven Bell, Graeme Bissett, Dennis Murray and Stewart McGarrity on Monday 25th February was because I was concerned that this technical , commercial and financial core document was being discussed and negotiated by TIE - as far as I could see -without the full TIE management team knowing about it or contributing to its evolution, post Rutland Square. I wanted to be sure other responsible TIE senior people were aware of this. I had expressed this precise concern (about

TIE's lack of internal communication) to Graeme Bissett on the telephone the day before, Sunday 24th February 2008, as I say at para. 3.24 above."

7.343 I agree with the generalised statement that is put to me in Inquiry's Question 69 that "the elements of how the price would be fixed and what would give rise to a deemed change is classic territory for the allocation of risk". However, SP4 is not concerned with the bare "allocation of risk": There is a fundamental point here: risk is something you think might happen and make agreed contractual provision as to how responsibility for occurrence and impact of the risk lies in the contract. Design development post-BDDI and post-contract signature and new design production post-contract signature were absolute factual certainties, not a risk. What was uncertain was *how much* SDS design development and new design production there would be, *what* it would be, *how long* it would take for CEC Planning/Roads Authority to approve it and at what cost in time and money (e.g. BSC claims for Notified Departures). These issues were at the core of SP4:

7.343.1 It would be a misconception to think that a contractor told to price based on SDS design and MUDFA works being substantially complete and then finds they are not will be content to simply price for risk by inserting contingency. A contractor will price for the occurrence of adverse events that can be assessed based on: (i) the experience of cost and time impact of similar events; or (ii) known facts. If these are not capable of accurate analysis (as was the case for BDDI and the absence of SDS design) then the contractor will seek protection through contractual relief. That is what SP4 does: the pre-agreed entitlement of the Infraco to have an automatic client variation order (using estimates) and the ability to seek additional money, time and prolongation costs on the occurrence (at any time after contract award) of certain known and contractually identified events.

7.343.2 And so: it was not a 'risk' that movement from V26 to V28 SDS design delivery programme would cause BBS to have to change their construction programme and construction sequencing/methodology. It was a *fact*, known to TIE and to CEC when the relevant assumptions were negotiated and prior to contract award. Indeed, by 17th October 2008 (CEC0060555 and /60), five months after contract award, TIE were confronting Design Delivery Programme V31 and 27 locations where BSC were asserting design/approvals delay and attendant cost and time entitlements for BSC. It was not a 'risk' that CEC approved SDS design did not exist for significant infrastructure components required to complete the tram scheme and that, when it did come to exist, BBS would have to price it, decide on build methodologies and then programme construction. It was a *fact*, known to TIE and to CEC. It was not a 'risk' that the MUDFA works stood in the way of BBS's mobilisation for on street tram installation works everywhere where there was at least some element of approved SDS design available for on street works. It was a *fact*, known to TIE and to CEC. It was not a 'risk' that significant elements of tram scheme design did not exist either on 25th November 2007 or 14th May 2008. These were *facts* known to TIE and to CEC and were the reasons for BDDI and for a number of the Base Case Assumptions in SP4.

CEC0060555 should be CEC00605557

7.344 I am asked in Inquiry Question 75 about the role I had in CEC01450182/183 and CEC01450309/10, drafts of SP4 sent by Bob Dawson to BBS on 3rd and 6th March 2008. The answer is: no role and there was no role as regards any other DLA Piper staff. I draw attention here to CEC01448862 which shows a set of Geoff Gilbert's notes on the language and content of SP4, in part taken at a meeting I attended for some of the time - as instructed by TIE. These notes from 7th and 11th March show TIE's agreement on a variety of SP4 points, including PA1.

7.345 I am asked later in the same question what I did regarding Bob Dawson's email of 10th March 2008 (CEC01450544). I do not recall doing anything or being asked to do anything with regard to this communication: it simply confirmed what TIE had agreed to. It confirms that Geoff Gilbert, Bob Dawson and Dennis Murray had agreed commercial principles and specific language for SP4 in discussion with BBS. As the Question correctly states, this language is placed by TIE into the draft SP4 (at Clause 3.5) issued by Bob Dawson under cover of his email CEC0059268. There was neither involvement of DLA Piper in this action nor any request from TIE for us to be involved. Simply copying me into an email did not serve as a request for DLA Piper to provide legal input, as I explain at para. 7.262.5. I was not asked to discuss any of these drafts prior to the meeting 11th March which I attended in part.

CEC0059268 should be CEC00592628

7.346 I am referred within Question 75 to CEC00592628 which is an email from Bob Dawson to Suzanne Moir of Pinsent Masons and others. Again, all this shows is that TIE had been in discussion with BBS and Pinsent Masons. There is no request or instruction for DLA Piper to do anything. Bob Dawson says that he has not spoken to - "or compared notes with" - Geoff Gilbert, Dennis Murray and Steven Bell. He makes no mention of TIE or him needing to speak to or consult with DLA Piper or Andrew Fitchie. He ends his email by saying: *"I look forward to concluding tomorrow"*. This email chain shows that, on the 6th March 2008, Dennis Murray and Geoff Gilbert met with Scott MacFadzen and Herbert Fettig of BBS (CEC01450544). This meeting considered the drafting and language surrounding 'normal design development'. Geoff Gilbert noted that he would circulate the drafting, as agreed. Here again, TIE is in charge of SP4 and agreeing its language, specifically regarding what concerns SDS design development.

7.347 Five days later and approximately one month after I had advised Geoff Gilbert and Steven Bell that the language of PA1 created, at best, considerable ambivalence about TIE's responsibility for the cost and time implications of design development post BDDI, the 11th March 2008 meeting took place. TIE's own records (Geoff Gilbert's notes) show clear acceptance of PA1 as drafted by him in his capacity as TIE's Commercial Director. It is not tenable to say that DLA Piper was responsible for this position or that TIE required more advice to understand what it had agreed.

7.348 The Inquiry then refers me in the final part of Question 75 to CEC00592629 which is the version of SP4 current on 12th March. I draw the Inquiry's attention to the following passage in the draft containing a TIE Note:

> 2.7 A "**Notified Departure**" is where the facts or circumstances that comprised the basis of the Base Case Assumptions are subsequently changed in a manner that results in a tie Change in accordance with this Agreement and not as a result of an Infraco Change or as a result of an Infraco Breach. Where Infraco or tie becomes aware of a Notified Departure they are to notify the other Party. **NOTE: tie has accepted the principle of Notified Departure but have kept matters simple and as a tie Change as per Richard Walker / Geoff Gilbert discussions – Pinsent Masons to check for consistency**

7.349 This Note confirms and aligns with what I say at para 7.523 regarding the important discussions between Geoff Gilbert and Richard Walker regarding TIE Changes (Clause 80). It demonstrates, again, that it is TIE that is negotiating these matters with BBS and Pinsent Masons.

7.350 I am asked in Question 76 about CEC01510266 which is two emails dated 19th March 2008, one from Bob Dawson to Geoff Gilbert in the morning of 19th March 2008. It has no text and no visible attachment in the version I can access on the Inquiry's site. The second part of CEC015100266 is an email in the late afternoon that day from Geoff Gilbert to Valerie Clementson, a TIE administrator working with the TIE procurement team. It has a heading showing attachment (but there is none) and says: "Val this goes in Sch. 4". These e-mails appear on their face to be internal to TIE and were not copied to anyone at DLA. I am not able to comment.

CEC015100266 should be CEC01510266

7.351 The question seeks my explanation on the version of SP4 attached to that email (CEC01510267) compared to an earlier version of 13th March 2008. The question does not reference that document and since TIE was communicating direct with Pinsent Masons and BBS, I have no means of saying if DLA Piper even saw this version. I cannot assist further.

7.352 I am asked in Question 77 about CEC01451012 and CEC01451013. CEC01451012 is an email from Ian Laing of Pinsent Masons to Bob Dawson on 19 March 2008. Ian is absolutely clear what the mark up of SP4 represents:

> Bob
>
> In advance of our meeting tomorrow, I attach our mark-up of Schedule 4 in relation to the Pricing Assumptions. This is extensive simply to align the content with the outcome of recent discussions.
>
> I have sought to amend the VE wording to bring this in line with the discussions between me, Scott and Dennis. I hope that this is honest to the principles that we agreed, certainly there is no intention to be otherwise!
>
> I look forward to meeting with you tomorrow.

7.353 The draft is presented to reflect TIE/BBS discussions and the Opening Note on the draft SP4 (CEC01510267) states plainly:

> "NOTE this mark-up reflects recent agreements reached between TIE and BBS in relation to Schedule Part 4 as amended as a consequence of discussions on 18.03.08".

7.354 I noted that TIE were progressing this Schedule Part with discussions TIE had been managing itself. The document was not an instruction or request from TIE to DLA Piper and did not elicit any communication to me from TIE – written or oral. I am asked how a change to the Notified

Departure wording in this draft came about. My answer is because TIE discussed it and agreed to it. I was not party to those discussions shown as taking place on 18th March 2008.

7.355 My e-mail at 19:20 on 19th March 2008 (CEC01489543) sent to TIE within three hours of receiving the Pinsent Mason revised draft is entirely consistent with the lack of involvement which DLA Piper had had with regard to TIE's agreement with BBS on PA1. It was already agreed by TIE, defended by Pinsent Masons and carved in stone as far as BBS were concerned. There was nothing more to say, write or advise TIE about.

7.356 The question states that this version of SP4 was "in a more rigorous form". I do not agree with this assessment: it is in practical effect precisely the same form. I do not agree that the Notified Departure language cited in the question represented any shift from the Wiesbaden terms. However, even if this version did (represent a shift), which I do not consider it does, TIE's Project Directorate had agreed to it and handled drafting the language themselves from early January 2008.

7.357 I am asked if I gave advice specifically on "this further evolution of the position". What I provided to TIE, quickly, were my immediate thoughts on what was appearing in this draft that appeared to me to go beyond what I had understood TIE were discussing. I did not receive a reply. I have given my best recollections as to the advice I gave to TIE on PA1, both specifically and generally.[106].

7.358 Question 77 also refers to CEC01518014 and suggests that I attended a six hour drafting meeting on 20 March 2008. CEC01518014 is a blank email from Scott McFadzen to himself and Valerie Clementson, not copied to DLA Piper. Again, this shows BBS and TIE communicating directly. I cannot assist with any comment on this since I never saw the document and it does not have any content. As I say, I did not attend a six-hour drafting meeting on 20 March 2008. The DLA Piper attendee was Phil Hecht, in the capacity agreed with TIE as I explain at para 7.262.5. That meeting was to produce an agreed and proofed final version of SP4, not to negotiate new drafting. This was done at DLA Piper's offices using projection equipment to make it visible to all participants and this version became the version that the parties agreed captured all matters agreed up to that point. There was no further advice for DLA Piper to give here nor was advice requested by TIE.

7.359 To place this question in its proper timing context, TIE corporate management – as distinct from TIE Project Directorate - at this point were still maintaining that there should be an Infraco Contract close on Easter Monday 24th March, in less than a week's time, with Easter weekend intervening, and were writing a close report for CEC. SP4 – still not complete - was just one of probably eight or nine important contractual schedules that TIE had not even begun to populate – leaving aside those that were required from BBS. I believe I was negotiating the main Infraco terms with Pinsent Masons in a separate meeting, as well as dealing with CEC Legal's urgent inquiries to service its internal processes prior to this new proposed Close date.[107] This date was in fact aborted.

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[106] See in particular paragraphs 7.283 *et seq*, as well as 7.234 *et seq* and 7.248 *et seq*
[107] This was not DLA Piper assuming any duty to CEC as discussed in para. 11.38]

7.360 I am asked in Question 79 about Ian Laing's email of 26 March 2008 (DLA00006398) which was issued five days after the lengthy clarification and proofing session on Tuesday 20th March but refers to a meeting "yesterday". I believe - and I read in fact from this document - that there had still been items remaining to be clarified by BBS and that the new draft issued by Ian under cover of this email was doing precisely that. I do not recall being at the further meeting mentioned in Ian Lang's email. If this was to receive and agree technical or engineering information from BBS required to complete the SP4, Assumptions or the appended Bills of Quantities then I cannot be certain that anyone from DLA Piper attended. It is in fact clear from CEC01451185 that Steven Bell and Jim McEwan had met BBS representatives that day, 26th March, to agree final points, one of which was the Network Rail immunisation issue (SP4: Appendix J). This is entirely consistent with my recollection that the issues discussed were nothing to do with PA1. All that this email shows is progress one of many technical issues that had lingered and that the parties had difficulty closing out efficiently.

7.361 I observe here that the BBS' eventual BAFO bid in October 2007 had contained an outline proposal on the NR immunisation issue. This was primarily to do with the proximity of the tram line catenaries and signalling to the Haymarket - Edinburgh Park mainline railway corridor and the elimination of risk of electromagnetic interference with Network Rail signalling. I recall that in October 2007, Mathew Crosse had highlighted this to the TIE Board as a key pricing differentiator between the BBS and the Tramlines commercial offerings. And yet here was TIE - five months after BAFO - still waiting to learn what that BBS proposal on Network Rail immunisation actually was, as a priced, Network Rail pre-approved and defined technical proposal. TIE was also struggling with the fact that BBS were refusing to show the draft Infraco Contract to Network Rail as a key part of the negotiations on the Network Rail interface arrangements to be included in Clause 16 of the Infraco Contract.

7.362 I am asked in Question 79 if I had a reaction to Ian Laing's emails CEC01451185 and CEC01548431 about the immediate Notified Departure due to the SDS design delivery programme V28. In short: yes, I had already contacted TIE personnel immediately, as is very clear from my e-mail to Jim McEwan and others at TIE, on 31st March 2008 discussed at para. 7.297.

7.363 CEC01451185 from Ian Laing was, in fact, ensuring that important engineering and commercial information that had immediate agreed contractual significance was being transmitted to TIE by BBS. I was not concerned about any breach of professional rules in him contacting my client directly for the reasons which I discuss at paragraph 7.336 above. It would have been extremely odd if this SDS design delivery programme variation was something that TIE and CEC Planning and Roads Authority did not already know about in detail – since TIE was managing SDS as its design consultant, not BBS, and had direct oversight of CEC's involvement as design Approvals Body.

7.364 I am asked in Question 80 about an email from Ian Laing the next day, 27th March 2008 (CEC01451209) in which he sends round an updated version of SP4 (CEC01451210). Ian's e-mail explains the two components of amendment to the draft:

7.364.1 Tables - A mechanical exercise (to be verified by TIE) insertion or updating of information which BBS had developed or produced for or as a task resulting from the technical meeting on 25th March 2008.

7.364.2 Pricing Assumption 3.4.3 - The need for this arose as a result of the TIE Project Director's decision to carry out an exercise of amending the ERs to version 3.2 post-BAFO.[108] BBS sought contractual protection if - as a result of the changes TIE had introduced - the SDS design when constructed, did not deliver the ERs. I had been involved in that meeting with SDS and TIE the day before. This was the direct technical and commercial impact of TIE's decision to amend the ERs being written into SP4. There were no legal arguments to resist what BBS were asking for.

7.365 I note that at this point there were still matters outstanding in the draft Schedule being circulated. These are not matters of either principle or contractual language; they comprised missing or revised financial, technical or factual information that BSC, in the main, required to finalise and present to TIE.

7.366 I am asked in Question 82 about CEC01423746 and 47, documentation emanating on 2nd April 2008 from Pinsent Masons. This was essentially confirmation of the position which TIE had agreed to concerning the revision of the SDS Design Delivery Programme from V26 to V28, made by SDS. It is clear from the contemporary email traffic that TIE (Steven Bell and Jim McEwan, and possibly others) had met with BBS and/or Pinsent Masons to agree this inclusion. I am asked what I advised. I had already advised in some detail on this point by email on 31st March 2008, two days before and in response to an email from Jim McEwan (see para 7.302et seq). I am asked if I think the inclusion in the Infraco Contract was at odds with my advice. My advice is discussed above. I do not regard this inclusion in the contract as being at odds with my advice. My advice was that TIE should attempt to analyse and agree in advance the time and cost consequences of this and other Notified Departures. The contract addition (agreed by TIE) simply recorded this known source of Notified Departures. I have explained what practical means and resources were at TIE's immediate disposal to carry out that assessment – which could in fact have been begun considerable period of time before 31 March 2008. SDS's requirement and move to produce V28 did not appear overnight.

7.367 The question then asks me, as regards two further issues of SP4 with minor adjustments in them *".... but the critical parts were not changed. Was any effort made to change them?"* I received no instruction from TIE to engage on SP4 at this stage and I do not know what further discussions, if any, TIE had with BBS.

7.368 By this time, TIE had been discussing the commercial, technical and factual assumptions in SP4 for two months. TIE fully understood SP4 as it had settled the document itself and had received DLA Piper's advice on its function and operation. The matters asked about in this question were, from my perspective then and now, adjustments and information provision that were required to

[108] See paras. 7.413 *et seq*

complete Bills of Quantity and other SP4 annexures or were simply clarifications. TIE had received my advice on its function and operation as regards PA1 and nothing had changed on that point since 6th February 2008.

7.369 Finally, I will now address the remaining limbs of Question 83 not covered above.

7.370 I disagreed then and I disagree now with Steven Bell's view that BBS "*were not closed to changes of position*". On the contrary, BBS were absolutely rigid (and they had been since early December 2007 and before) about not taking responsibility for inadequately developed or non-existent SDS Design as well as delay in its production due to CEC Planning and Roads Authority approval delay and all the evidence was that they were continuing to seek more protection by price increase. That is in fact exactly what they were doing when this meeting took place in early April 2008. There was no evidence at all to suggest that BBS would soften or alter their position on the core elements of SP4 and PA1 as TIE pressed on towards Close. What was non-negotiable was entirely clear: the protections that BBS had sought and secured from TIE at Wiesbaden and the language, which had been agreed as a result of this.

7.371 It is put to me that, "It is apparent that negotiations were carried out on the terms of Schedule Part 4 up to the end of April". As is apparent from a proper study and comparison of the various drafts of SP4 issued and about which I am asked, there were, in fact, no further significant negotiations on the document after 25th March 2008 as regards the principles of how a Notified Departure would come about and how this would work in connection with SDS design development.

7.372 I am asked if I remain of the view I expressed in late August 2010 (CEC00098063) that SP4 was imposed on the Infraco Contract: Yes, I was and remain of that view. The primary confirmation of this is: Clause 4.3 and the fact that Clause 80 had to be adjusted to link to Mandatory TIE Change (Notified Departure) and to defined Compensation Events. I have described the genesis of Clause 4.3, my direct instruction from TIE on it at the time at and Richard Keen QC's view of it at paras 7.331 *et seq.*

7.373 I did not "claim" matters were not negotiable as is stated by the Inquiry's Question. I repeated forcefully what I had already advised TIE senior management on several occasions - facts which they knew. As my file note shows, I made suggestions on how TIE might try to arrest the pattern of price concessions to BSC. And I wish to comment here that from my perspective, what I observed in the negotiations in the run up to Close was one-way traffic, with BBS dominant. Whatever TIE management believed it was they had extracted of value (see para. 11.167) during the negotiations post Rutland Square remained unclear to me.

7.374 Here, I wish also to refer the Inquiry to my e-mail sent to Willie Gallagher and TIE/TEL senior management mid-afternoon, 2nd May 2008. I listed no fewer than 14 distinct points that I considered TIE could use to exert proper pressure on BBS to stop them seeking more money and more concessions. I do not recall receiving an answer to this email in any form.

7.375 **TIE's Quality Assurance Review of Schedule Part 4 – Inquiry Question 84**

7.376 I am asked about TIE's Quality Assurance/Control ("**QA/QC**") review as evidenced by CEC01374219 and 4220. Here, DLA Piper is copied on SP4, by Dennis Murray on 22nd April 2008, as a TIE generated document that required conversion into the Infraco Contract schedule itself. That is evident from the fact that the document is entitled "Schedule Four" and not, as was required contractually, SP4. I did not play any role in TIE's QA process for SP4, nor was there ever any formal instruction or other direction for DLA Piper to do so. DLA Piper was responsible (under my supervision: Phil Hecht, Chris Horsley, Jo Glover, Nikki Horsall) for final due diligence and legal QA/QC for the main Infraco Contract and the accuracy and consistency of the entire suite of ancillary documentation, including legal schedules (e.g. DRP, Third Party Agreement and step down etc, bonds, guarantees, collateral warranties) but not for QA/QC on the technical commercial and financial schedules' content.

7.377 I note that Dennis Murray also sent the e-mail of 22nd April 2008 to Steven Bell. I do not know why Dennis sent the document to Stewart McGarrity since Stewart had not played any significant ro as far as I was aware, in negotiating the terms of SP4 and I note that Stewart said so in his email reply on 23rd April 2008. Dennis' e-mail confirmed the absence of any 25th November 2007 list for BDDI as at 22nd April 2008.[109]

7.378 I instructed my team to wait until the document was cleared by TIE and then to insert it into the contract suite. I then reported at the next TIE Project management meeting that DLA Piper had been given the document which TIE wished to include as the agreed SP4. TIE then changed the document's status from orange to green on their task chart.

7.379 The next day, Stewart McGarrity, sent his 23rd April 2008 e-mail reply to Dennis Murray. DLA Piper was not copied on this, but Stewart did copy: Geoff Gilbert, Steven Bell, Graeme Bissett and Susan Clark – effectively all TIE's senior managers with the exception of Jim McEwan. This further confirms that TIE was not expecting DLA Piper to carry out or provide input on TIE's internal QA/QC.

7.380 It is suggested to me that Stewart McGarrity 'signed off' (in CEC01286695) on the TIE document he had been sent by Dennis Murray as SP4. This is not correct. CEC01286695 is TIE's internal QC document for SP4. Stewart McGarrity noted on the TIE QA form that there were substantial outstanding issues and he set them out in his email. Interestingly, I read that two of Stewart's points of concern are: a 20% advance payment paid by TIE under Infraco Contract to BSC and how TIE may not have explained this to CEC and; the need for TIE management vigilance in relation to value engineering, design and programme cost and time exposures for TIE.

7.381 Stewart McGarrity discusses with Dennis Murray on 23 April 2008 the fact that CEC had asked TIE about how BSC were going to use the 20% advance payment – particularly for materials purchase where no CEC approval of the relevant SDS design was in place. He inquires if Dennis Murray has done an analysis of this risk and who owns it. I draw the conclusion from this exchange that CEC

[109] Paras 7.325*et seq*

personnel had been told directly by TIE management at some earlier point that TIE had agreed the 20% advance payment with BSC. DLA Piper was not told about this until well after award of the Infraco Contract.

7.382 **TIE's 2009 internal review of Wiesbaden**

7.383 TIE conducted an after-the-event review into the Wiesbaden Agreement in late 2009/early 2010 after McGrigors (now Pinsent Masons) had been briefed (by CEC and/or TIE I do not know whom) to review the Infraco Contract. I believe TIE called this "Project Challenge". The purpose of this part of Project Challenge[110] was to understand what had happened at and following Wiesbaden and the genesis of SP4. In particular, to find out where it had come from because, by this point in September 2009, there were a number of adjudications that had gone through and TIE had lost those adjudications on the basis of the interpretation of language contained in SP4.

7.384 E-mails between Geoff Gilbert of TIE and Scot McFadzen at BB show the exact genesis of the language in SP4 PA1. I had not seen these before 2009/10 when I received them as part of Project Challenge.

7.385 TIE had begun examining what had been agreed in Wiesbaden, and why, and where SP4 had come from. There was nobody left at this point who had attended Wiesbaden. Willie Gallagher had gone in late 2008. Both Matthew Crosse and Geoff Gilbert left before the Infraco contract close date of 14 May. So the three gentlemen who were involved in Wiesbaden, and in particular Geoff Gilbert who was involved in drafting, agreeing, settling, reviewing, re-drafting and settling SP4, had gone. So too, had Bob Dawson.

7.386 In order to understand better what TIE had aimed for (as opposed to achieved) through Wiesbaden and on the instruction of Richard Jeffrey, it was agreed that Stewart McGarrity would carry out a TIE archives search and direct contact would be made with TIE's 2008 Project Directorate – Matthew Crosse and Geoff Gilbert and with Willie Gallagher. These were the three TIE executives who had agreed and settled the Wiesbaden agreement. Richard Jeffrey asked me to call Willie Gallagher. I had not spoken with him since he had left TIE in November 2008. I believe I reported my conversation in an e-mail to Richard Jeffrey and Stewart – copied to Tony Rush (a consultant engaged by TIE in relation to disputes with BBS) and Brandon Nolan (of McGrigors). The essence was:

7.386.1 He did not remember the Wiesbaden meeting itself very well. He had had dinner with Matthew Crosse and the BB representatives. He did not tell me their names and was not sure if Siemens had been present or not. (The draft agreement I had seen had only one signature block on it for an authorised signatory). He had then left Matthew Crosse to handle the detail of the pricing agreement. He had no recollection of discussing the specific terms of what had been agreed at Wiesbaden with anyone afterwards or seeing these in writing in Wiesbaden. He said he did not remember

[110] See paras 2.170 and 8.69 *et seq*

being advised as to what SP4 meant but that he had left this to Matthew Crosse and Geoff Gilbert; and

7.386.2 He was relatively vague about what BB had said at Wiesbaden in relation to their position on the continuing inadequacy /incompleteness of the SDS design and delay in prior approvals and MUDFA delay.

7.387 I found this odd and unsatisfactory. Willie Gallagher had instigated the visit to Wiesbaden and had spoken at Tram Project Board and TIE Board meetings in late 2007 and January 2008 about its outcome and what TIE had agreed.

7.388 In February 2008, two months after Wiesbaden, Willie Gallagher had been asking Matthew Crosse where negotiations on the BBS construction price had reached - the price he had reported on 19th December 2007 and again in January 2008 to the TIE Board and the Tram Project Board and to CEC was fixed.

7.389 At the same time, Stewart McGarrity had tracked down Geoff Gilbert. I recall a teleconference early 2010 at TIE's offices with Geoff on speakerphone. In any event, the upshot was: Geoff also said he had very little recollection of events leading up to Wiesbaden and how the Wiesbaden documentation itself had evolved. He said he did not recall his December 2007/January 2008 e-mail exchanges on the precise language for PA1 at that time or into January 2008 (with Scott Macfadzen and others) as the direct forerunner of SP4. Nor did he have any clear recollection of conversations with Matthew Crosse or Willie Gallagher on TIE's planned approach to a pricing and programme agreement either before they flew out in December 2007, while they were in Germany or afterwards.

7.390 Given the content of the Wiesbaden agreement, its absolute importance and the very obvious negotiations on drafting by e-mail that TIE's archives showed Geoff had been involved in at the time of the Wiesbaden Agreement and then in early 2008, I found his lack of recollection very disconcerting. I said so to those who had been on the call: I believe, Stewart, Tony Rush and perhaps McGrigors.

7.391 I do not remember TIE having any success in tracking down Matthew Crosse but I was not involved in that myself. He was, I believe, either abroad or had taken an appointment at Crossrail In London.

7.392 Following the inquiries and reports I described above, Tony Rush coined the phrase: "a collective corporate amnesia" within TIE's former management regarding Wiesbaden. Based upon what I had by that point been shown from TIE's records and had heard myself, I agreed with this. I was disturbed that those who had been responsible for this very important decision by TIE appeared to want to disown it or at least distance themselves from talking about its obvious commercial and financial consequences.

7.393 In summary, this review showed, certainly to me, that the remaining members of TIE's 2007/8 senior management had somehow believed that DLA Piper had been involved with the Wiesbaden

meeting and in negotiating and drafting the resultant documentation. TIE's own inquest showed that neither I nor anyone else at DLA Piper had been involved with Wiesbaden. This came as a surprise to Stewart McGarrity, TIE's Finance Director whom Richard Jeffrey had asked to lead the task of assembling TIE's documentation and records. Other members of TIE's corporate and project management appeared to have played little part in Wiesbaden including, importantly, Steven Bell who, as engineering director, was responsible for BBS's performance, the MUDFA and SDS contracts and for what TIE was going to need to negotiate post contract award on the many technical, financial and commercial assumptions, contractual protections and pricing and scope qualifications that BBS had placed into the contract with TIE's agreement and were now insisting on implementing.

7.394 And so, I had to wonder: if this was the aggregated view of the TIE senior executives who had settled Wiesbaden terms - how, in fact, was their collective view and information about the exact effect of Wiesbaden agreement communicated properly by them to their TIE colleagues on their return and then to CEC? These 2010 conversations and the memory lapses reaffirmed my belief that SP4 had also been at the core of TIE commercial and financial dilemma in late 2007: their preferred bidder would not commit to providing a construction price and programme until TIE agreed to their terms on protection from SDS and MUDFA contract status. And those very clear terms were not consistent at all with how TIE presented their deal to CEC on the 20th December 2007. This was entirely distinct from the fact that SP4 had been perfectly understood by those at TIE who had negotiated its content over a period of approximately three months.

7.395 I have read TIE's documents saying that Jim McEwan carried out a TIE procurement process review covering the period October 2007 to Jan 2008. I never saw this review at the time. I would be interested to know: who was the audience, what did this review disclose and what did Jim write and conclude about TIE's actions leading up to, at and immediately after the Wiesbaden meeting? What was this report and were its conclusions made available to CEC

7.396 I am asked in Question 59 to comment on the exchange of emails dated 10 September 2009 in which Stewart McGarrity gave his views on what had been agreed in Wiesbaden and I responded (CEC00851679). This email exchange took place in the midst of Project Challenge, one year and four months after May 2008 Infraco Contract award. Stewart McGarrity's e-mail alights on a central issue within SP4. He quotes the text from the Wiesbaden Agreement that became PA1. It contains the language that underpinned the position which Pinsent Masons informed me was non-negotiable after I had seen SP4 for the first time in early February 2008.

7.397 TIE's Chief Executive, Project Director and Commercial Director had agreed at the Wiesbaden meeting and after it that, *inter alia*, BBS would be able to apply for an automatic client variation, leading to an entitlement to a potential extension of time, payment for variations work and prolongation/disruption costs, with consequent contract price increase if BBS were obliged to construct to SDS design that had either developed since BDDI or was generated late by SDS Provider or changed from BDDI. By the date of Wiesbaden, BBS had established that there was no

SDS design beyond outline - and in some cases no design at all - for significant parts of the scheme and that there was no design for Siemens' scope of work.

7.398 The proposition is put to me by the Inquiry that: once each of these Provisional Sum items had crystallised into an agreed firm price, this would somehow remove any financial consequences from "inadequacy of design". It is, in fact, an error to suggest that the Provisional Sums were addressing, for example:

7.398.1 the April 2008 move of the SDS Design and Consents Delivery programme from V26 to V28;

7.398.2 missing, unconsented or underdeveloped SDS design (i.e. design not within BDDI);

7.398.3 late and unconsented SDS Design or SDS Design that was being identified and instructed by TIE from post contract award design workshops;

7.398.4 the impact of MUDFA delays; and

7.398.5 the impact of all of the above on the BBS construction programme and its construction methodology,

7.399 To explain: it is clear that SP4 defines what are 'Provisional Sums' in a manner consistent with my understanding of the term as used in the construction industry, that is: either work which may well never be executed or work that requires an element of choice later by the employer/engineer (See for example: Hudson Building and Engineering Contracts, 13th Edition 2015 at p.347) and *per* May LJ in Midland Expressway Limited –v- Carillion Construction Limited [2006] EWCA Civ 936. The Schedule then sets these items out in its Appendix B, with related estimated prices for each. Not one of these 22 items listed as included (at estimated values only) within the BBS stated construction price relates to works that will be constructed using late, post-BDDI developed, incomplete or missing SDS design. This Appendix B was prepared by TIE in discussion with BBS and it was not a matter for legal input.

7.400 In short: if part of the tram infrastructure had simply not been designed by SDS, even in outline, it could not - and indeed does not - somehow appear as an estimated price within a SP4 Provisional Sum. Works to be constructed as part of the Infraco Works using missing SDS design do not fit within the term of art "provisional sum" because those works are neither works never to be executed nor something that TIE would elect later. To the contrary: they are something required to be constructed in order to deliver the ERs.

7.401 It is obvious that I cannot answer for what Stewart McGarrity thought and meant when he wrote his email. However, I strongly believe that Stewart's analysis demonstrates that he had not been properly briefed in early 2008 by TIE's senior Project procurement management colleagues about the commercial intent and reality of Wiesbaden and then SP4 and, most importantly, the true limited state/scope of the SDS Design actually within BDDI. I have mentioned the reason for my

belief on various occasions (see, for example, para. for example para. 7.573 and 7.205) and Stewart himself confirms his lack of information in CEC01286695.

7.402 It is, in my view, very telling that Stewart says in his e-mail in September 2009: *".....unless of course whole elements of the works from design information issued to BBS up to 25th November 2007 were missing."* That was indeed precisely the situation in which TIE had found itself in early December 2007: useable design for central elements of the tram scheme was missing from BDDI – wholesale - and this situation and MUDFA works delays due to missing design were the key reasons why: (A) both the BBS and the Tramlines BAFO returns in October 2007 had been unable to present an unqualified price for the entire tram scheme, with matching construction programme and build methodologies; (B) BBS was not prepared to price and programme its proposals beyond its BAFO submission, when pressed in mid December 2007;[111] and (C) TIE had been obliged to introduce the scheme design availability baseline of 25th November 2007, BDDI. Not only were central and time-critical SDS designs and their related Consents missing in October 2007, on into December 2007 and yet still in May 2008, they remained missing for many months after Infraco contract award.

7.403 The last line in my e-mail in reply to Stewart remarks: *" As mentioned in the past, I am confident that Geoff Gilbert could make a useful contribution if asked."* He had been: (A) TIE's principal author of SP4 and had led TIE's discussion and negotiation with BBS about the emerging 'Schedule 4' document and its drafting during January 2008 immediately after Wiesbaden; and (B) a member of the TIE's Project Directorate that took the decision to take negotiations forward with BBS on the basis of BDDI - which ultimately TIE itself could not pin down in terms of actual SDS design drawings (in all statuses as defined by the SDS Contract) that had been issued to BBS by 25 November 2007.

7.404 **TIE Amendments to the Employers' Requirements (ERs)**

7.405 The ERs is a client-based document. The development of ERs for a scheme like this would normally be carried out by a consulting engineer with detailed client input. Draft ERs were built up during Ian Kendall's regime as Project manager. They were done predominantly by Faber Maunsell and Mott MacDonald, who were two leading engineering consultancies in the UK who probably had the most experience of light rail projects. Ian Kendall worked out how, at an early stage, he could get the ERs produced in outline form prepared by these engineering consultants. I believe the budget for doing that work came out of the Parliamentary process budget, because I understood from Ian Kendall and Alex Macaulay there was not a budget for the production of Infraco ERs. This was procurement phase work, and not specifically relevant to bill promotion. But the ERs were an absolutely key document in terms of TIE's ability to produce an outline scope for the whole Project to inform what TIE's designer would be doing under the Scheme Design Services mandate. Faber Maunsell and Mott MacDonald left the Project probably in late 2006; about three months after the two Edinburgh Tram Bills were enacted. By this time, Faber Maunsell and Mott Macdonald had collaborated for TIE and produced, in my opinion, a very good working

[111] See paras. 7.139 *et seq*

draft ERs despite many sections that were work- in- progress for TIE's input. Both tendered for the SDS mandate but were unsuccessful.

7.406 This work on the ERs involved descriptions on how the trams would function, their depot, fleet size, scheme configuration, stops as well as structures and control systems. Mott Macdonald and Faber's actual mandate was to support bill promotion and, in particular, create the parliamentary drawings showing the scheme's Limits of Deviation or land-take envelope.

7.407 In the usual manner, DLA Piper vetted the draft ERs written by Mott Macdonald and Faber Maunsell for clear concept and concise language that matched – or at least did not cause conflict with the draft Infraco Contract. UK market practice had tended towards tram procurement contracts not having a standard prescriptive employer's specification because the intention was to have ERs that were output-based. The more specific you become, the more the contractor simply responds to this desire, without innovation or his own motivation for cost-control focus. TIE also needed robust ERs for the approach adopted and espoused by Ian Kendall of putting the different major contracts out to tender separately, followed by novations to the main overall EPC contract(Infraco.

7.408 All sorts of questions arose such as: what should the trams look like inside? What external livery would they have? What size of tram and how many trams? What would the expected asset life be of various key equipment? Should trams have room for bicycles? Should there be ticket collectors on board? How high should the overhead support poles be and at what intervals? Will there be building fixings for overhead lines? How big should the depot be and where should it be? How would the depot be equipped? What was the optimum runtime for a tram journey to the airport? What would the fare structure be? Would there be inspectors? How should the city traffic management system integrate with the tram control? Where do we site tram stops? Under what type of contract would the electricity be supplied over the Project life?

7.409 The point here is that these central issues were addressed by highly experienced engineers with access to institutional know-how, not as later happened through TIE's relatively inexperienced non-specialist staff.

7.410 The first draft of the ERs was the work product of David Hand (Mott Macdonald) and Doug Blenkey (Faber Maunsell), both senior experienced professionals. I saw it as very comprehensive and well thought through, although it was still a working draft. Ian Kendall's team then used it as a core technical document for the Infraco Contract ITN. It had been assembled using the combined insights of Mott Macdonald and Faber Maunsell on the current wisdom from UK and already operating continental tram projects. I am uncertain which UK projects these two big consultancies had been involved in, but there were gaps (properly flagged) in their range of experience. Ian Kendall's team did not necessarily know how to fill these themselves or where to find information to form a view.

7.411 Ian Kendall rightly kept up relentless pressure to achieve ERs to go with the draft Infraco Contract suite that DLA Piper produced. He was a demanding but very knowledgeable and also

appreciative taskmaster. When Ian Kendall left TIE, I understood from him that he thought there were still some gaps in what Doug Blenkey and David Hand had achieved which TIE needed to resolve adequately, but that the ERs were serviceable as a client document.

7.412 After Faber Maunsell and Mott Macdonald's appointments ended in summer of 2006, the further development of the ERs was very laborious because TIE did not have the in-house expertise. There was nobody at TIE who was a tram design engineer. Development of the ERs for issue at ITN was also within SDS's remit The production of the ERs to a fully developed stage where they could be issued to Infraco tenderers in fact sat on the critical path for assembling the Infraco ITN for a considerable time and Ian Kendall had become increasingly concerned about this. There was a further issue which delayed the ERs: input from various stakeholders, not least CEC Planning.

7.413 TIE took the ERs away from SDS's remit and at some point in 2007 and after BAFO and BBS's appointment as preferred bidder, in late 2007/early 2008, TIE's Project Directorate were still overhauling the ERs. That was done in isolation without reference to DLA Piper and, as I learnt later from Steven Bell, without consultation within TIE.

7.414 This decision cost TIE £2.7 million (see paragraph 7.425 below) without apparent benefit. The payment was required principally by Siemens who maintained that - despite the exercise that DLA Piper and SDS had done with them to ensure that the ERs had not been changed in a way so as to introduce ambiguities or conflicts with other parts of the contract suite (see para. 7.424) – there might be hidden technical risk for them as systems installer with long term maintenance obligations and direct interface with CAF trams. The £2.7million was their expression of this exposure, it appeared to me to be a premium that TIE agreed to pay that had no underlying hard costings.

7.415 I never understood or had explained to me by anyone at TIE the rationale for this. Revising the ERs would inevitably mean subsequent changes to Infraco Proposals, since amending the ERs was a change from the ITN to which they had responded with BAFO and might, for example, result in the need for changes to the SDS design and to BBS construction and systems installation methodologies.

7.416 This closeted review of the ERs, after BBS' Preferred Bidder appointment, suggested to me that the ERs had never been looked at thoroughly in 2007 by TIE's incoming Project lead. There was apparently limited professional ownership within TIE of the ERs prepared under Ian Kendall's watch nearly three years earlier.

7.417 The significance of this is not that the ERs failed. It is that by removing them for a comprehensive review and revision, TIE allowed BBS and SDS to say that their prices and construction and installation proposals and methodologies and their own design drawings were developed to deliver technical and commercial requirements that TIE had now unilaterally changed. They could then claim it was open season for them to review price, risk and programme. It also allowed SDS to say that they would resist novation, that they must review these new ERs and that TIE must pay for that SDS additional work. It also allowed them to say they could not warrant their existing design because it had been prepared to deliver against the old ITN ERs. That in turn allowed BBS to say

that they would not take risk from unwarranted design, especially design developed or created post BDDI.

7.418 Here are two simple (hypothetical but illustrative) examples:

7.418.1 The new ERs say that the line of sight of the tram driver to the tram signal must be 3.8m. SDS says that their design accommodates this - but the Infraco (Siemens technicians) asserts that a stationary tram vehicle at the end of an already designed and priced platform length will be too far back to achieve the required distance of 3.8m to the designed tram signal position. Result: design revision/repricing;

7.418.2 The new ERs decide that overhead lines need to be strung in more positions using building attachments instead of poles. SDS create designs which require both planning consent and building fixings agreements with the property owners. The Infraco has priced and programmed for erection of poles by a conventional subcontractor. Due to the design change resulting from the revised ERs, the Infraco requires to hire a more expensive specialist subcontractor (cost and programme) and to request third party permissions and SDS require to obtain CEC Planning consent to install the fixtures, mountings, maintenance points and tell-tales in the building facings (delay/works sequencing).

7.419 There are in fact three similar actual examples of this ER version change problem evident in BBS notes in SP4 drafts.

7.420 A big phrase in negotiations in practice became "alignment" regarding the contract suite. Siemens' negotiators spent quite a while pointing out lots of potential minor variances in the Infraco Contract, for example language arising from the modified ERs that might cause lack of clarity or arguments over their responsibilities. Most of this was insignificant and easily fixed but it allowed BBS to make noise, delay negotiations and seek reasons for price increases.

7.421 Siemens' attitude to the ERs was very pedantic. They brought in two Erlangen-based specialists to review the revised ERs. This was probably in late January/early February 2008. They were extremely concerned about the impact on their particular systems work installation and its greater technical interface with the trams and the eventual operator party. Siemens were also very sensitive about the revisions to the ERs because they had detailed long term maintenance obligations in terms of the equipment, the Infrastructure, the signalling and the stop lights. These were German engineers interested in millimetres, centimetres and precision. The idea that the ERs were being changed was a warning red light immediately. BB were using the situation, frankly, as leverage to say that they did not trust SDS and to highlight that there was unquantifiable design and technical requirements risk around.

7.422 I do not know whether a third party came in to review the ERs before TIE's decision and process of attempting to revise them. It would have been prudent for TIE to involve TSS in that process; that was what TSS had been appointed for. As TIE's independent engineering resource when SDS left

the house under novation, TSS were to be the part of TIE's ability to keep SDS and BB honest and enforce the Infraco contract and novation arrangements on them.

7.423 DLA's job was to remove some of Siemens' pedantry. I told TIE that they needed a details person to tell me whether all of this was having any impact on the Infraco contract terms. Sharon Fitzgerald went in there and cleaned it out. Under considerable time pressure (as is specifically noted in the DLA Piper letters) a line-by-line check of the revised ERs with SDS and Siemens was undertaken, controlled by DLA Piper sitting with them to remove, wherever possible, any of their arguments that inconsequential revisions were material and justified cost or time adjustment or had redesign implications. The new version of the ERs were reviewed for conformity with the Infraco contract language. There is always an issue between engineers writing quasi-contractual documents and lawyers looking at that and saying they cannot put it in that way. There was an exercise to clean the document out and make sure that Siemens were not just singing and dancing and asserting problems about minutiae. That was what I asked Sharon to do. I also sent her to find out what had been going on: we did not know since I did not learn from Matthew Crosse what the ERs changes were. Because of this DLA were put in a situation where we had to learn about them within the negotiations between BBS, TIE and SDS.

7.424 It turned out to be a storm in a tea cup as regards drafting misalignment - but there were some significant specific negative impacts: one was that SDS said that they would not guarantee that their design would deliver a tram runtime specified in the new ERs. And then, of course, BBS repeated that they could not novate a designer whose design was not validated against the ERs, which they would be constructing and had bid against; another effect was a claim for £3.2 million extra demanded by Siemens in February 2008 on account of ER V3.02. Lastly, it created a new pressure point for SDS to reassert their demand for immediate settlement of their two large claims.[112] SDS indicated that it would, after all, warrant its design against the revised ERs, encouraged no doubt by the receipt of the £1million incentivisation payment.[113]

7.425 As it came about in February 2008, the Rutland Square Agreement (see paragraph 7.434 *et seq* below) and TIE's internal records show that TIE also conceded between £1.6 million and £3.2million (to the best of my recollection, the final figure was around £2.7 million) to BBS as a 'risk premium' against the changes that Matthew Crosse had put into the ERs and the alleged knock-on effect onto the Infraco and Tram Supply Contract long term maintenance provisions. Added to this was the cost of DLA Piper's urgent engagement to negotiate changes which Siemens said it needed as a result of the revised ERs, as well as SDS's cost for reviewing the ERs.

7.426 It totally escaped me what commercial or technical benefit the ERs review had achieved for TIE. In my opinion, the time to review/adjust the ERs was in 2006 before the issue of the ITN, and certainly not still to be doing so 5 months after BAFO.

7.427 I am asked in Question 41 about a letter I wrote to CEC Legal dated 20 March 2008 (CEC01544970) in which I refer to "risk emanating from the Employers' Requirements because of

[112] See paras. 5.178 *et seq*
[113] See paras 5.186 and 5.66.1

deficiency in precision, clarity and link with the core contract provisions." I note that I state "We reported on Tuesday that work was outstanding in relation to this key contract schedule". In other words, the new ERs were not signed off by SDS and the Infraco as being satisfactory. I then state "We are instructed by TIE that both the SDS provider and BBS consortium are content the document is now in acceptable form and detail to be used as a contractual scope. Our reservations to the risk emanating from the ERs because of deficiency in precision, clarity and link with the core contract provisions have moved now to a level where we do not consider this an obstacle any longer TIE committing to a contract award by the end of March." In other words, I am saying that, on the basis of the instructions I had received from TIE about the progress of negotiations with SDS Provider and BBS and DLA Piper's own involvement in that, this particular schedule is no longer an obstacle to TIE committing to a contract award at the end of March 2008. That was my opinion on what had happened to the ERs at that time. By this point TIE had agreed to pay an additional £3.2million to BSC to address 'residual issues'.

7.428 I am specifically asked when and how I advised CEC of these risks emanating from the ERs prior to this letter. As I have stated elsewhere, I did not 'advise CEC' because it was not DLA Piper's responsibility to do so. The ERs are not contractual drafting; they are technical and commercial information sets. SDS had refused to warrant its designs because of the ERs being re-written.[114] BB had refused to novate because of this issue and said it would require to review its pricing and proposals and Siemens had forced another £3.2 million out of TIE for this on the basis of "misalignment risk".

7.429 There would be always be a logic and sense check on ERs in any project to ensure that there were no glaring difficulties which would give rise to conflict. But writing what the requirements are is the client's technical staff's responsibility, not the Project lawyer's. The point is not that SDS and BBS were nervous about hidden legal issues in the ERs – they were nervous that Version 3.02 contained a technical or commercial requirement that directly conflicted with their design, their construction proposals/methodologies or their long term maintenance obligations.

7.430 What I was reporting in my correspondence to Gill Lindsay in March 2008 (CEC01544970) was that this work was outstanding and it could not be converted into a key contract schedule. What is contained in the ERs is not legal information; it is technical, commercial, planning and financial information with operations and maintenance impacts. What I am saying to Gill Lindsay in my correspondence is that, on the Tuesday, the ERs had not been mature enough for me to say they no longer stood in the way of getting the contract suite ready. In the context of this, you need to understand that one problem with the Infraco contract negotiations and closing out the Infraco contract, was that there were upwards of 40 individual schedules to it. I would say that at least half of those were entirely commercial, financial and technical. There was no legal content in them. We were waiting for those schedules to be produced by TIE. I provide below some examples[115] where those schedules and various parts of them became time critical.

[114] See para 4.22 *et seq* on DLA Piper's duties to CEC and para. 7.413 on the revision of the ERs
[115] See paras. 7.543

7.431 I am reporting in my letter of advice that this was a function and a task that I knew had to be completed by TIE in order to give us a document that DLA Piper would then convert into a contractual schedule after our own legal QA process. Since SDS and BBS have signed off on it, it is ready to go into the Infraco Contract in final form subject to TIE releasing the master electronic version to DLA Piper. I would imagine that shortly after that we began to contractualise the ERs, i.e. to simply top and tail them to go into the contract as a schedule. The work on ensuring conformity with Infraco contract suite terminology had already been done by Sharon Fitzgerald, because she and I had ensured it was, not because TIE had planned to instruct this or even thought about this when amending the ERs.

7.432 Additionally, TIE's decision to begin unilaterally amending the ERs during the initial bid and BAFO preparation phases in 2007 was cited directly by BBS as one of a plethora of reasons why they were unable to confirm their construction price and construction programme, beyond the heavily qualified and incomplete construction price submitted at BAFO (see BBS "Preferred Bidder Update" letter 12th December 2007 to TIE, CEC01422384). CEC01422384 should be CEC01482234

7.433 **Rutland Square Agreement – 7th February 2008 (BBS's First Price Increase Demand)**

7.434 Two days after the tabling of SP4 - the first time I had seen this - TIE encountered a BBS price increase demand attack led by Siemens. At a series of meeting at DLA Piper's offices in Rutland Square, Siemens put forward a demand for around £8.5 million extra in relation to its component of the Infraco contract price.

7.435 This resulted in what became known as the Rutland Square Agreement. In retrospect, I think this was possibly a stratagem from the consortium members: first, BB engages on its own pricing and risk protection move on construction work to test the waters and then so does Siemens.

7.436 Behind and before the Rutland Square Agreement, though, I saw that TIE had already indicated that it would concede money for the ERs revisions. This was clear since Matthew Crosse was not resisting the idea of payment, again simply how much. This may have stimulated Siemens to put forward more demands.

7.437 Siemens couldn't explain the maths behind the extra money demanded – it appeared that they had just plucked figures out of thin air. I had never seen an experienced international supplier doing this to the same extent and I told TIE this.

7.438 At this point, TIE had scheduled an extremely challenging 12th March 2008 contract signature date. My best estimate, as at early February 2008, is that approx. three quarters of the 43 core technical, financial and commercial schedules which TIE required to produce for the Infraco Contract were either the first skeletal drafts not advanced beyond what DLA Piper had prepared as *pro forma* place markers in the ITN or had progressed minimally.

7.439 Combining my own recollections with the Rutland Square Agreement document itself and with the Project papers, I can relatively accurately reconstruct the sequence of meetings leading to the

Rutland Square Agreement and the timing of my various advices to TIE on the effect of SP4 and PA1.

7.440 *Tuesday February 5th 2008*: The meeting took place in the main conference room on the 4th floor of DLA Piper Offices. Matthew Crosse came to this meeting. This was the first time he had attended a Project meeting with BBS where I was involved. Alastair Richards was also present and possibly one other TIE manager. There were 9 people on the BBS side: Richard Walker, Michael Flynn, Tom Murray, Herbert Fettig, Ian Laing, Suzanne Moir, Martin Gallacher and two others (VT and MW –probably Siemens technical personnel) whose names I now forget. I do remember I felt that TIE were under-represented and I said so, but there seemed to be a clash with other TIE meeting commitments.

7.441 TIE had been having difficulty in assembling BB and Siemens at the same meetings and, this time, both BBS principals were available. There was discussion and "boxing" on various well-known outstanding issues. Richard Walker talked at considerable length about the risks that SDS novation presented for the consortium because of the absence and state of the SDS design a(CEC approvals for it.

7.442 Iain Laing explained all of this was why SP4, as agreed by TIE in Wiesbaden, contained the 'rules' to govern post contract signature design production and development, for which BBS could not, and was not prepared to, absorb any cost or time risk at all. Matthew Crosse, who had represented TIE in Wiesbaden, did not disagree with this as a description of what TIE had agreed. SP4 was to be discussed shortly, Iain said. He did not give any indication that this would be the following day, as it transpired. I said that on novation BBS would have direct contractual recourse against SDS if the design had quality issues or was late. Ian Laing said this was insufficient protection - since suing your designer while still needing to work with them was not an attractive idea. In any event, he said, SP4 was dealing with the issue. Various examples of how BBS would be delayed by SDS design being deficient, new or late were discussed, including a wheel lathe for the tram depot. Richard Walker said that following BBS's scheme design audit there was a significant confidence issue over SDS design quality and asked if there was additional Project budget to compensate (these clear risks which BBS was asked to assume at novation. I do not recall TIE's answer. There was a further discussion about BBS being very concerned that the "goalposts have moved" as far as design risk transfer was concerned because the original concept of full design responsibility being novated alongside a substantially complete and fully approved SDS scheme design linked to the ERs was simply not going to happen - in fact at a very significant level.

7.443 I do not recall any specific response from TIE's side at the meeting. After this session, Ian Laing called me to say he felt that it was important I attended the next session on SP4. I thanked him and said that I did not know when this was scheduled and that I had not seen any version of the document he was talking about. I was waiting to hear from TIE.

7.444 *Wednesday 6th February*: I had a full day of Infraco Contract main terms negotiation in the diary. I was preparing for this when Bob Dawson's email and attachment arrived just after 9.00am saying

that SP4 was going to be discussed at 10am at our offices, in about 40 minutes time. I discuss this meeting in relation to SP4 above.[116]

7.445 As discussed above at Ian Laing made clear that the core principles of SP4 and PA1 had been agreed by TIE in Wiesbaden and were non-negotiable.[117] The Rutland Square Agreement shows at 2.5.2 and 2.5.3 that we managed two or three changes immediately: language to ensure that BBS could not engineer an Notified Departure by being in breach and limbs (c), (n) and (o) of the draft were removed. My recollection is that those limbs failed on logic/realism and therefore their deletion was not much of a concession by BBS.

7.446 We negotiated these points after discussion with Steven Bell and, I believe, Geoff Gilbert which required going over SP4 in detail. I cannot recall now if this was in one session – I think not because of the requirements of the various strands of negotiations moving at the same time – in particular SDS novation discussions beginning. In doing so, we focused also on my views and me understanding TIE's views about PA1. But it was very clear at this point that TIE had agreed this and clawing back anything meaningful would be very difficult indeed. And I said so to TIE.

7.447 *That afternoon, 6th February 2008*, a further meeting was held to meet Siemens lead by Michael Flynn, with Herbert Fettig a senior Siemens Erlangen manager present. Siemens often fielded commercial technical staff from three different arms: vehicles, systems and contracting and therefore from different offices. Flynn was Siemens Transport UK. Fettig was, I think, from the international division. Two others may have been there, but no Biggart Baillie lawyers and no BB. TIE had different personnel present from those from the earlier meeting and seemed to have recognised that it needed a show of force and focus at this meeting. .

7.448 This time, Jim McEwan, Stewart McGarrity, Matthew Crosse, Geoff Gilbert, Alastair Richards (and possibly Dennis Murray) attended. Geoff spoke for TIE. Michael Flynn said that Siemens required to increase their component of the contract price, as distinct from BB's construction contract price. He noted that both BB and CAF had been given additional money by TIE for tram and civils works under the terms of the Wiesbaden Agreement. Siemens had not been given any increase but considered that one was necessary because *inter alia*:

7.448.1 The ERs were now at version 3.02 due to Matthew Crosse's re-write / revision exercise;

7.448.2 The new Picardy Place gyratory concept (essentially the trams turning around as opposed to continuing down to the Foot of the Walk) had not been priced in the BAFO bid. (This could not have surprised TIE since the Wiesbaden Agreement expressly excluded it from priced scope).

7.448.3 The CAF tram kinematic envelope - the relationship between tram movement (cant, acceleration etc.) and uninterrupted electrical contact required between pantograph

[116] At paragraphs 7.243 *et seq*
[117] See paras. 7.370 *ets seq* and para 7.396

and overhead line - was proving problematic, as were other aspects of the tram (its traction system) in terms of their interface and compatibility with Siemen systems;

7.448.4 CAF were being difficult about providing information due to their competitor status with Siemens and IP confidentiality (this was instantly challenged as false and a Siemen's ploy by Alastair Richards);

7.448.5 Aspects of the SDS Design gave them serious concerns, in particular the Overhead Line Equipment design;

7.448.6 Siemens' price had been based upon a systems installation, testing and trialling programme that was now significantly different due BB's civils works programme changing and extending; and

7.448.7 Lastly, Siemens might require performance bonding from SDS as well as a PCG due to a recent Parsons Brinkerhoff Group credit rating down grade.

7.449 It was not clear how much extra money Michael Flynn was talking about. He then read from a hand written note which appeared to comprise a list which summarised into a figure calculated from approx. 2.5% of the construction works and tram supply price, plus a contingency. I recall both an £8.5 million and then a £5.5 million figure. This may reflect the amount of additional money that Siemens wanted beyond the *ca.* £3.2 million for the revised ERs. I recall no one on TIE's side understood the numbers presented by Flynn well.

7.450 Geoff Gilbert expressed TIE's astonishment. There were various other strong reactions from the TIE side. I spoke directly to Herbert Fettig in German saying this was not professional at all and there was then a break-out. We went to one of the small rooms. I do not recall the precise discussion - but Alastair Richards was extremely agitated, saying that he did not understand at all what TIE had achieved at Wiesbaden if more money was being demanded.

7.451 Geoff Gilbert was saying that TIE needed to understand Siemens' reasons better. Jim McEwan said that their reasons were not relevant - because their motive was clear: they had seen BB playing the same game and it was now their turn. Stewart McGarrity said he thought that if TIE gave any indication that they were taking this blatant tactic seriously, it would not be a question of "*if TIE would have to find more money*" it would just be a question of "*how much*". I do not recall what if anything, Matthew Crosse said as Project Director. I advised TIE:

7.451.1 I agreed with Stuart McGarrity that if TIE entertained this at all it would not go away;

7.451.2 If this Siemens' demand entered the contract price at this level, it was a material improvement for the preferred bidder and was an immediate and visible procurement risk;

7.451.3 CAF would react badly and might want more money themselves;

7.451.4 TIE should say Siemens needed to request BB for a price reallocation for their adjusted consortium scope, not demand more money from TIE;

7.451.5 I did not see any benefit or value that TIE was being offered in exchange and Siemens comment about bonding from PB was not realistic;

7.451.6 A component of the TIE's response should be that Siemens were placing their consortium's preferred bidder status at risk; and

7.451.7 Where was BB in this - and I remember wondering if Siemens had been at Wiesbaden.

7.452 I also asked Matthew Crosse how this would stand with the commercial and pricing evaluations at BAFO where I understood BBS and Tramlines had been close and a main differentiator had been the BBS approach on indicative pricing/methodology and VE for Network Rail immunization works. I do not recall his response if there was one.

7.453 I insisted to TIE that what was being agreed at a commercial level should be documented – to avoid more public sector money simply entering and augmenting the Infraco contract price, with no clear record of why or what benefit to TIE. I also insisted to TIE management that there should be analysis and recognition of what TIE was receiving for this concession and 'lock-downs' to give TIE the ability to threaten BBS with loss of preferred bidder status and to set up a clear framework to reach close on remaining open issues. Otherwise, I said, BBS would continue to pick off issues as they wished and bring in new ones. I recall Jim McEwan agreed, referring to TIE's need to stop "death by a thousand cuts".

7.454 Ultimately TIE's decision was not to reject the tactic. It was to get Siemens to explain themselves better. There was a consensus that some theatre was needed to convey TIE's displeasure at this move. We returned to the meeting. Geoff Gilbert spoke:

7.454.1 Willie Gallagher had been misled at Wiesbaden;

7.454.2 All the points being made had been covered/allowed for at Wiesbaden;

7.454.3 Siemens was ambushing TIE with no cogent numbers;

7.454.4 TIE's legal advice was that this represented a real procurement risk to the Project; and

7.454.5 Willie Gallagher would require to raise the issue with the ultimate client, CEC.

7.455 Michael Flynn said that Siemens had a serious issue with SDS design quality and that they required money to be added as a contingency for this, and the fact that about 25% of the Siemens work on systems installation had no clear SDS designed scope. Whatever TIE might have thought of Siemens' tactic, this statement by Siemens' Project leader was yet another 'red flag' about how the state of the SDS design was fundamentally impacting the consortium's view on risk transfer

and price. TIE later conceded a further £2.5 million on this to BBS[118]. He also mentioned that Wiesbaden had been about civils work scope, not systems installation and tram interface. And this flagged to me immediately that Siemens had not been included at the Wiesbaden meeting and that this had been a mistake by TIE management.

7.456 TIE instructed Siemens to draw up a report showing its demands, with reasons and full calculations while TIE had internal management consultation and briefed CEC on what had happened. The meeting then closed.

7.457 *Thursday, February 7th*: In the meantime, TIE had sought CEC's view (Director of Finance level), with a recommendation that TIE see what Siemens really wanted and then negotiate. CEC agreed with this approach. I believe I was in the room when the first call to CEC was made. Beyond that, I have no knowledge of CEC's composite views on the Rutland Square meetings. The starting point had appeared on the evening of 6th February to be a worst case of about £8.5 to £9 million. Siemens had presented their paper on an increase and the parties re-convened to hear Siemens explain this. I may have seen this paper but do not recall when – there were no legal points, oth(than the continuing general theme of "alignment" between Infraco Contract and Tram Supply/Maintenance contract provisions. A lengthy discussion took place as TIE sought with arguments to remove the commercial and technical basis for Siemens' demands. This did not appear to be closing in on a solution.

7.458 I know that I was not present for all the meeting once I had TIE's instruction to prepare a protocol which 'drew a line in the sand' to stop further creeping improvement to BBS's position. My instructions came from Willie Gallagher, Steven Bell and Geoff Gilbert. Matthew Crosse was also present. At a point in the meeting, TIE put forward the draft document and it was used to record how agreement was reached progressively. Six key points went into the protocol. Three of these refer specifically to SP4: one about limbs (n) and (o), one about Notified Departure not being a product of BBS breach and the last about "granularity" –e.g. BBS's detail and costings behind all Pricing Assumptions.

7.459 However TIE's use of the word "granularity" in discussions at this time to request more detail (... the claims was revealing to me. What it signified was: not "if" TIE was accepting BBS demands for more money or not, but instead "how much" TIE would agree to, based upon more detailed justification from BBS.

7.460 The protocol itself refers directly to the SDS Residual Risk: "the provision of adequate design information and in particular earthworks design by SDS and the recovery by the BBS Consortium of costs and expenses from SDS in the event that their designs prove inadequate." It then provides for a separate presentation by each consortium member of its pricing on SP4 a week hence and to resolution of "splitting" construction and maintenance – which, I think, had essentially resulted in 'overlap' pricing for scope within the Consortium. I played no part in this exercise.

[118] See paragraph 7.316

7.461 And so: although the agreement shows only one explicit number for Siemens – £3.2 million for the Matthew Crosse ER v3.2 and TIE saying it had £1.6 million for this – the clauses reveal that BBS keeps significant demands open for further negotiation. As a result, a month later, TIE agreed a further consortium price increase of £8.6 million[119].

7.462 Richard Walker was leading discussion for BBS and I pressed him for a firm, clear commitment on latent defects liability period from BB – which he conceded at the last and this was reflected in a manuscript amendment to the Rutland Square Agreement

7.463 The Rutland Square Agreement was signed in the early evening 7th February in the atrium of DLA Piper's offices by Richard Walker and by Willie Gallagher and Matthew Crosse so the two senior executives who had been in Wiesbaden were present to hear what I had said to TIE about SP4.

7.464 The Rutland Square Agreement contains references to many key issues that were current, including SP4 and Clause 80. I had explicit discussions with TIE management on PA1 and Notified Departures (in the context of SDS design evolution) before drafting this protocol and presenting it to BBS. As discussed earlier, I had already been told by Pinsent Masons that SP4 PA1 was non-negotiable.[120] TIE management was aware of this and, as the contemporary comments show, continued to lead discussions themselves on the drafting and language for SP4 without pause.

7.465 The importance of the February 2008 Rutland Square Agreement requires emphasis. It reflects part of DLA Piper's core advice to TIE at the very time that SP4 had just appeared. Virtually every operative section in this document is designed to try to give TIE higher ground within the procurement to arrest BBS's steady improvement of their contractual and commercial position and their tactics for risk transfer erosion – by either direct attack (e.g. money grabs) or by re-opening/finessing negotiations on the Infraco contract main terms.

7.466 To summarise:

7.466.1 The two 6th and 7th February 2008 meetings at Rutland Square – first just with Siemens and then all parties – were the start of BBS's various demands for price increases to which TIE acceded in very large measure. As far as I could see, TIE (Willie Gallagher) involved CEC and its governance organs in deciding how to respond to these demands and DLA Piper was giving TIE clear, continuing and often urgent advice on what agreeing to these demands meant and would signal to BBS, already sitting as preferred bidder. Whatever CEC (and perhaps some members of TIE's own management) had believed in December 2007 about TIE's Executive Chairman and Project Director's visit to Germany achieving a fixed construction price at Wiesbaden must have changed at this point.

[119] The Citypoint price increase agreement referred to at para. 7.469
[120] See para 7.396

7.466.2 In parallel, on the morning of the 6th February 2008, TIE and BBS had begun negotiations on SP4 which contained the initial but comprehensive range of qualifications, risk protections, provisional pricing and technical scope reservations with which BBS had qualified their Wiesbaden construction price. I discuss the evolution of SP4 above.[121]

7.466.3 With TIE's instruction, DLA Piper drafted the Rutland Square Agreement - to capture and express a basic framework for identifying and protecting key agreed positions and for moving technical, commercial and legal negotiations forward towards a Close date that was extremely ambitious but, at the time and given a full co-operative attitude, I felt might have been achievable. The agreement reflected TIE's aspirations far more than a fully engaged BBS attitude, as events very quickly demonstrated. BBS simply treated TIE's urgency about reaching contract negotiations close as TIE "crying wolf".

7.466.4 The Rutland Square Agreement also contains specific reference to the particular SP4 provision that had been under discussion and is therefore contemporary evidence (what advice TIE had been receiving in relevant meetings, break-out sessions and debriefings from DLA Piper about, among many other topics: how the language in SP4 was intended to work and its impact on the Infraco Contract.

7.467 Since TIE had determined it would (or had to) accede to a price increase demand, the prime intent (of DLA Piper advice) within the Rutland Square Agreement was to at least give TIE an obvious agreed base line with which to stop BBS eroding contractual protections TIE had in the draft Infraco Contract and to try to set proper negotiation rules Despite the specific inclusion in my advice of a provision (Clause 7) that BBS could lose preferred bidder status for not adhering to the Rutland Square Agreement, TIE never used this sanction nor even threatened to. This can only have served to send an unmistakable signal to BBS that TIE was wanting – above all else - to award the Infraco Contract.

7.468 **Citypoint Agreement – 7 March 2008**

7.469 Following the Rutland Square Agreement, BBS successfully submitted a further price increase demand.

7.470 The first of these was on 7th March 2008 when a further £8.6million was added to the contract price in negotiations at Citypoint. Those negotiations were handled, I believe, by Steven Bell and Jim McEwan in a meeting held at Citypoint offices. I had no involvement in this meeting or TIE's preparation for it. It came a month after Rutland Square.

7.471 This addressed Siemens' outstanding claim from negotiations relating to the claims presented on 7th February 2008.

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[121] See paras. 7.214*et seq*

7.472 **Formal Notice of Intention to Award –18th March 2008**

7.473 At senior level, through its Chief Executive Willie Gallagher, TIE projected an image of being in control and relaxed. Yet, TIE suddenly announced in the first week of January 2008 (after hinting pre-Christmas 2007) that it was programming issue of the Notice of Intention to Award the Infraco contract in the last week of January 2008. Notice of Intention to Award is a stage beyond conferring Preferred Bidder status, which indicates that the award of the contract is imminent and that the parties have concluded all permitted negotiation. It triggers an automatic debriefing entitlement for the losing bidders. I remember returning to Edinburgh on 8th January 2008 after Christmas leave that year in Hong Kong and being very surprised indeed.

7.474 It is hard to fully explain the dynamic that was present at TIE in early 2008. Once the SNP reviews had cancelled EARL and indicated no objection to CEC proceeding with the trams, the opposition political parties had an incentive to scrutinise the Project closely. My strong perception was that TIE and CEC staff recognised that the procurement required to close as soon as possible to avoid CEC itself becoming unsupportive of or indifferent to the Project.

7.475 Willie Gallagher, TIE's CEO, was saying that this was not the case and he was under no pressure to sign a deal. But I regarded that as essentially a bluff for BBS and, to some extent, for the public and the media. There was a real thought at TIE senior level that the new Scottish Government's goodwill towards the Project would evaporate (and consequently CEC political solidarity could fade) if it didn't get up and running swiftly –especially since TIE had prematurely indicated that a contract award was imminent and had begun to brief the media regarding a PSCD in late 2010 whereas, at BAFO, BBS had indicated a qualified March 2011 PSCD.

7.476 TIE's behaviour and consequently instructions to me were essentially that it wanted a fanfare announcement early in 2008 to show the people of Edinburgh that actual tram installation works were about to take place and to give a final date for it all being finished. But this ignored the reality of where the Infraco procurement had reached –or to be explicit had not reached given the true content of BBS's BAFO tender.

7.477 In the background Transport Scotland was of course auditing progress through TIE's reporting. The promoter and owner was CEC, not Transport Scotland although CEC was the junior partner financially. In round terms, Transport Scotland had committed £500 million and CEC just over £45 million. TIE's basic approach was to give all indications possible that swiftly moving towards signing the Infraco Contract suited all parties. It appeared to me that TIE senior management felt that this would prevent process drift and compel BBS to march in step. But soon after preferred bidder appointment, BBS, not TIE, began to control speed of engagement and priorities. And SDS joined suit.

7.478 As discussed above, TIE wished to issue Notice of Intention to Award in early 2008. But it was clear to me and must have been clear to TIE the Infraco negotiations on pricing, programme, commercial and technical matters were nowhere near ready to achieve clear, agreed and final positions. There was still a major outstanding argument about the revised ERs not being aligned

with the SDS design.[122] MUDFA was in delay. The SDS design was still untouchably far from being stable or clear regarding its delivery programme, let alone completion.[123] Pricing discussions were still on going and a multitude of technical and commercial points were still open –not least that SDS had indicated it would not novate.[124] There was not much in depth discussion about how TIE considered it was actually ready to proceed to the next stage i.e. to award and then sign the contract. This appeared to me be more a process in TIE management's mind, not a series of in-depth discussions, careful negotiations and close-outs. I was often the only person saying that the parties were not ready. I said that if the Infraco Contract was not ready because of outstanding TIE or BBS deliverables, there could be no Close. I said to TIE management that if BBS were not committing to a master construction programme, commentary about a PSCD was meaningless, not least because a pre-determined period of trialling trams and testing infrastructure and systems was mandatory (after substantial completion of the Infraco Works) in order to receive requisite clearances to operate the system. And the examples of what the TIE Board appeared to have considered related to cost/risk protections – LDs, PCG and bonding all already sat with TIE or CEC to provide their proper instructions to DLA Piper.

7.479 I advised TIE on probably four different occasions in January 2008 that: (1) issuing a formal Notice of Intent to Award the Contract would strengthen BBS's resolve to squeeze all the pricing and/or risk transfer concessions that they could from TIE; and (2) an extended delay from this formal public notice to an actual Close would heighten the risk of a procurement challenge or a FOISA request from the reserve bidder (entitled to a full debrief within a stated period) or even a hostile third party or the EU Commission itself alerted by a complaint. There is always a risk at that stage of exposing problems and a possible interdict action from a procurement prospective. I asked D&W to keep the caveats at court updated. TIE listened to my advice but did not appear to plan how to mitigate the risks I was drawing to their attention.

7.480 The timing of my initial advice on this is confirmed by a note I sent to Sharon Fitzgerald on 11th January 2008: "*I have advised TIE on no account to issue the cooling off period notice* (short hand for the Notice of Intention to Award) *until they are sitting with a complete contract suite*.....". And TIE were nowhere near that point, as discussed above.

7.481 The formal Notice of Intent to Award the Infraco contract to BBS was eventually issued by TIE on 18 March 2008. I tried to stall it as long as possible (for the reasons I explained to TIE and have mentioned here) and was successful in doing that for a couple of months. TIE did not appear to agree with my view that issuing the Notice of Intent prematurely would simply strengthen BBS' negotiating hand - but it did. And it impacted TIE's ability to simply withdraw BBS's preferred bidder status, as the ITN rules allowed TIE to do with absolute discretion.

7.482 In mid-March 2008, TIE planned to close the Infraco Contract on Easter Monday, 24th March 2008 and CEC agreed with this. Close and contract signature would therefore have had to involve senior executives from BB, Siemens, SDS, CAF and TIE all being present in Edinburgh over the Easter

[122] See paras. 7.413 *et seq*
[123] See para 2.41
[124] See paras. 5.193 and 7.417

weekend. In my experience, it is entirely outwith normal procurement management practice for the procuring party to issue a Notification of Intention to Award when the parties are still in negotiation over central contractual documentation, the price and when probably 60% to 70% of the technical, commercial and financial schedules to the contract are either pro forma or at very best only in draft form. At this stage, there were, as examples: no agreed contract price; no Milestone Payment Schedule; no Bills of Quantity; no agreed master construction programme with critical path to PSCD; and no agreed post novation design delivery programme. There was also no signed CEC – TIE Operating Agreement.

7.483 **Final Negotiations**

7.484 The lead up to Close involved an intense period of DLA Piper support for TIE. Integral to this were my daily exchanges with TIE's senior management about the risks, open issues and uncertainties that still surrounded the Infraco Contract, because of SP4 and the behaviour that BBS was exhibiting.

7.485 I advised the TIE senior management group on several occasions (when TIE was planning to or had announced that it wished to close the contract) that, though the terms would be fixed on signature, BBS's behaviour regarding the use of the concessions and protections they had secured would not stop just because a contract was signed. And my warning was borne out by events when BBS began submitting its Notified Departure claims within a few days of Close.

7.486 By contrast, there was a strong mood in TIE, expressed more forcefully at Q1/Q2 2008 management meetings, that it was time for negotiations to be closed out because: (i) Transport Scotland could well easily step in to call a review and/or remove funding; and (ii) It was 'High Noon' for the procurement and TIE needed to live with what it had achieved and get to Close swiftly. I witnessed these discussions both in TIE management meetings and in informal meetings with TIE corporate executives.

7.487 There were constant on-going Infraco negotiations – sometimes broken off as relations soured or BBS moved for a price increase demand – but, particularly from mid-March 2008 to early May 2008. Dealing with BBS's attempts to secure more money from TIE began to dominate TIE senior management's time.

7.488 I am asked in Question 63 why I sent an e-mail to Geoff Gilbert and others on 30 April 2008 saying that TIE should give nothing further away at all (CEC01332431). As described above, throughout the entire period of late January through to this date I had been attempting to support TIE through putting down markers against further concessions. My job was to advise the client what these concessions and price increases meant legally during the post-preferred bidder set of negotiations. First of all, it meant putting public money into a price that TIE had already told everybody was fixed. You are putting additional money into a situation where the bidder was preferred. It was an EU negotiated procedure, a public procurement, in which you are allowed to have discussions and a certain scope for adjustment to close out the contract. But procurement law is very clear and there are certain issues that are 'red' zones, as far as alteration is concerned. Perhaps the reddest

zone is pricing and agreeing to BBS demands for more money created procurement risk. That is why, as described above, with the Rutland Square Agreement, I had attempted to assist TIE to draw a line in the sand as regards significant movement away from the BAFO bid pricing and risk allocations. But both TIE and BBS had ignored this agreement. Now TIE appeared intent on awarding a contract with only limited regard to procurement risk and BBS were taking full advantage of this to ambush for more concessions and more money.

7.489 The behaviour that BBS was exhibiting was obvious. They were using, as any contractor would to some degree, their preferred bidder status and the fact that they knew that TIE was under pressure. But this was very blatant and continuous. At this point, TIE was intent on awarding the Infraco contract and had already been making press announcements about PSCD for the trams. We were in another phase of the many phases during March and April when a contract close deadline was set by TIE. To BBS this was just TIE crying wolf. BBS controlled the timetable. I was trying to set a platform for TIE to rip this back off them into TIE's hands, giving TIE some leverage to say "*we are the client here. It is our procurement programme. Behave or risk losing your preferred status.*"

7.490 My email states: "there is in the offing an appreciable chance BBS will exert more pressure on TIE with reasons to increase the Contract Price by further amounts. All points on the contract terms should, in my view, be negotiated on the basis that TIE gives nothing further away at all and BBS accept TIE positions on every important point." In other words, if any increase to the contract price was to be agreed in closing out the Infraco contract, nothing else in the contract, for example in terms of BBS trying to change the DRP provisions and trying to get a better deal on Clause 80 should be conceded. The email is brief but its context is that it was written by me to TIE's most senior people at the end of a period of four months in which I had been providing advice to TIE daily including on the various issues discussed above. I sent a further email in a similar vein to stimulate TIE to resist BBS's tactic.[125]

7.491 No procurement challenges eventuated but the other part of my caution to TIE proved true: BBS simply said they needed more money or further protection. They cited issues such as TIE having procured the trams from CAF which gave them an unquantifiable integration risk or that they had found subsoil conditions that left them exposed because the SDS design for reinstatement of the road surface was not available or that there were unquantifiable quality issues with the SDS design. I remember, in particular, one late night telephone call with TIE and CEC about procurement risk and advising that permitting a preferred bidder to adjust its offering and change its price is a very clear source of procurement risk.

7.492 **Kingdom Agreement – May 2008 (BBS's final price increase demand)**

7.493 BB made a final price increase demand shortly before contract close. BB and Siemens Germany came to visit TIE. I learnt from TIE that Richard Walker was saying that BB had made a calculation error in their original bid and needed another £16m to £17m. On 9th May 2008, TIE acceded to

[125] See paragraph 7.512

the demand and a further £9 million was added to the price following negotiations in the Kingdom Room at Citypoint.

7.494 I recall discussing in a TIE management group meeting a final ultimatum letter to the BBS consortium that they would be de-selected if this price increase tactic continued. It was an all day Sunday session, with me producing various analyses and advices and then counter proposal letters. I recall saying to TIE management that there was a risk that Siemens would come back again for more money too if TIE gave BB what they wanted. I would place this meeting as the weekend of 3rd/4th May 2008 - but this was a very busy and intense period indeed and so my memory on time sequence may be slightly inaccurate.

7.495 I had never before come across a bidder being allowed by a client to negotiate like the BBS approach on the Project. I said so to TIE management.

7.496 TIE's recommendation to CEC was essentially to agree this price increase demand, provided it could be contained within a £12 million ceiling. I had no input or knowledge of why this number was acceptable to TIE. TIE's analysis appeared in TIE's draft "Final Deal" paper which Graeme Bissett sent out by e-mail at 1.26 am on the morning of 12th May 2008, two days prior to Close.

7.497 I warned TIE management that extreme care would be needed on how to explain this. This advice was given verbally. I gave the advice to the most senior managers in TIE, point blank. The break-out meeting in on 9th April 2008 took place in a small windowless room on the first floor of TIE's offices that could be accessed by back stairs from the second floor. This was during a break-out from the discussion with BBS on, I think, pricing generally and then leading into various outstanding issues. I had asked for the break–out because BBS were still looking for more money.

7.498 This further price demand was first tabled by BBS at a meeting on 9th April 2008. It included an additional amount for the Network Rail immunisation works. This worried me immediately because these vital third party accommodation works had been presented in October 2007 by Matthew Crosse to the TIE Board as an important price differentiator (within TIE's BAFO bids evaluation) for the BBS appointment as preferred bidder. How was it that BBS' price for this was being revisited? Here, six months after BAFO, I was stressing again and forcefully to TIE that BBS already had SP4 which contained clear protections and qualifications against adverse outcomes for BBS.

7.499 I remember clearly that there were not enough chairs in this room, which had been used by SDS design staff as a kind of store, and I stood. Steven Bell, Jim McEwan, Dennis Murray and possibly Geoff Gilbert and I went into the meeting room. The bottom line was: how much risk did TIE run by acquiescing to BBS's demands for more money and was TIE prepared to entertain this? I advised that unless TIE could structure the response on how some value was being obtained in exchange (and even then an argument could be run that the other bidder would have given a better exchange), there was very great vulnerability to procurement challenge and it was yet another concession to BBS ambush tactics.

7.500 I also reminded the senior TIE managers present that SP4 already contained numerous relief/ compensation/ arguable risk re-allocation points for BBS, on civils work especially, and that, as TIE knew, it was biased in favour of BBS with a certainty of BBS deploying SP4 – as the emails of 31st March about V28 already showed. So -BBS was seeking another increase to its headline construction price despite the strong protections for them in SP4.

7.501 Jim McEwan's response was that this was the "last chance saloon" to close the Project. He was concerned that there had been too many occasions where TIE had announced a date to BBS for contract signature and then had not achieved it. His sense, he said, was that political will could be wearing very thin.

7.502 Richard Walker had given TIE some forewarning on this by indicating that BB had made an error in its pricing calculations and was asking to be permitted to correct this. From memory, there was a list of items for which BBS (mainly) were seeking an additional £16 million – some were presented as necessary to help BB correct the bid calculation errors. There was, as I say above,[126] an exchange of letters/emails with counteroffers made by TIE and BBS replies.

7.503 It was not my responsibility to negotiate contract price but my first reaction was to say to TIE management, in essence: "Look there is so much cotton wool in this contract to protect BBS, can you really concede more? I recommend TIE goes back to the Rutland Square Agreement and dig in behind this, saying to BB that this had been signed up in good faith to be a binding commitment to close off any further cash grabbing". Steven Bell, primarily, was instructing me and seeking input from me on this new move from BBS. I do not remember what Willie Gallagher or Jim McEwan's position was on this but I did say forcefully that TIE should try and collectively think what TIE could require in return. I was fighting to come up with ideas and I remember being pretty agitated with Steven Bell, Jim McEwan and Graeme Bissett present, saying words to the effect of: "Come on, guys, we have to fight back here and make some serious demands in exchange". The reply was more or less to the effect: "what would you recommend? " Part of my reply is stated below.[127]

7.504 I simply could not walk through forty-three detailed SP4 engineering and pricing assumptions to see how TIE could chisel back concessions already made. I asked Steven Bell directly if this was a possibility. He said he would reflect but time just ran out. I came up with the idea of requiring BBS to escrow £5 million, I believe, to cover off the uninsurable economic loss, which CEC had been very concerned about. This was agreed at £3 million, with TIE entitled to keep any residual money in escrow when the trams went into service. BBS agreed and also later complied with the escrowing of the funds. But as part of its answer to BBS's ultimate £9 million price increase demand, a day later TIE immediately conceded its entitlement to keep residual escrow funds, valued at £1million.

7.505 With Close date at stake, TIE was simply resigned to make the additional concessions.

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[126] Paragraph 7.494
[127] Also at para 7.512

7.506 I received an instruction from Steven Bell on 9th May 2008, following the meeting between BBS senior German management and TIE senior management at which BBS said that the Infraco Contract required to contain a so-called "incentivisation" payment that had been agreed with BBS. I had no knowledge of the discussions surrounding this but together we drafted a three page document which set out what BBS and TIE had agreed at the meeting. It effectively conceded another £9 million to BBS onto the construction contract price.

7.507 The incentivisation mechanic can be found at Clause 61.8 of the Infraco Contract. The payments in that section total £4.8m. They are not an incentive in any normal sense. "On-time" sectional completion bonuses on large projects are not unusual but are calibrated to some benefit or future saving that the employer will recover over time. I asked TIE if these would be withheld if Infraco were late against the sectional completion dates through its own failures. The instruction was "no", they would be simply delayed until BBS achieved actual sectional completion. I asked how TIE saw this operating in relation to the liquidated damages provision – e.g. on the one hand, a standard running debit obligation against the Infraco for being late against sectional completion and on the other a guaranteed bonus payment on actual completion. It had taken TIE (Bob Dawson) four months –with repeated input and interrogation from Phil Hecht - to produce cogent LADs calculations. He had left the Project and there was no time to discuss this further as Close was within two days and I knew that Steven Bell was carrying out TIE management's wishes.

7.508 I was in no position to comment on the financial impact of these matters on TIE's overall budgetary authority at Close and it was not DLA Piper's responsibility to do so. In Q1 and Q2 2008, TIE did insert commercial benefits into the draft Infraco Contract with absolute clarity so that BBS was improving its commercial position without TIE receiving a corresponding benefit. For example, there was a 'sweetheart' deal done in relation to Phase 1b which was the Roseburn to Granton loop. In 2009, BBS were paid money – from memory, £3.2 million – to prepare essentially a rudimentary estimate for the cost of Phase 1b. I do not believe there was ever any intent to do Phase 1b and TIE made it clear to me that BBS had provided a guesstimate. It was included on TIE's specific instruction from Steven Bell in the Infraco contract in Clause 85.1 and Schedule Part 37. What Clause 85 says is that if phase 1b did not commence by July 2009, TIE would make a payment in compensation for the estimated cost included in BB's bid for phase 1b. That event ultimately happened. Phase 1b was not commissioned, nor any procurement commenced by July 2009 so BBS was paid this money in July 2009, I recall. Interestingly, it is apparent on TIE contemporary documents on the Inquiry archive that neither Steve Bell nor Willie Gallagher knew or understood that this is what TIE had agreed in August 2007 until early May 2008 – when Steven Bell had to ask Geoff Gilbert by email what he and Matthew Crosse had agreed 9 months earlier with BBS in August 2007.

7.509 **Infraco Contract Close – 14 May 2008**

7.510 I attended a number of urgent meetings at TIE's offices in late April early May 2008. Willie Gallagher sought the collective senior TIE management view on how to proceed. He was also in regular touch with CEC senior officials. The predominant view was that dropping BBS and

returning to the reserve bidder was not attractive[128]. I pointed out that TIE had issued a Notice of Intention to Award – and not awarding the contract would at least require explanation to mitigate the possibility of Tramlines formally complaining. Jim McEwan voiced the opinion that if TIE wanted to conclude a contract, it was now or never; he opined that there was a political high tide of support and as that receded, so the chance that the Project would be placed on hold or cancelled by central government increased disproportionately. His view was based on the various announcements and press briefings that TIE had made along the way starting in December 2007, prematurely creating the impression of overall readiness. More time to iron out flaws before contract signature, TIE management seemed to me to be reasoning, would simply allow BBS more time to think of further price increase demands. But there was no new thinking on how to compel BBS to move in step with TIE to close and desist from more negotiating.

7.511 I advised TIE very clearly that BBS had side-lined the Rutland Square Agreement - in part because TIE had not used it - and the mounting evidence was that BBS would be very determined behind any contract. I essentially repeated the warnings I had given TIE senior managers on 31st March 9th April and again on 30th April 2008.

7.512 Throughout these final negotiations I advised TIE that, at minimum, it needed to get balancing factors or concessions in their favour in exchange – otherwise there was a particular vulnerability to procurement challenge. This was especially so if TIE kept making such obvious financial concessions. I recall both DLA Piper notes to and discussion with senior TIE managers about how they might structure demands back to BBS in order to redress the balance: notably, a 14 point email I sent to Willie Gallagher in early May 2008.

7.513 I did not see TIE remonstrating very much with BBS about pace to close. My view is and was that despite going through the motions of discussing options, TIE management never had appetite for dropping BBS from preferred bidder status because of TIE's overwhelming desire to reach Close.

7.514 There is a sentence in TIE's Final Deal report dated 12th May 2008 saying that TIE decided to use "*tough tactics*" in response to the BBS demand for an extra payment. TIE may have talked tough but, as that report demonstrates in its later sections, TIE ultimately gave BBS virtually all of what it wanted financially and commercially. Unknown to me, TIE had already agreed to pay BBS an unsecured advance payment of £42 million[129]. How this decision sat with the description of 'tough tactics' is beyond me.

7.515 I was never sure where Willie Gallagher stood on this subject, as I have said, for he maintained publicly that he was not under pressure to close the Infraco Contract. The relief that he expressed to me on the 4th floor atrium at DLA Piper Piper's Rutland Square offices on the day of Infraco Contract signature told me otherwise.

[128] See paras. 7.538 et seq
[129] See paras. 7.563 et seq

7.516 The Infraco Contract was signed on 14 May 2008. The novation and the trams supply and maintenance agreements were also signed on that day, as well as the entire suite of important ancillary documentation.

7.517 **Clause 80**

7.518 Another major piece of negotiation which was taking place in the last days of run up to Infraco contract Close was over the contractual change provisions contained in Clause 80.

7.519 Clause 80 was, in its original form, produced by DLA for the ITN suite drafted for Infraco contract. This was a completely normal legal function. Its formulation and function was approved by TIE - Ian Kendall, the Project Director, who had very strong views about the type of change provisions he wanted. Ian of course left TIE during the course of 2006.

7.520 Clause 80 was not simply a lawyer's invention. It was a clause that had other professional eyes going over it before it was put to the market. It would almost certainly have been looked at by Mott MacDonald and Faber Maunsell during that phase when the procurement documentation or the ITN for the Infraco contract was being developed. I do not remember exactly when Doug Blenkey (Faber Maunsell) and David Hands (Mott MacDonald left the Project. They were certainly around for the building up of the ERs and for meeting with us during late 2005 and, early 2006. Since the Bills did not get formal Royal Assent until the spring of 2006, Faber Maunsell's commission and Mott MacDonald's commission, which were line 1 and line 2 respectively, probably finished sometime in the summer of 2006. There were quite a lot of meetings involving DLA, Faber Maunsell and Mott MacDonald about the ERs and generally about the contract and how the contract would be put together in that phase of assembling the MUDFA, Tram Supply and Infraco ITNs documentation, with the emphasis for DLA Piper's role being the production of the ITNs and the draft main terms and conditions of the contracts.

7.521 There might have been different timelines, or a slightly different process for applying for a Change Order, but Clause 80 was based on one or more standard forms and used language and a change mechanic that sat very much within standard approach to construction and engineering contract drafting. It provided for TIE to manage the process since TIE had opted not to have an engineer appointed to manage the Infraco Contract. TIE was to carry out that function itself. The original Clause 80 included in the draft Infraco Contract issued to bidders with the ITN suite in autumn 2006 I believe, had its origin in the Leeds Supertram draft EPC Contract. It was based, in brief, on the approach to change/variations in ICE 6th and 7th Editions (Design and Construct). The principles are to be found in the ICE models Clauses 51(1) and 52: where a variation is required by the Employer, the contractor is to produce a substantiated estimate for agreement by the Engineer (in this case, TIE). Where no agreement can be reached on the proposed value of the variation and any related extension of time, the Engineer decides on a provisional valuation and/or rates and the contractor must proceed with the work.

7.522 Until April 2008, Clause 80 largely stayed as it had been at ITN issue date. Suzanne Moir was Iain Laing's number two at Pinsent Masons and was the lawyer who was doing the main contract

negotiations opposite me. I believe around mid-April 2008, she came up with a proposed wholesale amendment to Clause 80. I rejected this outright because it broke both the rules of the Rutland Square Agreement and the ITN. Lesley McCourt and Jonathan More had tinkered with the clause in 2007 during the period when DLA Piper was not instructed, but I do not recall this was anything fundamental. Then five months after BAFO, BB, through Pinsent Masons, basically proposed this complete re-write of the clause. I reminded Suzanne that her client had had ample time to mark up and to discuss the contract. I told her I was not accepting her attempt to re-open Clause 80 and that I had no instructions to accept an entirely new Clause 80, forbidden under the Rutland Square Agreement terms. I reported this to TIE Project management and said why I recommended TIE should not entertain it.

7.523 Geoff Gilbert then had a series of face-to-face meetings and phone calls with Richard Walker of BB, which I would place very shortly before Geoff left TIE in late April 2008. Geoff told me that Richard Walker was concerned about the link between Notified Departures (INTCs) and Clause 80. This was vague and I said to Geoff Gilbert that TIE had already compromised significantly to appease BB's positions regarding SDS and the state of their design production and that TIE h agreed Clause 4.3. At this point, only a matter of days from the then intended 10th May 2008 Close date, there was already in place an across-the-board agreement that lawyers were only to be drafting, not negotiating terms anymore. Without this, there was a real risk of compromising the job of having the Infraco Contract suite QC checked, fully proofed, printed with all its 43 Schedules and ready in time. I had already said that Clause 80 was a standard change mechanism and my reaction to Suzanne Moir was to the effect: "no, it was not going to be changed because it has sat for a year with no approach or communications from you on it" and cited the Rutland Square Agreement.

7.524 Geoff Gilbert then came back to me with his draft. I reminded him of the Rutland Square "line in the sand" on contract provision negotiations, but he wanted TIE to have complete control on the change mechanism. I advised Geoff specifically what his changes to Clause 80 meant. I advised him that the way the Clause was drafted could result in BBS abusing it, because there could be a situation in which they simply submitted their estimates and were not obliged to continue worki until TIE agreed their estimates or opened a DRP. That is not how Clause 80 was originally drafted. Geoff was very clear that he and TIE were extremely concerned about having BBS do work with no agreed pricing. In other words: BBS wanted to submit a claim for time and cost and not continue with the works until it was clear what the works were and what the estimate was. He and TIE were concerned about committing to what might be a somewhat open-ended position. But the original drafting was essentially: TIE had the right to instruct and say "ok, we have got your estimate. We do not agree it. We will pay you at this interim rate. In the meantime, Get on with the works", but TIE did not want that. They wanted a position where they could say "give us your estimate and we will tell you when we want you to move on with an agreed cost." That is the reason why the contract can be read that BBS is not obliged to work pending a formal priced TIE Change Order (see para 7.528 also).

7.525 I tried to get Steven Bell and Geoff Gilbert to talk to each other about this issue. By this time, I knew Geoff was leaving TIE and that Steven's team would be operating Clause 80 within days of contract signature. But I do not think that conversation took place. The result was that Geoff's wording went in as TIE's position on Clause 80. Ultimately, it was not my responsibility to invigilate on TIE managers' communication inside three working weeks before contract close.

7.526 I am referred in Question 23 to the email from me to Tony Rush and others on 3 March 2010 (CEC00619254) in which I acknowledge that the original clause 80 was produced by DLA for the ITN contract suite in 2006, but note that it was heavily negotiated in 2008, What I say in the email is broadly correct. It does not acknowledge (as the Question puts to me) that the final version of Clause 80 was produced by DLA Piper. It in fact explains part of what happened to the version of the TIE Change provision (Clause 80) that was produced by TIE's commercial director, Geoff Gilbert, after one to one negotiation with Richard Walker of BBS in April 2008 (as described above). This TIE negotiated drafting was included in the Infraco Contract on TIE's express instructions as an agreed replacement for the original DLA Piper drafted provision.

7.527 I see that Brandon Nolan of McGrigors is copied into this email (CEC00619254). TIE had already indicated that they (or possibly CEC, I do not know) wished to instruct McGrigors (in whatever capacity McGrigors were appointed) to run the Carrick Knowe Bridge adjudication. I am talking about Clause 80.13 specifically. I am telling the people who are copied into this email, in particular Tony Rush, that Clause 80.13 was something that I attempted to salvage from TIE's April 2008 redraft of Clause 80. The language, as I say in that email, is inelegant. That language was looked at by Richard Keen QC (Dean of Faculty at the time and Senior Counsel) whose view was that clause 80.13 supportive of TIE's position and it should be put forward in the adjudication. For whatever reason, Lord Dervaird disagreed. That is the context of this email.

7.528 I now compare the original drafting of Clause 80 in CEC01650760 – the draft Infraco Contract as issued with the ITN at 8th March 2007 and prepared by DLA Piper - to the final version of Clause 80 negotiated, revised and drafted by TIE itself. I comment on the key points only:

7.528.1 TIE's April 2008 drafting simply removed TIE's ability (acting reasonably) to instruct Infraco to proceed with a TIE Change or Mandatory TIE Change (i.e. a Notified Departure) before any DRP determination about a disputed Infraco Estimate for the change. This TIE entitlement was unequivocally stated in the original Clause 80.10 DLA Piper prepared: the provision was drafted to be operated so that TIE could ignore BBS's delinquent/unacceptable Estimate and instruct BBS to proceed with the TIE Change on the basis of a provisional estimate prepared by TIE itself. Either Party could refer that provisional estimate to DRP but, importantly, BBS could not refuse to implement the TIE Change. As discussed above, this provision is based upon the approach in ICE 6th and 7th Edition Clauses 51 and 52 where the Engineer (on the employer's behalf) has the right to substitute his valuation of a change/variation if the contractor puts forward an unacceptable estimate and then instruct the contractor to proceed.

7.528.2 This very standard client control mechanic was replaced by TIE's April 2008 drafting for Clause 80.15: this removed TIE's right to prepare its own provisional estimate and instead required any disputed BBS Estimate to have been submitted to DRP before TIE could instruct Infraco to commence any work on the TIE Change from the Notified Departure in question.

7.529 As I have said at para. 7.524, when I pointed out the impact of these changes to Geoff Gilbert in April 2008, his comment was that TIE did not want to be exposed to a situation where BBS would be carrying out work without pricing certainty. We discussed my views on what BSC's approach to the production of Estimates was likely to be: notification of an INTC, then basic estimate first, then more detailed if TIE pressed contractually, with the process requiring resolution through DRP if TIE still considered an Estimate was unsatisfactory. Meanwhile work affected by the INTC would halt/not start.

7.530 I was not clear why Geoff had agreed these changes in his meetings with Richard Walker since, as I said to him, I did not see ostensible benefit to TIE. It was left for TIE to consider, again a possi discussion between commercial and engineering. I heard nothing more and as at 30th April, drafting on the Infraco Contract froze.

7.531 This alteration to Clause 80 proved to be at the core of TIE's post contract award problem caused by the incomplete, underdeveloped, non-consented and/or missing SDS Design and BBS's approach on Notified Departures. BBS submitted Estimates that were unacceptably high or vague, or simply did not submit an Estimate. TIE then had no means, other than commencing DRP, to require BBS to proceed with the works. Given the volume of Notified Departures coming from BBS's view on SDS Design, the log jam was inevitable.

7.532 There are a variety of other amendments to the original DLA Piper drafted Clause 80 which TIE agreed. I would categorise these as: (i) diluting or softening BBS obligations in relation to production of information under response times; (ii) adding to BBS' ability to make prolongation/disruption claims; and (iii) introducing credible and necessary alignment with the concept of Notified Departures and the potential effect of TIE Changes on long term maintena obligations (specifically from Siemens' perspective).

7.533 My consistent advice to TIE in Quarter 1 and Quarter 2 of 2008 (see, for example CEC01496537 and paras. 7.321 *et seq* and 7.488 *et seq*) and the clear intent of the Rutland Square Agreement to prevent further commercial concessions to BBS, all show that I did not agree with what had been done in (i) and (ii) above or see any need for TIE to have agreed these. I believe, by this time – late April 2008 – after the new Clause 80 drafting had been agreed by TIE, I had had a short discussion with Pinsent Masons/Biggart Baillie on (iii) above to ensure these provisions did not overstep what was required and I had insisted, despite resistance from Pinsent Masons, that the final words in Clause 80.13 were added to try to preserve the intent of original Clause 80.10 and the control it gave TIE.

7.534 The time limits in Clause 80 had been chosen by TIE itself (Geoff Gilbert) as I have explained above.[130] There were no problems with clarity over time restrictions or limits for the provision of Estimates and requests for further time to provide Estimates - nor were these provisions in any way unusual as regards time for parties to act; a number of these time limits had been adjusted by TIE to be more favourable to BSC.

7.535 It is my professional opinion that if Clause 80 had been left as it had been drafted at ITN, it would have protected TIE's interests better. That is why I had rejected Pinsent Masons' initial move to redraft it entirely. TIE elected to change the clause themselves and I alerted Geoff Gilbert to the issues at the time. But the issue which developed was not about time limits, it was that BBS began simply disregarding these provisions altogether.

7.536 What I can say is that any Change provision - and in particular one administered by a quantity surveying team as small as TIE's - would have been seriously challenged by the approach that BBS took. SDS design was dissected top to bottom for variation/development from BDDI and any findings on differences presented as an INTC without compromise. I discuss the disputes which arose below.[131]

7.537 **Reserve Bidder – Tramlines**

7.538 The only card you have as a client once you have selected a preferred bidder and down-selected the other bidder is that you could threaten to return to the other bidder. TIE right to do so was absolute under the ITN rules.

7.539 I was not asked to advise TIE in depth on the option of TIE dropping BBS from preferred bidder status and going back to Tramlines, the reserve bidder.

7.540 When BBS had asked for more money in the Rutland Square Agreement, the option of going back to Tramlines had been briefly considered by TIE management, but without any enthusiasm. I advised that TIE had grounds for dropping BBS. This advice was given verbally but forcefully at a meeting attended by CEC officers Alan Coyle and also, I believe, Donald McGougan and Gill Lindsay (the meeting had in fact been called as a result of Siemens' suddenly announced position on Project insurance and third party economic loss claims). However, TIE was persuaded by arguments from BBS that it was getting a fair trade. The explanations provided by BBS were in any event technical, commercial, financial or programme related, not legal points. I gave TIE high-level advice in that meeting that, if it sought to switch from BBS, there would be a process with delay because Tramlines were unlikely to just come back on board but rather would have wanted a period for due diligence, and that I considered the legal component of Tramlines' own BAFO had been very heavily qualified, with the Infraco contract mark-up very incomplete on major points. I was not in a position to advise immediately what I thought Tramlines' attitude would be if TIE approached them.

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[130] Paragraph 7.524
[131] See section 8

7.541 In the Close Report I believe there is some mention of how TIE had examined this option. The report said something along the lines of "were we to have thought about using a reserve bidder, it would have had consequences". At this point, I was asked by TIE my opinion on bringing the reserve bidder, Tramlines, back into the picture. But I had no idea at that point whether Tramlines' project team still existed, underpinned by a consortium arrangement between the three participants, Bombardier, Laing O'Rourke and Grantrail. When you down-select a consortium or joint venture, usually it evaporates pretty quickly. They had a standing bid team in Edinburgh and a standing bid team in Manchester. To service a doubtful chance of success on a project is an overhead that most consortia are not interested in. Once a consortium loses a bid; they dissolve and move on. The idea of that bidder drawing itself back together again was not for legal advice but common sense based on knowledge of how bidder consortia form and the glue that holds them together. On my best estimate, it would have taken some persuasion, and probably three to four months, to get that party back into the ring with TIE. There would therefore have been a cost and time impact for TIE to get them back into play but without perhaps confidential discussion with Tramlines, I do not believe an assessment was possible.

7.542 **Commercial and Technical Infraco Schedules**

7.543 Many of the core contract schedules, which were TIE's responsibility, took an excessive period to materialise. No time had been spent by TIE – so far as I could judge – during May to August 2007, when DLA Piper had been stood-down, on developing these documents and this lost opportunity greatly increased pressure on TIE personnel in the critical two months after Notice of Intention to Award on 18 March 2008. It meant that DLA Piper were constantly chasing TIE for these parts of the Infraco Contract and BBS could dictate how and when they replied to TIE's requests. In fact, in early May 2008, during the short freeze declared in order for legal diligence to be done on the Close documentation, TIE had still not produced key Infraco Contract financial and technical schedules. TIE was not able to convince BBS to engage on these tasks methodically where information needed to come from BBS. This resulted in BBS having too much control over the Close process. Examples were:

7.543.1 *Liquidated Damages* – Bob Dawson was in charge of the calculations to set liquidated damages for Infraco sectional completions. The contract needed to provide for sectional release. The sections were not as one would expect on a standard construction contract, but rather related to progressive tram supply and certification for use and tram trialling runs on the completed system. I do not pretend this was an easy task, but Phil Hecht and I spent a great deal of time patiently scrutinising Bob's repeated efforts and finding that the timings, sectional definitions and damages calculations and concepts did not hold. We needed this to be correct, not least to avoid the inevitable challenge from BBS and also a situation in which the clause was unenforceable at law on account of lack of sense or not being a genuine pre-estimate of TIE's damage in the event of breach by BBS;

7.543.2 *Milestone Payments* – The proposed method of payment for the Infraco Contract did not emerge until very late indeed in the process. I recall seeing the first full draft of the document to be inserted into the Infraco Contract about a week before contract signature. TIE clearly considered that they had the expertise to produce this documentation without input from external financial or quantity surveying experts (Schedule Part 5 of the Infraco Contract). But their difficulty in getting this key document ready did not inspire confidence and part of this was the multiple commercial tasks which fell to Dennis Murray at this stage;

7.543.3 *Design Review* – Schedule Part 14 sat unread and totally underdeveloped for many months, yet TIE (and CEC) knew that this enshrined their ability to have proper oversight into SDS's design production post novation. It was not until Damian Sharp was recruited in early 2008 that we received any TIE manager's commentary on draft Schedule Part 14. But Damian was neither an engineer nor design consultant and this contractual schedule, the counterweight to SP4 and PA1, was neglected and used scarcely by TIE, if ever at all; and

7.544 Less than a month from Close, TIE's email 22nd April 2008 regarding its own QA on SP4 shows that the Milestone Schedule and the important list of BDDI designs are not ready and that Provisional Sums have not been calculated.

7.545 **Value Engineering**

7.546 I recall that Value Engineering was discussed at the 5th February and 11th March 2008 meetings I attended and that it had been commented upon in the late February SP4 drafts. The idea of value engineering had begun at BAFO: to present some construction pricing as qualified by a potential for BBS to achieve savings for TIE. I am not sure what TIE thought it was getting from this approach.

7.547 From what I saw at SP4 meetings, Scott McFadzen, the Bid Director at BB was extremely reluctant to make any firm commitments. The result was that most, if not all, the Value Engineering "commitments" were unlikely to eventuate to TIE's benefit or were under BBS's control, with no sanction or particular incentive attached to them. BBS could say that they had looked at options but that they couldn't be done and therefore no programme acceleration or cost saving could be made. I advised Steven Bell at the time that that is how BBS would behave but it was a financial/technical matter outside DLA Piper's remit. DLA Piper had no role in advising (nor any expertise in) what were or were not realistic savings that BSC could target during construction.

7.548 I did not know if Geoff Gilbert was working with Steven Bell on this or not. This was disturbing to me since Geoff was at the centre of TIE's pricing strategy and VE was being presented as if it were real and actual cost savings, not what it was: just the possibility of savings if BBS felt like

investigating the option. In the end, I believe that very little if anything at all of the £13.8[132] VE came about.

7.549 **Clause 10 and Schedule Part 14**

7.550 Schedule Part 14 in the Infraco Contract was to be the design review process post novation of SDS. This process was a critical control mechanism and part of what I considered TIE would be able to use to prevent what Jim McEwan called "gaming" in his email of 31st March 2008.[133] It sat for months without any detail in it. I came to realise that this was because TIE had no one who was responsible for oversight of SDS production post novation and the post contract award function of handling and enforcing TIE's input into what SDS and BBS were doing to complete the design. It was not until early 2008, when Damian Sharp joined TIE from Transport Scotland that I saw TIE had anyone specifically responsible for working on this key contractual device. Damian was able but I do not believe he was either a designer or a quantity surveyor or an engineer. This was an example of how TIE's resourcing was not suited to the function required. I am aware that Tony Glazebrook was TIE SDS contract manager but I had little, if any, contact with him.

7.551 I recall several conversations with Steven Bell and possibly Dennis Murray after I learnt that Damian Sharp was, I believe, supporting analysis and improvement of the SDS-TIE-CEC Planning interface on design approvals. I highlighted the fact that Schedule Part 14 would need to be used by TIE in conjunction with the Client's controls through Clause 10 of the Contract and that I needed TIE's detailed input on Schedule Part 14. This was probably two to three weeks or so before draft SP4 appeared in February 2008.

7.552 On this very important point, I had written to Denis Murray (copying Steven Bell and Geoff Gilbert) on 4th February 2008 about BBS's absolutely clear position on CEC approvals risk. CEC had apparently wanted to raise various design approval matters and I gave the following caution:

7.552.1 "BBS are very sensitive to the issue of CEC seeking to protect itself from the delay emanating from prior approvals and design approval generally. Thus any language which is geared towards placing detailed or subjective conditions on their ability seek relief faces tough objection..."

7.552.2 I went on to say that a way through and a clear mitigant was Clause 10 and Schedule Part 14 – the Design Management Plan for post novation. From my perspective, TIE and CEC simply forgot, ignored or underestimated this advice – which I repeated numerous times to responsible TIE managers.

7.553 When that happened, it became absolutely imperative that TIE and CEC Planning focused on Clause 10 and Schedule Part 14 so that these could work as at least a form of counterweight to PA1 in SP4 and BDDI. That is why, on 7th February 2008, I inserted a reference (at point 2.2) to this Schedule Part 14 being agreed under the Rutland Square Agreement. I repeated this stress on

[132] See paragraph 7.217
[133] See para 7.298

the value of these provisions to TIE as a condition in the document produced on 9th May 2008 to record TIE conceding the further last-gasp price increase to BBS.

7.554 It is absolutely clear that TIE understood the importance of this as it is specifically mentioned in their Final Deal paper dated 12th May 2009. But I never saw TIE using the provision to monitor SDS post novation.

7.555 On TIE's instructions and with their understanding, the Infraco Contact stated clearly (Schedule Part 30 at 1.1 and 1.2): "BBS Proposals for the Civil Works are the SDS Design to be developed and finalised to Issued for Construction status under the Design Management Plan Schedule Part 14."; But also: "The Design is at present incomplete or not issued to BBS for some sections of the Works".

7.556 And so: BBS's Infraco Proposals (essentially the scope of the civils works) were contractually accepted by TIE as reliant on an incomplete or non-existent design that was going to be developed and finalised after Contract award. But note: "under the Design Management Plan Schedule Part 14". This was DLA Piper's addition – not TIE's - to try to combat PA1 at a practical review and checking level. This is why I was insistent that TIE and CEC recognised and used Schedule Part 14.

7.557 **DRP Provisions**

7.558 I have been asked as part of Question 23 to explain how the DRP provisions were agreed. These were one of the last provisions in the contract to be discussed and negotiated. In 2006 I had involved DLA's contentious construction specialists when preparing the DRP provisions to put in the Infraco contract suite for the ITN issue. I would need to refer again to internal DLA Piper documentation to refresh my memory on the genesis of this provision. There was quite a lot of discussion at the time about the HGCRA 1996 which was a statute that came into play with construction contracts and interfered with the parties' freedom to agree bespoke contractual DRP provisions. HGCRA 1996 had to be dis-applied in order for certain components of the DRP provision to be free from certain statutory intervention and requirements. I do not remember the detail of that discussion. I do recall that it was a pretty standard provision. Since I myself had considerable experience in arbitration and dispute resolution on construction contracts, I felt TIE's interests were well safeguarded by this provision and it allowed for the filter of senior management review as well as mediation (both of which were used by the Parties).

7.559 During 2007, BBS were unwilling to engage on negotiating and settling the DRP provision. It was reasonable to surmise that this was because: (i) they saw it as an essentially lawyer-to-lawyer discussion and did not want to spend money and increase their bid costs on this before winning preferred bidder status; and (ii) they had no specific issue to raise and simply wanted to hold closing the point 'in limbo'. I inserted specific reference to closure on the outstanding DRP provisions negotiation to prevent any erosion of the drafting we had used (See February 2008 Rutland Square agreement Clause 2.6. But since TIE did not stand behind the Rutland Square agreement, this leverage was lost.

7.560 Pinsent Masons were clearly instructed to ignore the Rutland Square agreement. They just came and said "we want to talk about things". They brought a contentious construction specialist to a meeting to debate a number of quite technical points. They argued about the re-application or the application of the HGCRA. I rejected their arguments. In the end, there was no significant change to the DRP provision following the negotiations. It sat pretty much the way it had been in the Infraco contract. I distinctly recall raising my voice with Suzanne Moir (and later apologising) in a meeting in mid-April 2008 when she indicated that BB wanted to re-draft the DRP provisions. I just said "it is not happening". At that point we were 24 hours away from a moratorium, that all the lawyers needed, to do due diligence on the contract suite. It was out of the question that we would still be negotiating these things. Siemens, through Biggart Baillie, expressed no interest in negotiating the DRP provision.

7.561 I do not recall being consulted at any point by TIE regarding any difficulty in the operation of the DRP provisions, either in practice and its mechanics and hierarchy of referrals, or because of specific legal points being taken by BBS. In the end, the DRP provision did not change in any material or adverse way from how it had been drafted originally in the ITN suite and it served the parties without issue.

7.562 **Advance/Mobilisation Payments – Inquiry Questions 67 and 89**

7.563 I do not know why an advance payment was made to BBS. Neither I nor anyone else at DLA Piper had any input into TIE's decision to make advance payments to BBS. DLA Piper was never asked for advice on this. I was not informed by TIE about any distinction as between advance costs or mobilisation payments which TIE intended to make to BBS, nor was I ever informed that TIE had such an intention. Schedule Part 5 of the Infraco Contract appeared from TIE about a week before contract signature, with instructions to DLA Piper to simply insert it.

7.564 This is also obvious from my email to Stewart McGarrity on 19 February 2010 (CEC00111697) where – nearly two years after the Infraco Contract signature - I had been requested to provide a paper on this subject. It is clear that I needed to ask for TIE's instructions as to the basic facts surrounding its decision to make the advance payment to BBS before I could advise. I was never asked by CEC Legal about this matter and I have no knowledge of when or in what ratio and modality TIE made the advance payment to BSC.

7.565 It was not until some time after Infraco Contract award that I learnt that TIE had agreed and paid an advance payment of approx. £42 million to BBS. I do not know what explanation was given to CEC and to Transport Scotland regarding this draw on grant funding. I recall Stewart McGarrity commenting on this decision during a TIE management meeting, well after contract award. I found it very odd that no security had been required from BBS in respect of this large payment.

7.566 If I had been consulted by TIE during commercial negotiations with bidders, I would have most certainly advised TIE that it should require an on-demand advance payment bond at a suitable level or at the very least an increase in the amount of the on-demand performance bond. That bond, in line with the normal market approach, was roughly 10% of the estimated civil construction

price at the time. Before BAFO, when Geoff Gilbert and I were negotiating the contract, I said to Geoff that we needed to get headline commercials, liability caps, bonding levels, a defects liability period, a defects bond and indemnities out of the negotiations before I could provide any meaningful evaluation against these core contractual commitments. If I had been told at that time that TIE had already agreed with BBS that they were going to release and pay an advance payment £42m to BBS. I would have advised that BBS must provide TIE with normal and appropriate security for this payment. BB must have been delighted to get £42m with no security or retentions attached to it. On TIE's instructions, the ITN had been designed with requirement for a performance bond and for maintenance and defects liability bonding/retention arrangements. I had personally insisted that these matters were discussed and settled with BBS during the pre-BAFO negotiations. Given BB UK's status as a company with a very limited balance sheet, I wanted to ensure that bonding levels and credit rated bondsmen were identified for BAFO evaluation and that bonds were on demand and PCGs provided from a suitable corporate parent or holding company.

7.567 TIE had also entered into an advance works contract at some point in 2007. I recall this was to do with the tram depot earthworks or, possibly, BSC's Edinburgh Park site offices in which TIE was also to have accommodation. But, again, DLA Piper was not consulted by TIE on this arrangement. When I did learn about it, I advised TIE to ensure that it was extinguished and it was by specific drafting inserted in Infraco Contract Clause 7.21 of the Infraco contract.

7.568 I ultimately saw a draft of that advance works agreement although I cannot remember when that was. I have some memory of somebody at TIE telling me, possibly Dennis Murray, whose team worked at Edinburgh Park in BBS's site offices, that the advance works agreement related to BBS preparing their site offices at Edinburgh Park and possibly some of the tram depot earthworks which were on the critical path. In the construction industry, and in the large projects that I have worked on, an advance payment is usually about giving the contractor some working capital to mobilise and there is a justification for it. TIE had obviously agreed that there was a benefit to BBS being able to mobilise on these aspects of the Project.

7.569 The mobilisation payments and advance works contract are two contractual, commercial and financial situations where the client had simply made a decision to do something involving important contractual relationships without the benefit of any legal advice. They represent two further examples of things where somebody in the TIE management structure or Project Directorate had either made an intentional decision or, from my perspective as legal adviser, a rather odd decision, to exclude any legal input. I have discussed those situations in more detail earlier on in my statement[134].

7.570 So far as CAF were concerned, I do recall learning in TIE management meetings in the autumn of 2007 that CAF had requested an advance payment to retool and prepare their manufacturing and assembly line for the tram vehicles but, again, I played no role in this. This was dealt with by Alastair Richards on a commercial level (and possibly David Powell before he left TIE). I do not now recall how this was built into the Tram Supply Contract. This would have been considered and

[134] For some examples see paras 7.8, 7.180 and 7.246

dealt with by my partner Ian Bowler, assisted at the time by Sharon Fitzgerald. I do not recall any controversy or issue arising from this CAF request and TIE's agreement on it. I also recall a brief inconclusive discussion in late January 2008 about a possible key subcontractor advance payment but I heard no more.

7.571 I recall that Stewart McGarrity expressed disquiet about being asked by TS, during Project budget reviews post-contract award, about the circumstances in which the £42m advance payment was agreed and paid by TIE. I found this very odd because Stewart McGarrity was TIE's Finance Director. The Finance Director would usually be the person who is explaining the drawing down of a large payment to a would-be contractor. But I was not involved in how TS grant funding was drawn in proportion to CEC's funding contribution. I recall Stewart joking in Stewart's style about what would happen to him if TS asked detailed questions. At the time, the gist of what Stewart said to me, in a private conversation was: "*I feel extremely exposed here. What have I got contractually to tell TS that covers this? Do we have an argument*" and I had nothing I could say. I said to Stewart "*I do not know about this advance payment.*"

7.572 I found it very odd that Stewart appeared to have been blind-sided by how this decision had happened. His discussions about it, or comments on it, came up during TIE management meetings at some point after contract signature. My impression was that Stewart was angry about not being told about this at the time.

7.573 In this context, I am interested to read CEC01286695, Stewart McGarrity's email to Dennis Murray (and others at TIE, though not copied to DLA Piper) in April 2008. It is clear from this that Stewart considered that TIE might not have explained to CEC properly that the advance payment of £42million was going to be made/had been made and how it would be deployed. On learning about this issue later, I surmised somebody else other than Stewart McGarrity had decided within TIE and agreed with BBS that this advance payment would be made. It was a very significant amount of money, equal to 93% of CEC's total funding contribution. Stewart McGarrity never mentioned to me who he suspected was the person who agreed the advance payment. All he said was that he had been confounded in terms of trying to find information. I did not want to quiz him to find out he had been misled or had not been given information. It did not serve any purpose at that time.

7.574 In early 2009 I advised Stewart McGarrity that, *in extremis*, the £23 million BSC Infraco Contract performance bond (issued, I recall, by Deutsche Bank and ANZ Bank) could be called to recover some of this advance payment - provided TIE were able to establish a material breach in order to defeat any counterclaim by BBS that an 'on demand' call – full or partial - was an unjust enrichment at law. It was a multiple-call bond, so TIE could have called it for a specified amount of money, provided the argument against a claim for claw-back was in position. But this was not what the bond had been intended for: it was a standard on demand contractual performance security issued by two credit-rated banks.

7.575 **Delay in Concluding Contracts**

7.576 I am asked in Supplementary Question 20 about a DLA Piper letter to CEC dated 17th December 2007 (prepared by me in fact on 30th November 2007 and held in draft until discussed with CEC Legal prior to 16th December 2007) and specifically whether the Infraco Contract closing date TIE had selected as its target - 28th January 2008 - was realistic.

7.577 I have already discussed my views on how TIE managed its procurement timetable from the mid-autumn 2007 BAFO onwards and set a series of unrealistic target dates for contract close[135].

7.578 Based upon engagement with BBS and their lawyers since early September 2007, my view in mid-December 2007, perhaps optimistic, was that DLA Piper's task in supporting TIE in negotiating and settling the most important draft Infraco Contract main terms could reach a substantial close in six weeks conditional upon:

7.578.1 a co-operative and solutions-focused attitude from BBS;

7.578.2 hard and effective work by TIE in progressing, producing and completing all of the work required to generate and populate the missing Infraco Contract Schedule Parts that were missing;

7.578.3 TIE using all of the time before and during the Christmas break and into the early New Year (as TIE was challenging itself to do) to engage on the obvious tasks and cooperation with BBS;

7.578.4 efficient, focused commercial negotiating and a clear agreement on pricing and construction programme; and

7.578.5 SDS making methodical and accelerated progress on CEC consented design production, with the full and cooperative support of CEC Planning/Roads Authority;

7.578.6 Disciplined policing by TIE of all of the above and TIE Project management focus on pushing BBS forward at TIE's pace, not BBS's pace.

7.579 In this context I refer to what I had said to CEC and TIE, four days before I wrote the 17th December 2007 letter[136]. But at that date I had no proper knowledge of: (i) the events at Wiesbaden; (ii) the draft SP4; (iii) the large SDS Provider claims against TIE being still unsettled and SDS's attitude towards novation; (iv) the extent to which BB Wiesbaden now wished to control matters; (v) TIE's ongoing 'behind closed doors' amendment of the ERs; (vi) the true criticality impact of the missing and underdeveloped SDS Design and MUDFA; (vii) the irrecoverability of the MUDFA programme delay; and (viii) the real extent of the hardening of BB Germany's attitude towards time and cost risk. Had I known these facts and been instructed about them with clarity by

[135] The contract negotiations are narrated in section 7 and in particular 7.75 onwards. They are also set out in the context of DLA Piper's reports in section 10, see paras. 11.77.2; 11.86; and 11.89 ahead of the eventual Close date on 14 May 2008

[136] See para 7.141

TIE and had time to absorb their meaning in terms of DLA Piper responsibilities within the procurement programme, my view would have been different – as indeed it was when I returned in early January 2008 to find no real evidence of forward movement and that the matters I list at 7.578 had not happened or moved.

7.580 The DLA Piper letter of 17th December 2007 was copied - both in draft and final **versions** to TIE's Project Director, Matthew Crosse, who had attended the Wiesbaden meeting only days earlier. According to Willie Gallagher's version of events[137] Matthew Crosse had taken the lead role for TIE. I received no communication from him about this DLA Piper letter to CEC and how what TIE had agreed at Wiesbaden had direct and important bearing on the content of the letter.

7.581 On return from annual leave in East Asia in the late morning of 8th January 2008, I stated more or less immediately and again the next day to TIE management that the 28th January 2008 target was not feasible, as I have discussed at paragraph 7.221 above.

7.582 I am asked what I consider caused the delays from January to May 2008. I refer to the detailed factual picture presented in my statement. My answer is:

7.582.1 The immature state of BBS's Infraco Contract initial bid and then BBS's BAFO Proposals in October 2007;

7.582.2 TIE's insistence on appointing BBS as preferred bidder too early, thereby removing any competitive tension and handing negotiation timetable control to BBS;

7.582.3 BBS status as a preferred bidder e.g. in a position of too much strength, with little incentive to respect the draft Infraco Contract terms as issued at ITN;

7.582.4 TIE's decision to stand DLA Piper down, resulting in the loss of five months negotiating time (with competitive tension) on the Infraco Contract main terms and nearly all of that time being required post BAFO with BBS in a stronger position as preferred bidder;

7.582.5 The 8 month delay by TIE in settling the two significant SDS claims and SDS's consequent attitude to novation

7.582.6 The parties' prolonged inability to reach agreement on price, scope and construction programme;

7.582.7 The state of the SDS Design (its production timetable, the quality concerns raised by BBS and CEC's consenting) up to BAFO and generally all the way through to Infraco Contract close;

7.582.8 CEC Planning/Roads Authority's performance in dealing with SDS design submittals in its capacity as the key Approvals Body over the entire SDS mandate from October 2005 to May 2008;

[137] See paras 7.386 *et seq* and 8.190 *et seq*

7.582.9 TIE's decision to amend the ERs post BAFO;

7.582.10 Damaged relationships due to BBS's repeated demands for more money in Q1 and Q2 2008;

7.582.11 TIE's decision not to enforce any significant part of the February 2008 Rutland Square Agreement;

7.582.12 TIE's tactic of trying to use repeated unrealistic Infraco contract close dates as pressure levers, which turned into false dawns on at least four occasions;

7.582.13 BBS's fractured and uncoordinated approach to negotiations in Q1 2008;

7.582.14 The departure of TIE's Project Director during the critical phases of commercial and technical discussions and lack of hand-over;

7.582.15 The departure of BB's bid director to the M80 project and continued non unified approach by the BBS consortium;

7.582.16 BB Wiesbaden's controlling approach and its interventions and its impact on BB UK and its legal advisers;

7.582.17 TIE's desire to accommodate all BBS's demands for additional money and enhanced protections during Q1 and Q2 2008 and the timing and nature of those demands;

7.582.18 Protracted negotiations over the 43 SP4 Assumptions;

7.582.19 TIE inability to settle and complete technical and financial schedules for the Infraco Contract;

7.582.20 SDS's reluctance to novate and related tactic of using of the immature state of its own design and the amendment of the ERs to stall, linked also to its two large unanswered claims against TIE;

7.582.21 Difficult tri-partite novation negotiations as a result of the SDS design status and the ER amendment; and

7.582.22 Visibility to BBS of TIE's difficulties with and chronic programme delay on MUDFA and direct knowledge through SDS and BB design status audit of SDS production and CEC Planning/Road authority performance.

8 POST INFRACO CLOSE EVENTS

8.1 Introduction

8.2 Richard Jeffrey (ex-Managing Director of Edinburgh Airport Limited) came in as TIE CEO in March 2009 just under a year post Infraco Contract award. He was energetic and positive. Steven Bell

remained Project Director. Stewart McGarrity left at some point in 2009/2010; I believe he had been looking for the CEO role himself. I continued to be instructed by Graeme Bissett on some very discrete governance and transport integration matters as between TIE, CEC and TEL well into 2010 - but by that time he was less and less visible on the Project implementation side. I was also involved in forward planning for the operational phase, including structuring and reviewing detailed tax advice regarding the leasing of trams and a concept to attract green energy credits.

8.3 There was an initial sweeping up exercise to ensure that TIE had copies of ancillary documents, such as warranties, performance bonds and parent company guarantees. Phil Hecht went to work in Dubai shortly before Close, so he was not involved and his responsibilities passed to Chris Horsley and to Jo Glover. There was a session offered and planned to go through with TIE how each of the contracts worked at a practical level in order to supervise what BBS was doing. TIE never took DLA Piper up on that. I believe a number of "road map" papers were produced by DLA Piper on subjects such as the DRP mechanism and the TIE Change provisions (Clause 80). This work would have been provided to Steven Bell or Dennis Murray - but I cannot now recollect exactly when.

8.4 There was a general discussion about DLA Piper assisting TIE in educating their implementation team. It was left up to TIE to request this. The senior TIE personnel charged with responsibility for Infraco Contract implementation responsibility were: Steven Bell and Dennis Murray and, I believe, one or two quantity surveyors helping them to engineer the contract. Frank McFadden joined at some point in 2009 I believe, to be the Infraco contract manager. John Nicholson, an independent claims consultant came in to support Dennis on the DRPs during 2009.

8.5 Alastair Richards ran the CAF tram supply contract and asked for input at agreed intervals. I also supported Alastair in the gradual wind-down of DPOFA, with a formal assignation to TEL when Transdev exited its role. This occurred smoothly.

8.6 **Notified Departures (also called 'Infraco Notice of TIE Change')**

8.7 DLA Piper's role as regards the Infraco Contract dropped off for perhaps three months post Clos Then queries came in from TIE about Notified Departures.

8.8 This first arose because BBS had claimed Notified Departures but had not provided estimates with them as required by Clause 80. TIE wanted to know what to do. For example, BBS might say that a new issued version of an SDS design drawing had shown a new culvert not on the equivalent BDDI drawing and that an estimate of time and cost for the works would follow as this was a Notified Departure. TIE would say that it needed an estimate; BBS would say that it needed a reasonable time to provide that, but would in fact do nothing. Along with Chris Horsley and Jo Glover, I advised Dennis Murray on using the contract. Sharon Fitzgerald was still involved dealing periodically with contentious contractual issues on MUDFA.

8.9 TIE's Edinburgh Park Project team reported an avalanche of claimed Notified Departures on trivial things such as bars on overpass railings, extra/different kerb stones, as well as more significant

items. For example, the SDS first drawings for one aspect had a comment saying that bat boxes under a bridge deck were needed. The second version of the drawing, post BDDI, showed the boxes. BB argued that this was a change from outline specification which entitled it to extra money, despite the fact that the first drawing mentioned that the boxes would be needed. It reflected the fact that PB had in a great many instances merely produced an outline design. Either the next design stage for the drawing had not been achieved or it had but CEC Planning had not approved it prior to BDDI.

8.10 Had TIE used the SDS contract effectively by deploying a permanent and suitably qualified contract manager, in my opinion TIE would have at least preserved some contractual points and commercial leverage regarding SDS's indifferent start to the SDS contract. TIE's and CEC's acceptance of the claims settlement arrangement of over £2.5 million essentially vindicated SDS's assertions about TIE's delinquent management and CEC's major part in this.

8.11 As I had told TIE - in particular Jim McEwan and Steven Bell - one lever for control should have been the contractual design review mechanism.[138] PB was not TIE's designer anymore; it was BBS' designer following the novation. TIE needed to get on top of this aspect of the procurement strategy but never did in my opinion, as I have discussed above.

8.12 At the heart of the procurement strategy regarding design novation were three important components: (1) the SDS Contract itself, which had all the contractual mechanism to push the designer hard towards substantial completion of the scheme design, (see paras 5.20 *et* seq)., (2) the Design Review Procedure and Management Plan, which was even more critical post novation of SDS and (3) importantly, TSS engineering input and contract management support for TIE throughout the procurement process and in particular post-novation. In my view, TIE never invested in the engineering and designer resource to understand, refine and use these levers. I had no visibility of TSS' role.

8.13 I have discussed the evolution of Clause 80 above.[139] I am asked in Inquiry Question 105 whether other changes to the contract procedures would have made a difference to keep matters moving smoothly, but I cannot speculate on this nine years later I would say that no contract could have acted as a complete bulwark against BBS's approach of claiming for the smallest issues on new or revised SDS drawings and producing inflated Notified Departure estimates or, often, no estimate at all or an inadequate or aggressive one after a lengthy delay. However, a clause 80 - as drafted by DLA in 2006 with the ITN and as it had sat until April 2008 - would have avoided many of the difficulties later faced by TIE. And I have explained why earlier.

8.14 There were never any protracted or material issues over how the DRP provisions operated from either side. BSC reported a concern in October 2008 that Clause 80 was too detailed (CEC0065560) saying they were reinforcing their change management team and the level of detail required on changes was introducing significant delay in reaching agreement. I regarded this as nonsense and said so. TIE agreed. In some example INTCs I had been shown by Dennis Murray,

CEC0065560 should be CEC00605560

[138] Paragraphs 7.550 *et seq*
[139] Paragraphs 7.518

BSC were producing very sparse detail even after requesting more time. One clear reason why they felt some burden was because they were scrutinising every SDS design drawing to see what conceivable design development they could use to found an INTC. Nine years on I am not in a position to speculate whether, if TIE had agreed to what Richard Walker was writing in October 2008, it would have changed the contract administration or not. Making it easier for BSC to launch and justify an INTC did not appear to me to contain any advantage whatsoever for TIE. And I discuss TIE's instructions on this proposal and attitude to it in one of my response to the required multi-part answer Question 127 limb (l).

8.15 BBS was extremely aggressive with their use of the contract by exploiting the normal language in the clauses surrounding providing reasonable estimates of cost and time within a certain period of time. If BBS needed more time to provide an estimate, and some of these Notified Departures were massive claims, they requested it and then did nothing for long periods of time. Any change provision in any contract would have struggled to handle somebody attempting to block contract administration and claims processing, unless the client was prepared to go to DRP, and TIE were not.

8.16 I did not envisage that BBS would seek to use Clause 80 so many times (I believe near 900 Notified Departures by early 2009). This was because I did not have a role in understanding what the exact status of SDS design was at Contract award. But I was not unduly surprised by the initial volume of INTCs post contract award, bearing in mind the known SDS design programme change to V28, the existence of the BDDI concept since November 2007 and the fact that I had read TIE's Close Report saying that 87 SDS design submittal packages were outstanding at the date of contract signature. CEC had already reported in January 2008 that in the order of 62 design approval packages remained to be dealt with during 2008/09.

8.17 TIE was on notice that the SDS design delivery programme amendment would immediately trigger INTCs or Notified Departures (see para. 7.285). As I describe at para. 7.300 *et seq* I talked to TIE and tried to advise them to assess what they thought that would mean, not just in money terms, but in terms of Project end date. I again advised that they should stop saying publicly that trams are going to be on the street in December 2010.

8.18 I had advised TIE management that I expected BBS to administer the Infraco Contract aggressively (see para. 7.315). I said to TIE that I expected BBS's Project management team in Edinburgh to be under explicit instructions from Wiesbaden to do that, because everybody knew at that point that Richard Walker was under great pressure and great scrutiny from Wiesbaden. He was all the more under pressure because, during the latter stages of the Infraco contract negotiation, TIE had begun to communicate directly with people in Wiesbaden. Naturally, this resulted in the senior executives in Wiesbaden having their antennas up and asking what was happening with this bid for a project in Edinburgh.

8.19 What did surprise me was that BSC very frequently refused to comply with the requirements under Clause 80 to submit proper and timely estimates. There was a time limit in Clause 80 for submission of proper estimates which was a very conventional requirement. The Infraco contract

also had a clause in it saying that when the contractor was making an application for client change, if he assessed that he needed more time to provide a sensible estimate and supporting documentation, he needed to request that within a certain period of time, and give an estimate as to how long it would be before they were able to submit that information to the client. There is no doubt that BB abused those time limits. They either did not respond or they put in a grossly inflated estimate which TIE had difficulty assessing or attacking.

8.20 This meant that TIE could not assess the value of a claim or its time implications. When chased for estimates, BBS simply issued an unacceptably high one, ignored TIE's request or re-asserted that what they had provided was sufficient. If TIE asked for a breakdown the matter became an argument at QS level.

8.21 TIE simply did not have the resource to respond to this approach. One way of a contractor administering a contract aggressively is to build up a plethora of pending claims and to exploit any weaknesses they perceive. I recall Dennis Murray telling me that his BBS counterpart at Edinburgh Park, Colin Brady, had told him off the record that BB Germany was monitoring all contractual exchanges. He told me in early summer 2008 that Colin Brady had told him that BB UK were under instructions not to mobilise, but to invest in building claims based upon the state of SDS design and the chronic MUDFA delay.

8.22 Since the BBS Project administration team and TIE Project management members were co-located at BBS's Edinburgh Park offices, BBS could see precisely what TIE's quantity surveying and claims management resource was for dealing with INTCs. Anecdotally I heard that BBS had a large number of quantity surveyors there. Usually a managing contractor does not carry a large overhead of quantity surveyors, but BBS had 15 people in that room looking at SDS's design and creating the claims materials. I do not know how many people Dennis Murray had in his quantity surveying unit at the time, but it was not many. I have read in various TIE internal reports in 2007 and 2008 (and in Board minutes) that TIE had plans to recruit suitable resources for the Infraco execution phase. But I saw no evidence that this happened. Dennis Murray, TIE Infraco Contract manager, told me very soon after Infraco Contract award that he felt exposed in terms of resource.

8.23 The 15 April 2009 TPB minutes (CEC00633071) touch on TIE's state of resourcing. This can be seen at paragraph 2.7 on page 6. In response to a question from Councillor Gordon Mackenzie *"regarding the cost and availability of additional resources"*, Stewart McGarrity stated that TIE were taking external advice. I am not sure where the additional resources and costs were going to, but my assumption would be it was on the claims. The external advice that was being taken at that point could only have been legal advice from DLA - unless this meant expert witnesses or other advisers I knew nothing of. To the best of my knowledge, the only other external advice that TIE was in receipt of, at that point, would have been John Nicholson, who was a solo claims consultant assisting Dennis Murray, and possibly Turner Townsend on MUDFA. Stewart also advised that an additional two commercial positions were being advertised and people had been seconded from CEC and other people had been repositioned internally. Stewart then repeated *"..still a challenge to manage the resource costs across the project. DJM* [probably David Mackay] *noted that*

streamlining the governance structure would present opportunities and the sooner it is completed, the better for the project." So project governance was still an ongoing subject 8 years after TIE had been appointed and a year into implementation.

8.24 In my view, these minutes are a factual confirmation of my view that TIE was struggling. It is not clear why people had been seconded from CEC and other people had been repositioned internally. In summary, even a year later TIE were looking to increase resources to respond to the Notified Departures. That would suggest that for the prior twelve months, TIE were chronically under-resourced to respond to the Notified Departures.

8.25 My best recollection is that DLA began giving advice to TIE on the subject of Notified Departures in late summer of 2008. I advised TIE contract and project management, Dennis Murray and Steven Bell, that this impasse should be taken to DRP and/or that TIE should consider applying to court for specific implement to force BBS to provide the Estimates within a reasonable period of time (this was intentionally carved out of the requirement for the escalating DRP process). I know that Steven Bell considered this advice. He may have raised it with TIE senior management – I do n know, but TIE did not act on it until well into 2009.

8.26 I was not involved in processing INTCs because I am not a quantity surveyor. We only advised on INTCs if TIE brought a particular Notified Departure to DLA to have a look at. There were, of course, ones that we advised on and looked at from a legal standpoint - the ones that were selected by TIE to try and drive out a resolution and went into DRP or adjudication in 2009.

8.27 Before the Infraco Contract was awarded, I believed that TIE must have done an estimate of the cost and time impact of movements from the SP4 Base Case Assumptions, including what the entirely missing SDS design and post BDDI design development represented in terms of cost and time outwith BBS's construction and installation price and programme. The former – that is new SDS design for Infraco works to respond to the ERs but was not in the Wiesbaden price - was not something that might happen; it was something which would definitely happen. Bluntly this was not a "risk", it was a certainty.[140] My response to question 127(l) reviews TIE's own confirmation th(as at late 2008, they had not in fact assessed time/cost impact of the SDS programme revision from version 28 – by that point already version 31.

8.28 Without this exercise, I do not see how TIE could have reported at contract signature about an outturn cost and contingencies within the Project budget. This alone demonstrates that TIE was fully aware of what SP4 and an entire series of factual Assumptions would mean to the notional fixed price approach, were those Assumptions to fall – as they did and, in some cases, were already known to be false before 14th May 2008.

8.29 I have no knowledge of exactly who, when, if and how TIE carried out an assessment of the cost and programme impact of the various kinds of Notified Departures permitted under SP4 or what, for example, would be the cost impact if no Value Engineering was achieved – as in fact came about.

[140] See paragraphs 7.343 *et seq* and 7.318

8.30 I saw that Steven Bell and Scott McFadzen at BB had the makings of a decent working relationship, but then Scott McFadzen left the Edinburgh Trams Project. He went to be Project Director on the M80 PFI project shortly after the Infraco contract was signed and then had a serious accident and didn't return to work for a considerable time. If Scott McFadzen had stayed involved, then that might have had some kind of moderating influence. My impression was that his successors and their support staff – one of whom (Kevin Russell) arrived from Seattle where BB was in litigation with the municipal authority - never warmed to TIE.

8.31 **Dispute Resolution in 2009**

8.32 When the Infraco contractual disputes arose with BBS, DLA Piper's initial advice was that TIE needed to start the DRP with adjudication, otherwise there was a risk that the contractor would stop work. TIE, essentially Steven Bell's decision, didn't want to do that and preferred meetings and escalation as provided for. BBS seemed to be past-masters at this and gave nothing away.

8.33 I am asked in Question 107 to comment on the DLA Piper advice recorded at para. 2.8 in CEC00633071 which is the minutes from a 15th April 2009 Tram Project Board meeting. This note records that *"DLA Piper were confident of TIE's position with regard to the principle areas of contractual disagreement"*. The basis of this view was that DLA Piper considered that an adjudicator presented with legal submissions and confident expert witness evidence as to how PA1 should be read from an engineering and technical standpoint would resolve any ambiguity in TIE's favour.

8.34 The language of PA1 depended upon what was meant and understood by design development. Whether something was a Notified Departure or not depended on what kind of Notified Departure it was: if it was a Notified Departure which concerned the fall of an engineering assumption, then it would not be a matter for DLA to advise on. It would be a matter for TIE's engineers and quantity surveyors to form a view on. BBS were in many cases intentionally failing to provide the substantive technical information to support their claims for INTCs as required under Clause 80. BBS's position, at that point, was essentially using the production of estimate provisions as a reason for not progressing the works. It suited their argument very well to say that they had given TIE all the information that TIE needed to determine whether or not there was a Notified Departure and whether or not their estimate was correct. That was in fact their ideal position supported by the language which had been introduced by TIE itself in the amended Clause 80 before contract signature: i.e. no commencing the INTC works until TIE had agreed their Estimate or had referred this issue to DRP. Factually, BBS alleged that TIE did have enough information and TIE said it did not. There was therefore in each case a dispute and this dispute was about commercial, technical, design and engineering facts and information and the related time, materials and cost consequences.

8.35 DLA Piper's view was reviewed approximately one month later by Senior Counsel, Callum McNeil QC, at a consultation on 1st June 2009. CEC00901461 is DLA Piper's e-mail of 21st May 2009, essentially the cover note for a detailed set of instructions to Counsel. The purpose of the consultation, organised under instruction from TIE (Steven Bell), is summarised in that e-mail: to

e-mail should be letter

examine the issues that were in dispute between Infraco and TIE and to advise TIE regarding Senior Counsel's views on the various arguments being made and upon the interpretation of contractual provisions that the parties consider relevant, including DLA Piper's views on TIE's side. The overall purpose of obtaining the advice from Senior Counsel was to assist TIE in deciding if it wished to launch DRPs. The email encloses the briefing paper for Senior Counsel, which is not available to me on the Public Inquiry's extracted documentation platform. The briefing paper, which I wrote for the most part, explained in depth what the specific purpose of the consultation was and I do not see benefit of repeating that here. The document will be clear on its face.

8.36 CEC009001460 and CEC009001462 are Callum McNeill QC's written advice notes following the consultation itself and supplemental questions which TIE required to be put to Counsel. Senior Counsel's advice did not differ materially from DLA Piper's advice at the time.

CEC009001460 and CEC009001462 should be CEC00901460 and CEC00901462

8.37 Broadly speaking, the outcome was that: (i) TIE selected DRPs to test its factual and engineering arguments and reported to CEC that it was doing so; and (ii) DLA Piper became increasingly involved – when requested - in supporting TIE with every day contractual correspondence on the Infraco Contract (principally Steven Bell and Dennis Murray). DLA Piper ensured that, wherever possible and practicable, the rationales within TIE's arguments and positions that had found favour with Counsel were used in the DRPs launched by TIE.

8.38 So far as I recall the first adjudication did not start until around one year after Close. By then there was an unmanageable log jam of Notified Departures. Some were very substantial i.e. around £1 million in claimed value and many, though trivial, were time-hungry. TIE tried to select some Notified Departures for adjudications to get answers on common issues. Others were chosen as they were high value.

8.39 There was an attempted mediation before the adjudications began. This was in the summer of 2009. I attended one meeting at which the mediators simply wished to hear the parties' introductory positions. DLA Piper played no further role in this.

8.40 By the time the first adjudication was attempted, the relationship between managements was very hostile. We were drafting letters and reviewing correspondence for TIE on which I took specialist advice on defamation and invoked Clause 7 in the Infraco Contract which forbade the contractor from bringing TIE or the Project into disrepute. David Mackay had by this time taken the TIE Chairman's position but meetings between CEOs to discuss DRP solution were made difficult because of this atmosphere.

8.41 The delay in starting adjudications greatly undermined TIE's ability to use the DRP as it had been intended to work: to remove blockage based purely on contractual argument and to narrow issues. DLA Piper advised that the contractor was testing the contract in extreme fashion and the only way to stop the logjam was to have adjudication. As I say, TIE didn't want to do that for over a year. In the end, this was down to TIE's style of contract management and the desire to talk things through with BBS, if possible.

8.42 David Mackay, who became TIE interim Chairman from late 2008 onwards, said to me both informally and in TIE management meetings that he did not understand how the Wiesbaden Agreement had come about (it was being quoted at him by BBS) but asked me whether it had bolted matters down, and if it had, why BBS continually came for more money pre and post Infraco Contract award. I told David that, in essence, the Wiesbaden deal had stated a contract price in return for BBS having the unconditional right to apply for automatic change orders attached to all SDS new design and design development post 25th November 2007 and a lengthy set of technical and commercial Assumptions qualifying BBS's price and construction programme, many of which TIE had known would fall after contract signature.[141] The fact that he asked me - as opposed to having had that information given to him from Willie Gallagher or TIE management at the time in early 2008 - suggested to me there had been an information void within TIE.

8.43 With TIE's agreement, I passed the dispute resolution and adjudication matters to colleagues in our contentious construction group. The main individuals were based in Leeds and Edinburgh. TIE prepared a considerable number of submissions themselves on the factual, technical or quantity surveying matters.

8.44 My own role in the formal dispute resolution process for adjudications diminished with the full time involvement of specialist DLA Piper lawyers, including support during 2009 after McGrigors became involved. I attended one adjudication hearing, but it was not cost efficient for me to be present or involved in detail. By this stage, I had become directly involved in TIE's strategic plans to engage with BBS in order to solve the contractual impasse through contractual correspondence discussion and behavioural change.

8.45 From memory, I believe that DLA Piper took the first three or four Notified Departure claims for TIE through the adjudication process. Each commenced after reaching CEO level meetings that had not produced resolution. The Hilton Car Park dispute yielded an award in TIE's favour. The other adjudications produced liability awards for BBS, I do not now recall the quantum awards in those cases. TIE (or possibly CEC – I do not know) instructed McGrigors to handle a DRP to test contract interpretation on Clause 80 and SP4. This produced an odd - but also adverse award from Lord Dervaird. I would place this at some point in early 2010 since I recall that I took a call about the award from Tony Rush when I was in the centre of Orvieto, Italy around then.

8.46 It had become obvious in early 2009 that both BB and Siemens were looking for much more money. BB Group Management came over from Wiesbaden and made that intention plain and said that they would use the contract to do so. As I have alluded to previously, having worked for five years at a large German construction company, I told TIE again that the Kalkulationsabteilung (head office estimators) in Germany would have done an audit of what they regarded as a troubled contract and then carried out a further systematic review of the bid estimations – probably finding that these had not been supported by subcontract pricing – and had reported that BB needed to protect itself continually. BB kept using Notified Departures to create an on-site and construction

[141] Paragraphs 7.199 *et seq* and 7.318 *et seq*

programme related situation in which they could maintain that there was nowhere that they could start meaningful work on site.

8.47 I am asked in Inquiry Question 111 to comment on CEC01213973 which is an agenda issued by TIE regarding a meeting scheduled for 5th February 2009, by which time TIE was considering launching DRPs. I have no recollection of attending this meeting where two DLA Piper colleagues presented on legal and contractual matters. This in itself is not significant because as I have explained I had, with TIE's permission, engaged DLA Piper contentious construction team to support TIE on this aspect of the Infraco Contract. Dennis Murray, TIE's Contracts Director, at this point had John Nicholson, an independent claims specialist not at TIE, assisting him as is shown on the distribution list on CEC01213972.

8.48 I am then asked in Inquiry Question 111 to explain CEC01119938 which appears to be a response from BSC to a paper which TIE had sent to BSC. The DLA Piper comments make it clear that we had not seen that paper prepared by TIE. Hence, the DLA Piper comments placed into CEC01119938 cannot be expected to be complete; they were reacting to what BSC's commentary stated, itself a commentary on what TIE had written or said. So far as what is asserted in the BSC paper, the DLA Piper comments indicate our views there and then based on the letter from BSC to TIE. Certainly the agenda for the 5th February 2009 meeting included "BSC position": it is therefore sensible to assume that the BSC position paper and TIE's position paper were reviewed by the meeting and the DLA Piper preliminary comments in CEC01119938 expanded upon. Trying to say now, eight years later, whether I agree or disagree with BSC's position about a TIE document that I had not seen at the time is too speculative for me.

8.49 I am asked in Inquiry Question 65 about an email which Stewart McGarrity sent to me by copy and others on 17 February 2009 with his notes of a meeting on 9 February 2009 (CEC00941819). It appears that the comments in italics are Stewart McGarrity's comments. The parties at the meeting apparently were Steven Bell and Stewart himself. From BBS there was R Sheehan (Contract Manager), Richard Walker (Chairman of the consortium), Martin Heerdt / Michael Flynn (Project Director for Siemens and Richard Walker's counterpart) and Jakob Frentz (Siemens Erlangen). This was quite a serious meeting if the guys from Germany were over. They had recognised that things were going to be talked about that they needed to hear first-hand.

8.50 There is reference in this email to a "gentlemen's agreement" and I am asked what this refers to. I have no knowledge of a "gentleman's agreement". Being completely fair to Stewart, he is simply writing down what Richard Walker said. He had no involvement in that other than saying "really bad behaviour". In other words, he did not trust what Richard Walker was saying. I was not at the meeting and I certainly never had any discussion about this with Willie Gallagher, who apparently was the only person who may have known about the "gentlemen's agreement".

8.51 To put things into context, this is TIE bringing all the pressure they can think of to bear on BBS to mobilise and work. This is early February 2009 and nine months after contract award. There were no BB subcontractors on the street. I note that at paragraph 8 of the note for Tuesday 10 February 2009, there is a mention of a general acceptance by TIE, pre-contract, that the Project would cost

£50m to £100m more than was in the contract at 15 May 2008 (CEC00941819). What Richard Walker was saying in 2009, and he may have been exaggerating things, is that there was general acceptance by TIE, and TIE had been told again (and probably again) by BBS that even the Wiesbaden price was short by a very substantial amount of money, and that that price increase was sitting in the 2007/8 qualifications and reservations BB had wanted. In other words, the reservations and qualifications that you, TIE, are signing up to equal somewhere between £50m and £100m additional cost.

8.52 There were a series of meetings between TIE and BBS at CEO level. In order commence the tram works properly, BBS wanted their reservations and qualifications realised methodically into more money – I recall being told that £90 million was being raised with David MacKay. There were also suggestions regarding legal advisers meeting to review Infraco Contract provisions surrounding the production of BSC estimates and generally the operation of Clause 80 (TIE Change) but TIE did not wish this.

8.53 I am asked in Question 106 about CEC01010525 which is an email to me dated 20 February 2009 containing a summary report by Stewart McGarrity on the outcome of a meeting which TIE had had with BBS Wiesbaden and Siemens UK and Erlangen senior management. I had not attended that meeting and nor had any lawyers. It is TIE's response to my asking David Mackay (by email attached in this chain) if there is a proper detailed written note of the meeting. I also note that Graeme Bissett (CEC01010525/002) was beginning to develop TIE's thoughts on how BBS's reporting on a troubled project would play into their corporate reporting to the Frankfurt stock exchange and also within their on-going corporate re-organisation involving a holding company listed in Luxembourg at this point (I recall).

8.54 Graeme Bissett had clearly done some research on BB's holding company and their group performance in Europe. What he was saying was that BB had other problem projects where they have got difficulties in terms of profitability and/or quality of workmanship. I note he stated in the second paragraph of his email on 19 February 2009 *"If BB think there is a loss approaching a big number, they have a profit warning problem. Their guidance for 2009 is c€300m PBIT."* Therefore, what he was saying was that, if they were placing the Project into their troubled projects reporting, they were going to have to alter their stock exchange announcements and look at how they treat this particular contract carefully. Graeme was essentially offering a commercial analysis of what BB Wiesbaden might be thinking in overall terms about the Edinburgh tram and was reporting this to his Chairman, Finance Director and Project Director, copying me in. I was not asked to make any comment. I believe that Graeme appreciated that I had been in Germany for five years in the project finance sector with one of the three leading German civil engineering concerns and knew I might have some views on these matters.

8.55 It looks to me as if Graeme Bissett's email is after David Mackay's meeting with BSC. My email at 23:25 that evening appears to respond to David Mackay's email of 23:15 and I say that I would like David to put on record the conversation with BB and Siemens senior representatives, where they stated they were going to make a loss on the Edinburgh tram network contract. What comes back

is Stewart McGarrity's note of the meeting that took place. In summary, my involvement here was pointing out to TIE that they had a meeting with BB and asking TIE to make sure that there is a minute on file recording what was discussed.

8.56 What is instructive is that, to break even at this point, BBS had calculated that they needed £50m to £80m more which was in line with what Richard Walker had said in December 2007.[142] All of this probably needed to be taken with a pinch of salt. This was the contractor telling TIE in non-binding negotiation what their best outturn position would be. But these approximations by BSC at intervals: December 2007 post BAFO, February 2008 pre-contract award and February 2009 (crisis point over lack of mobilisation), appear remarkably similar and consistent to me.

8.57 I find it very instructive and in fact telling that nearly three years later in CEC00337645 on 30 July 2010 – when Tony Rush is discussing and reporting to TIE what BSC are in fact claiming and how TIE might want to react and negotiate - we read very clearly that £80 million figure again. Tony's summary says: *"part of the £80 million unagreed BB changes"*

30 July 2010 should be 29 July 2010

8.58 In late February 2009 (CEC01010735), I advised TIE again that there was evidence to suggest that BSC still did not have their key subcontractors properly engaged. When TIE informed me that CEC had said BSC had requested a direct meeting, I recommended to TIE that, at that meeting, CEC should ask BSC about their supply chain. This occurred and the BSC reply appeared evasive. This was a breach of contract, entitling TIE to warn BSC and to withhold payments. TIE was also in breach of its operating agreement obligation to CEC to obtain key Infraco supplier collateral warranties and I pointed this out. I do not now recall what TIE did in response to this advice. As far as I am aware, nothing was done about this.

8.59 I am asked in Question 114 about a summary paper I sent to Gill Lindsay on 20 April 2009 (CEC01003720 and CEC01003721). Richard Jeffrey, TIE's recently appointed CEO, had instructed me to keep CEC informed in relation to TIE considering a decision to commence the DRP process and adjudications. This covering email to Gill Lindsay stated clearly that the attachment was a summary of the advice that DLA Piper had already given to TIE.

8.60 I am asked where the idea for project scope truncation or contract termination came from. I believe that the concept arose from TIE senior management internal discussions as a possible response to BSC's intransigence, which had culminated in a clear ultimatum in April 2009 from BB Wiesbaden that at the very least £100 million more was required for BSC to complete the tram scheme as envisaged in the ITN. By that stage, I had been asked by TIE to produce DLA Piper's thoughts on these two options in terms of legal and commercial outcome for TIE. We did so in the form of the DLA Piper paper I have mentioned at paras. 8.169 - 8.170 and CEC00302039.

8.61 The last paragraph in my e-mail to Gill Lindsay (CEC01003720) made it plain that CEC Legal had also known about and/or been party to the thinking about truncation and/or termination. This is because I write in that email to Gill Lindsay that her colleague Nick (Smith) has asked for a paper on this subject – which I was already instructed to produce for TIE. I do not know to what extent

[142] Paragraphs 7.123 *et seq*

TIE and CEC were in discussion on these matters, but I did report to David Mackay and Richard Jeffrey that CEC Legal had asked for this paper. I do not recall attending any meetings with other CEC officers at this time, although on occasions - later in 2009 - I was asked informally about the DRP process by CEC Finance (Alan Coyle) and I met twice with Alastair McLean, Gill Lindsay's successor.

8.62 Within Inquiry Question 114, I am then asked specifically about the last sentence of the first paragraph under 'Contractual Basis' in the DRP 3 – Design Change from Base Date to IFC section of CEC01003721. The cited sentence reads: *"TIE agrees the degree and effect of any change to design will be a matter of technical opinion, but TIE reasonably requires a proper examination and explanation of the changes to design which the Infraco asserts have been made to BDDI in order to determine whether a breach has arisen, or other circumstances apply, which would prevent a Notified Departure being properly claimed."* This is saying that whether or not a change in design from BDDI to IFC stage constitutes a Notified Departure will be a matter of technical opinion and fact and that TIE will require to see all the facts surrounding that change in design to isolate whether Infraco (or an Infraco party) has been in breach, thereby preventing Infraco from asserting a Notified Departure. That is how the Infraco Contract worked. Beyond that, I have no comment.

8.63 I note that the summary paper (CEC01003721) contains a sentence in it, which says that it is "legal advice" to CEC. This was inserted because we were concerned to ensure (as an exemption under the relevant section of FOI(S)A 2002) that CEC would not be obliged to release that document (containing DLA Piper's legal advice on actual DRPs to TIE) under a FOI(S)A 2002 request, since BSC had recently been to talk to CEC officials directly about the stalemate under the Infraco Contract. We had been instructed by TIE that BSC might well be using agents to make FOI(S)A 2002 requests for project information.

8.64 I am referred in Question 34(b) to the advice note produced by DLA dated 27 July 2009 (CEC00652331). This report was probably co-authored by me and an associate in the DLA Edinburgh construction department. I do not remember this note, specifically, but the Inquiry refers me to para. 2.2.3.8 where it is stated that *"...the time for performance of Services is allied to and measured by the Consents Programme and the Design Delivery Programme..."*. The commentary here was to the best of my recollection from Keith Kilburn (Contentious Construction Associate who had been supporting both Keith Bishop and Fenella Mason on the SDS contract advice). It is correct to say, as the Inquiry suggests, that adherence to the SDS consents programme and the design delivery programme is essential to compliance with the SDS contract. The reason for the report was, I believe, a request from Steven Bell who wanted, apparently, a summary of DLA Piper advice across the key themes stated in the opening paragraphs to CEC00652331. And that is what the report provided to TIE. At this point, I do not recall meeting TIE to discuss this nor do I recall any response from TIE. It was a summary and TIE had called for numerous papers by this time at the same time as DLA Piper were supporting the DRP escalation process and the adjudications

8.65 I am asked in Question 112 for my view on what difference to TIE's strategy three adjudication awards made. From DLA Piper's perspective after the receipt of the Carrick Knowe and Gogarburn

decisions in mid-November 2009, I did not perceive any immediate change in TIE's approach to discussion with BSC or the management of the Infraco Contract. There remained the very substantial backlog of INTCs and TIE's continual struggle in identifying sections of the linear on street site on which BSC could be instructed by TIE to mobilise and/or be instructed to work. DLA Piper was supporting TIE's efforts to answer BSC contractual arguments over proper and timely provision of reasonable and sufficiently detailed Clause 80 Estimates.

8.66 I was not involved in the immediate debriefing with TIE on the adjudication awards. Other qualified personnel at DLA Piper handled this as I have explained. The Dervaird decision in early August 2010 was a significant setback and surprised McGrigors (who had conduct of it), DLA Piper and Senior Counsel. Tony Rush was heavily engaged on Projects Carlisle and Notice (see below) and my impression was that TIE management became more attracted to a negotiated solution under Project Carlisle (discussed below) and to supporting the more aggressive, unified use of the Infraco Contract in tandem.

8.67 I am asked what the basis was for McGrigors to act for TIE in the Dervaird adjudication if they were appointed by CEC. I have no comment on this other than that it appeared to be TIE's wish. I had and still have no idea whether McGrigors were acting for CEC and not TIE or both.

8.68 **Projects – Pheonix, Pitchfork, Carlisle, Challenge and Notice**

8.69 I am asked to explain the various "projects" which TIE undertook in managing the contract: Phoenix; Pitchfork; Carlisle; and Notice. When it says "project" what it means is a strategy that was developed by TIE with a view to dealing with the contractual impasse with BBS. I discuss these further below, but by way of introduction:

8.69.1 DLA Piper was not involved in anything referred to as Project Phoenix while I was involved as TIE's legal adviser. I do not know anything about this.

8.69.2 Project Pitchfork was the initiative that Richard Jeffrey, who was Chief Executive, TIE, started in 2009 to investigate all contractual and commercial means to move BBS away from their position of entrenchment in behind the unanswered, disputed or log jammed Notified Departures. Pitchfork was essentially all the means that TIE had at its disposal within the Infraco contract of any kind of commercial or other financial pressure which could be brought to bear as well as "blue sky" thoughts about how BSC could be induced to behave in a more co-operative manner. I have already discussed many different aspects of this. I sat in many meetings and gave many forms of advice and commentary on the idea of Pitchfork and what TIE was trying to achieve.

8.69.3 Project Carlisle was an initiative which started as soon as Tony Rush arrived in early 2010. Carlisle was headed by Tony Rush, supported by his own team. He was also supported by, and making demands on, TIE's personnel, at all levels, to create a situation in which BBS would be persuaded to talk to TIE to find a commercial solution. Carlisle was trying to arrive at a commercial solution which could be agreed between

the parties. It involved attempting to achieve some kind of arrangement where BBS would finish the project to a guaranteed maximum price, to a timetable and to a construction programme. This is discussed in detail below.

8.69.4 I do not now recall Project Notice being given that name. But I surmise that this was the sobriquet which TIE and/or Tony Rush had given to one aspect of the work that Tony Rush and his team did in DLA Piper's Glasgow offices. Supported by DLA Piper with input from TIE's QS unit, Tony Rush sought to bring about the position whereby TIE could elect to issue – and did issue in the autumn of 2010 -Remediable Termination Notices (RTNs), underpinned by sustainable evidence of breach by BSC.

8.69.5 In parallel, TIE continued its own process of review, "Project Challenge", on the formation of the Infraco Contract. I have already discussed Project Challenge in the context of TIE's 2009 review of the Wiesbaden Agreement.[143]

8.70 Three work strands – Pitchfork, Carlisle and Challenge – under Richard Jeffrey's leadership began in the spring of 2009 and then on into 2010. My role was both advising on the use of the Infraco Contract and providing detailed views (sometimes in writing, sometimes orally in many internal TIE meetings) on contractual and extra-contractual ways to exert pressure on BBS to perform and/or to create opportunity/incentive for BBS to engage with TIE in a more conciliatory and partner-like manner. Over a 2 year period, DLA Piper produced a number of detailed option papers for TIE, trying to help crystallise their thought processes and decision-making. I also attended a sequence of meetings with McGrigors and TIE discussing the Infraco Contract terms and SP4.

8.71 Part of this was to assist Richard and David Mackay of TIE in frequent engagement with BBS management and the train of increasingly tactical contractual correspondence. But however TIE manoeuvred, probed, warned, notified and cajoled, it always came back to three things: SDS design delay and unresolved Notified Departures; MUDFA work blocking site availability; and what TIE had agreed with BBS at Wiesbaden.

8.72 **Appointment of Tony Rush**

8.73 Post the flare-up and standoff in early / mid 2009, TIE engaged Tony Rush as a consultant. The exact timing of this escapes me but I believe that I was introduced to Tony Rush by Richard Jeffrey at a meeting in early 2010, also attended by McGrigors.

8.74 I played no role in this appointment, but I agreed with Richard's idea that an independent negotiator could operate as an informed and persuasive go-between with BBS. I tried as hard as I could to support TIE and at one point arranged for TIE to meet with a freelance international major construction claims consultant (and expert witness in arbitrations) I knew from my time in Hong Kong. Shortly after this, Tony Rush came on the scene.

[143] Paragraphs 7.383 *et seq*

8.75 I had no reason to know about Tony's reputation or his background. I knew that TIE had been looking to appoint an experienced, skilled and hard-nosed negotiator to help them engage with BBS. They were looking for a change of pace, a change of voice and a change of skillset. TIE wanted somebody with the perspective, background and personality to bring BBS to the table.

8.76 One of the issues in this long-running saga of not being able to get BBS to work was a rather unpleasant friction within and possible breakdown of relationships between the various people in charge of the contracts dating back to the procurement process. I have cited various examples of this above.[144]

8.77 Tony Rush made his recommendations direct to Richard Jeffrey and David Mackay, who were making the ultimate decisions. But there were points reached where the only person who could make a decision was Tony Rush. This was because he had had the negotiation, informal meeting, or telephone call and he had the key information to force a position with BBS. I cannot judge how he was sharing that information with TIE, Richard Jeffrey and David Mackay. I was not shadowing him, I was reacting to what he wanted and making suggestions for his plans from a legal standpoint.

8.78 I recall David Mackay resigned from TIE sometime in late 2010. Tony was ultimately a consultant under TIE's control. There is no doubt that Tony was, by nature, somebody who was motivated to win and wanted to take charge. He wanted decisions and he wanted support in behind him. He worked at a very fast pace and he knew the value of momentum and time pressure. He had a team of people working with him. Members of Tony's team worked in Glasgow with my assistant, Jo Glover, on the Notified Departure and remedial breach notices exercise.[145]

8.79 Tony was more than a claims consultant. He was somebody who had dealt in the world of failing contractors and broken, troubled contracts. I gauged quickly that he was a resourceful dealmaker with a great deal of energy and skill. Tony did not mince words. If he thought you were not doing a good job, he would tell you. He was used to people taking responsibility, putting their shoulder to the wheel and getting things done. He was somebody that paid attention to quick thinking and reasoned argument. If you told him he was making a mistake he would listen. Tony's style caused clashes with certain TIE personnel, Stewart McGarrity and Steven Bell in particular.

8.80 Tony frequently expressed to me his frustration over TIE's slowness in providing him with information to underpin his negotiating strategy and its various financial, commercial and technical positions. He became increasingly interested in Challenge and frustrated by Pitchfork which overlapped with his efforts to use all means to bring BBS to the negotiating table. I witnessed this sometimes boiling over in TIE meetings when Tony was directly critical of TIE management and saying pointedly that their energy should be applied to solutions, not introspection/retrospection. I remember at least one call from Richard Jeffrey: he initially wanted to upbraid me but apologised when I explained my side of the events in meetings with Tony Rush that had antagonised him. I recall an e-mail exchange on this. He ended by telling me that Tony could not continue in that way

[144] See for example paras 5.210; 7.232; and 7.582.10
[145] Paragraph 8.118 *et seq*

and requesting me to speak to Tony and ask for him to moderate these criticisms that were demoralising for TIE. I remember there were further emails from Richard to all parties on this subject asking for a collegiate and less terse approach; I did speak to Tony and he understood but made it clear to me that his misgivings about how TIE had handled the procurement and the Infraco contract administration and was now handling matters in a way which did not prioritise and undermined his work remained very serious and unchanged.

8.81 **Appointment of McGrigors and Subsequent Negotiations**

8.82 I was not told with any real precision by TIE Ltd, our client, or for that matter by CEC Legal, why McGrigors were appointed. I did not know who McGrigors were acting for when they first began attending meetings about the Infraco contract.

8.83 Their appointment began in 2009 and continued into the period of TIE's appointment of Tony Rush.

8.84 In short, I had no involvement in McGrigors' engagement. I do not know if their retainer was with CEC or with TIE. I do not know if their appointment was the subject of any formal EU regulated competitive process to appoint lawyers (as would have been normal for a public sector legal mandate - unless their appointment was argued to be exempt from the EU regulated procurement process on the grounds that it was for the purposes of litigation or possibly being especially unique/urgent).

8.85 McGrigors (Brandon Nolan and Simona Williamson) began attending TIE meetings in the second half of 2009, I believe. Their primary task in late 2009 / early 2010, from my perspective, appeared to be to interrogate the Infraco Contract and assemble information about the Wiesbaden Agreement and the genesis of SP4. I do not know what role CEC played in this appointment. This exercise was known as "Project Challenge."

8.86 I have already mentioned TIE's after-the-event review of the Wiesbaden Agreement which took place in late 2009/2010 and effectively formed part of Project Challenge.[146]

8.87 Tony Rush and Brandon Nolan of McGrigors asked me who had been involved at Wiesbaden. Tony's starting point was that since it was called an agreement and its principles had gone directly into the Infraco Contract, DLA Piper must have written it, or at least negotiated it, and he said he was giving me a friendly heads-up that I was going to get a very rough ride. Tony was extremely surprised to find out when I told him (and TIE's own research confirmed) that DLA Piper had played no part in Wiesbaden at all.

8.88 Richard Jeffrey gave me a brief explanation that McGrigors' remit was to assist TIE in a review of how the financial, technical and commercial components and the underlying contractual positions in the Infraco contract had been arrived at. If that was the remit, then it was a pretty wide one.

[146] Paragraph 7.383

8.89 DLA Piper were not being instructed by CEC Legal. DLA Piper had been instructed by TIE to provide CEC Legal with DLA Piper's reports to TIE. My concern was to act for TIE and to take instructions from Richard Jeffrey on Pitchfork and from Jeffrey and Rush on Carlisle[147]. I was not specifically instructed to share information with McGrigors on either Pitchfork or Carlisle or Notice. I recall some initial meetings which McGrigors attended on these TIE initiatives and was occasionally aware that Tony Rush was communicating with McGrigors.

8.90 DLA Piper supported Carlisle and Pitchfork with considerable commitment for well over a year. I was not clear what McGrigors' function and remit was at that point once they finished looking at Wiesbaden as part of Challenge.

8.91 As far as I could see, they were not involved in Carlisle and they were not involved - visibly - in Pitchfork or Notice. Nor were they, again as far as I could see, involved in assisting TIE in drafting and responding to Infraco contractual correspondence. I seem to remember one or two Pitchfork meetings attended by Simona Williamson of McGrigors taking notes, but any legal work produ[illegible] was delivered by DLA Piper. I recall Stewart McGarrity saying to me that he did not see the point o[illegible] paying for two Rottweilers, when one (DLA Piper) was a pretty good one anyway. Who was paying for McGrigors' work I did not and do not know.

8.92 I read that the Inquiry has seen documents - which I have not seen – showing that McGrigors were acting for CEC. Clearly, CEC felt able to instruct its own lawyers without any input or advice from DLA Piper. This further illustrates –in my response to Question 90 and Question 92 that DLA Piper was not required to advise in order for CEC to decide that it would benefit from obtaining independent legal advice.

8.93 My main concern at the time was to ensure that DLA Piper's scope of work was distinct from McGrigors' for client's budget purposes and for obvious professional indemnity insurance reasons. And since TIE did not instruct any change in how DLA Piper was to work, our work and mandate was distinct. Whether it was in some way discussed by TIE or by CEC with McGrigors I do not know. DLA Piper's position remained to be as responsive and communicative as possible in ord[illegible] to support TIE. That we acted in that way is borne out by the contemporary documents.

8.94 I have no knowledge of or recollection of Shepherd & Wedderburn being involved for TIE Ltd. Since I had no involvement in CEC's approach to independent legal advisors, I would not know whether Shepherd & Wedderburn were acting for CEC or not.

8.95 I am asked in Question 117 whether McGrigors' involvement hampered the effective management of the disputes. I do not consider that it materially impeded the conduct of the DRP and adjudications since I had purposefully made sure that DLA Piper was equipped with personnel (a partner and a senior associate) to handle DRP conduct on TIE's behalf. What their involvement may have done is increased legal costs with no discernible benefit. There were certainly meetings which took place to discuss in great depth what McGrigors' views were on certain provisions of the

[147] Para. 8.69 provides a brief explanation of what these 'projects' were and they are discussed in more detail throughout my statement.

Infraco Contract and the extent that those discussions bore on what TIE was going to do under the DRP, i.e. whether TIE was going to bring a DRP or not and the timing of the submission for dispute into the DRP process. During 2009 and early 2010 I spent appreciable blocks of time in meetings with McGrigors and TIE management essentially reviewing the operation of the Infraco Contract. There was limited product required of DLA Piper from these sessions and I do not know what McGrigors produced or for whom. From my perspective, McGrigors were not involved in advising TIE on the proper application of the Infraco Contract in support of the Carlisle and Notice initiatives.

8.96 The efficient and effective management of the INTC claims, at that point, related to several hundred Notified Departures. I do not think the debates that went on between TIE, ourselves and McGrigors had any influence on that, other than locking Steven Bell, and sometimes Dennis Murray, into Challenge meetings, but this use of its senior Infraco contract management resource was for TIE to manage. From my perspective, TIE's efficient and effective contractual management of the volume and backlog of INTC claims, started when Tony Rush arrived in early 2010 and took stock of the contractual situation and addressed how to lessen BSC's commercial dominance. What the presence of two law firms produced was a situation latterly on the DRPs in which TIE tended not to move until it thought that the two firms were either agreed or there had been a discussion. However, I do not recall the two firms having significantly disagreed with one another about DRP.

8.97 I am asked in Question 113 why I sent my e-mail of 26th November 2009 CEC00851367 to Gill Lindsay of CEC Legal: DLA Piper was under instruction from TIE management to keep CEC Legal abreast, when requested, of the adjudication outcomes on Carrick Knowe and Gogarburn. My earlier short email in this email chain serves that purpose: I sent her the awards and a DLA Piper Note produced for TIE. As appears from the e-mail chain, CEC Legal then asked me about: (a) what TIE may be contemplating in terms of challenge on the awards; (b) time limits; and (c) written opinions. I replied to that inquiry 20 minutes after receiving it. I did not know and do not know what other communications CEC Legal was receiving on these matters from TIE (or others). Clearly, at that point, CEC Legal had not heard from TIE on the subject of challenging the adjudication decisions. I do not recollect receiving a response to my email.

8.98 On 9 December 2009 DLA Piper provided a note of advice (CEC00651408) which is, in my opinion, an extremely useful and succinct 8 page summary of the positions and arguments around the various SP4 and Clause 80 language and provisions which had been adjudicated up to that point. I am asked about this in Question 110. I cannot comment on McGrigors' positions since, as the paper states, I do not recall ever seeing their views expressed in writing in this form or to this level of particularity. These views and advice on CEC archives may well exist, I do not know. What this DLA Piper paper included were the McGrigors' views as communicated in meetings during Project Challenge.

8.99 There were clearly divergences in how four lawyers[148] viewed these matters. I see nothing unusual about that. There was a lack of certainty as a result of: (i) neither TIE, nor SDS, nor Infraco being able to state what drawings were in fact available at BDDI, but I do not believe that any dispute taken to adjudication ever centred on this point; and (ii) the drafting in SP4 itself, prepared by TIE in direct negotiation with BSC. I am asked whether these issues were considered at the time that the agreement was concluded. I have addressed this above in my discussion of the Wiesbaden Agreement, Schedule Part and DLA Piper's advice to TIE on those matters, I also note that out of the seven issues validated in that paper, Senior Counsel again agreed without reservation with DLA Piper on five of these.

8.100 I do not know why TIE decided not to challenge the adjudication awards. I do not recall being party to any TIE meeting to discuss challenging the adjudication awards or being instructed by TIE to advise beyond CEC00578621 which I discuss below. I am referred to CEC00578620, but this is a short exchange between Tony Rush and me concerning various contractual provisions, as opposed to any discussion about adjudication awards.

8.101 CEC00578621 is a 29 page DLA Piper report produced for TIE (and provided to Tony Rush) in December 2009 on the outcomes of the adjudications. It includes DLA Piper's views on the merits and practicalities of challenge to the awards; this followed my information e-mail to Gill Lindsay in late November 2009 (CEC00851367) informing her what I knew of TIE's position as regards challenge and the absence of written advice – as far as I knew - from McGrigors regarding the adjudications that they had conducted for TIE.

8.102 I did not see and have not seen any written record of TIE's decision not to challenge the adjudications or to await further developments for any specific reason before challenging the adjudications. If there had been a TIE instruction to DLA Piper to prepare challenges, DLA Piper would have been involved in producing guidance on the procedure, a full budget, and also a recommendation on counsel. The absence of this set of advice reinforces my view about the lack of any decision by TIE about challenging the adjudication awards. I do not know if TIE kept the matter under review.

8.103 Having provided TIE with our extensive advice, including the views of two Senior Counsel, there was no more that DLA Piper could do or be expected to do. By this time, Challenge had been under way for a considerable period of time and Project Carlisle was commencing. I remark that in August 2010 when Lord Dervaird's award adjudicated in favour of BSC's interpretation of Clause 80, McGrigors (who had had conduct of the adjudication for TIE), indicated that they did not regard the award as watertight (see CEC00338149 on 8th August 2010). So far as I am aware, TIE never instructed McGrigors to pursue a final decision on this in court. . By Q1 2011, DLA Piper's mandate had ended and so further input on potential litigations to unwind the outcomes of DRPs was not our concern.

[148] Richard Keen QC, Callum MacNeil QC, DLA Piper and McGrigors

8.104 In response to Inquiry Question 128, I do not know what led to the switch to mediation in November/December 2010. I was outside the UK recuperating from illness at this time and was not involved.

8.105 I am asked in Questions 89 and 113 about "Mar Hall". I do not know what this is and was not involved in it.

8.106 It has to be remembered that it was not simply a case of the works proceeding in relevant confined site areas. Even once the Notified Departure adjudication or claim had been resolved, the SDS scheme designs were still not complete or approved by CEC Planning and Roads Authority and MUDFA was still all over the city streets. So in many areas where BB should have been working, had the critical path on the construction programme been followed or acceleration measure taken to make this possible, BBS could still assert:

8.106.1 they had no site to do so;

8.106.2 the working methodology that they had planned could not be deployed; or

8.106.3 if they were to mobilise and work, this would be very inefficient because of non-contiguous or limited work areas and simply generate more payment entitlement claims.

8.107 It is therefore hard for me to separate out the impact of the Notified Departure disputes and lack of construction drawings from the effect of MUDFA delays in terms of the overall programme delay to the Infraco works. Indeed, that exercise was not within DLA Piper's remit at all. MUDFA had simply not delivered sufficiently clear and handed back on-street areas for BBS to be challenged conclusively about their indifferent mobilisation effort. And MUDFA contractor, Carillion, had itself presented TIE with a very substantial prolongation and disruption claim, based in appreciable part on the unavailability of critical path SDS designs.[149]

8.108 **The Princes Street Supplemental Agreement**

8.109 There were serious arguments regarding Princes Street works and access in 2009, shortly after Richard Jeffrey became TIE CEO. Ultimately, I believe that BBS also wanted to find ways to avoid work because it was not ready to mobilise and it found many reasons to do so. After Christmas 2008, TIE had been focusing hard on the completion of MUDFA works on Princes Street as the best prospect of releasing sufficient street length and instructing BBS to commence works there. I was involved on a more or less daily basis drafting contractual correspondence for TIE - both instructions and warnings and replies to communications from BBS - which almost certainly had input from Pinsent Masons.

8.110 By March 2009, with the exception of works out near Carrickknowe and Broomhouse where BAM as BBS's subcontractor had been active on a section of the tram line that was not on-street, there had been virtually no tram installation works anywhere along the scheme route. This was 10

[149] Para 6.67

months after Infraco contract signature. The reasons were either unresolved/disputed Notified Departures, complete absence of prior approved Issued for Construction designs, absence of street sections clear of MUDFA works or a combination of all three. TIE were under clear and mounting public pressure to demonstrate that the tram installation works were going to somehow gain momentum.

8.111 Steven Bell concluded from an engineering standpoint that sufficient utilities diversions in Princes Street could be completed to allow BBS to begin preparatory work for track installation. I seem to recall that there were still problems and on-going MUDFA works on Princes Street at the foot of the Mound but TIE considered that this could be managed.

8.112 From memory, Princes Street was one of the key areas where CEC had placed time-constraints on tram related works due to various pre-programmed annual City-wide events. These were reflected in the Infraco Contract terms and had been stated in the ITN to bidders. For this reason, I have in mind that commencement, efficient and clearly programmed sequences and sectional completion (at least to a standard where the street was capable of taking road and pedestrian traffic) Princes Street were particularly time critical in order to respect these pre-set CEC working windows.

8.113 It is suggested to me in Question 97 that there was significant congestion in Princes Street when traffic regulations were introduced. I do not know what the reaction to such traffic congestion was at the time. CEC Transport instructed Dundas & Wilson on the procedural legal aspects of TROs and TTROs, it was not something on which I expected DLA Piper to be consulted by TIE and we were not asked.

8.114 TIE instructed BBS to mobilise on Princes Street during the first week in March 2009 and issued a full request to CEC for traffic diversions along George Street and diversions were put in place. BBS wrote back formally – but in an uncharacteristically odd and rather vague fashion - to say that they would not mobilise to move onto Princes Street because site access was not exclusive: a single lane had in fact been cordoned off for continuing bus use. I do not know whether traffic congestion was the reason for this. I was not (and would not have been expected to be) asked my view on that matter by TIE. My assumption was that TIE were in communication with CEC Transport and Lothian Bus (and other Edinburgh bus operators) about this. I do recall that D&W had secured the temporary traffic regulation orders relating to diversion along George Street and that barriers (and their erection at the West End) had been contracted by TIE through a specialist subcontractor.

8.115 BBS considered this access offered by TIE was not sufficient to permit safe and efficient working. There had been a build-up of exchanges between TIE and BBS. Initially BBS said that they were not going on street because they thought it would be unsafe and it was not ready. TIE came back and informed BBS that they had 750 metres from the West End to the Mound that was clear, bar a single bus lane. BBS's response to that was that TIE had not provided sufficient notice to enable them to commence works. In turn, TIE responded by saying that BBS would be in breach of contract if they did not mobilise. Finally, BBS responded saying that they would not mobilise because of the bus lane reservation, BSC was not obliged to work because they were contractually

entitled, they said, to exclusive possession of the site. BSC also stated that it was a health and safety issue. That final response came in the form of the email from Robert Sheehan dated 18 February 2009 (CEC01032271) which asserted that retention of one lane for buses on Princes Street made it unsafe to work there and they would not mobilise. TIE then issued CEC00942549.

8.116 This exchange of correspondence will be on file and parts of TIE's correspondence (CEC00942549, CEC00942802, and CEC01032608) with contractual notices and instructions to progress the works were drafted by me (on TIE's instruction and with Steven Bell's factual and engineering input) in order to make it clear that if BBS refused to mobilise, TIE would treat this as: (i) a very serious material breach of the Infraco Contract (failure to progress the works for no justified reason) indeed; and (ii) as a deliberate bad faith obstruction by BBS to the proper and collaborative operation of the Infraco Contract. In particular, TIE's letter of 19th February 2009 (CEC00942549) gives notice that TIE has invoked the DRP process thereby triggering TIE's right to instruct BSC to proceed with the works under Clause 80.15 of the Infraco Contract. CEC00942802 is the same letter. CEC01032608 is TIE's DRP position paper on the dispute over TIE's instruction to mobilise and work on Princes Street. CEC01032611 is BSC's DRP position paper in response. Both are dated 2nd March 2009.

8.117 Behind this correspondence, TIE had asked for our advice in relation to the use of the £23 million performance bond (which could be called 'on demand' in part or in full at TIE's option), the PCGs, and escalation to possible issue of a remedial termination notice under the Infraco Contract as well as continuing material breach and substantive grounds for termination of the Infraco Contract at this point

8.118 I advised in some depth on the contractual termination mechanic which, after issue of a contractual default notice by TIE, permitted the Infraco a time-bound opportunity to present a rectification plan to TIE to remove its default. These came to be known as Remediable Termination Notices ("**RTNs**"). Our advice was that, without careful analysis of the type of BBS breaches relied upon, termination would carry an appreciable risk of being challenged as wrongful.

8.119 Since TIE's use of the Infraco Contract to warn BSC about their approach to INTC's and Clause 80 had had little effect, we saw RTNs as the most obvious next level of means of using the Infraco Contract to exert pressure on BSC to work effectively. At the same time, TIE would be attacking the log jam of Notified Departures and BSC's failures to provide proper or timely estimates. The attack would be by recording these failings and then converting them into material breaches by BSC.

8.120 My advice to TIE management was to press to implement the contract and to say to BSC that not commencing works on Princes Street when under explicit instruction would be a material breach of contract for which TIE would be in position to issue a Remediable Termination Notice.

8.121 I recommended that TIE obtain Senior Counsel's advice. The objective of this was to seek his views on what Tony Rush and DLA Piper were recommending. TIE sought Richard Keen QC's

advice who agreed with DLA Piper's view. In this context and in conference with Senior Counsel, there was a discussion about how BBS were using SP4 and its position within the contract terms.

8.122 TIE prevaricated and BBS then abruptly agreed that they would mobilise. I remember seeing some subcontractor plant and equipment - Mackenzies, I think - moved onto Princes Street at the West End the morning after there had been the exchange of contractual correspondence.

8.123 BSC's position had been initially weak. However, on receipt of the letters we had prepared for TIE (citing Clauses 7, 34, 60 and 61 - from memory), BSC shifted their position as explained below, to assert that the whole of Princes Street works under a post BDDI SDS Design was a Notified Departure.

8.124 I recall very soon afterwards, further BBS contractual correspondence arrived with Steven Bell. This was distinctly more crisp and had the flavour of having had input from Pinsent Masons. This basically indicated that the November 2007 Base Case Assumption SDS design against which the Princes Street road works had been priced had been different. It was essentially a 'key shaf design" with the centre of the road to be excavated to a certain depth to ensure stable platform for the tram tracks. Outside this area the street was to be cut out and reformed at a much shallower depth. This letter from BSC stated that any works on Princes Street would be an INTC, due to the SDS design having been changed from a key pattern excavation to full depth 'curb to curb' excavation, as well as some alleged particularly untoward ground conditions (see paras 8.126 - 8.127).

8.125 The state of the SDS design for Princes Street track installation works would have been clear to TIE at this time. When TIE had decided at Christmas 2008 that MUDFA would be sufficiently progressed so that Princes Street would be the works section to require BBS to mobilise for on street works three months later, my assumption was that TIE were confident there was a matching, Roads Authority consented SDS Design available in Issued for Construction form. TIE had had every opportunity to consider how BSC would approach an instruction to mobilise on Princes Street and every opportunity to understand what would happen if: (i) there had been a change(SDS design after BDDI requiring curb-to-curb excavation width and depth for track installation (including using Clause 10 and Schedule Part 14 in the Infraco Contract to monitor this possibility); and (ii) unforeseen ground conditions emerged. These are engineering and quantity surveying issues, not legal ones and TIE was certainly long sensitised to how BSC reacted to any possibility of encountering adverse ground conditions.

8.126 I have no memory of whether this came as a surprise to TIE or not. I believe this design evolution was because of SDS's concern about the general load-bearing capacity and sub-surface quality of the whole of Princes Street. From time to time, TIE had voiced concerns about SDS over-engineering its designs to protect its own design liability position and this issue was probably a case in point. I seem to recall that Steven Bell took this up with SDS who were unhelpful.

8.127 I remember also BBS citing that their subcontractor had encountered unexpected concrete obstructions (possibly relating to First World War sub-pavement air raid shelters or the original

Edinburgh tramlines) near the middle of the street. I recall Kevin Russell, the new Australian BSC contracts manager, raising this particular point in the meeting on the afternoon of 13th March 2009 at Edinburgh Park. And so: the situation in Princes Street, in BBS's view, was indisputably a Notified Departure.

8.128 Steven Bell led on this and there may well have been some reliance on one of the limitations on Pricing Assumptions which focused on depth of sub-surface road reinstatement.

8.129 Further written exchanges and calls failed to resolve matters and an urgent meeting was called. As I remember, this was set for late on a Friday afternoon 13th March 2009. TIE had already told CEC that Princes Street works would commence on the Monday (16th March 2009) and relevant notifications had been given to affected businesses and residents. I also remember that there may have been resultant restricted bus services along and/or bus diversions off Princes Street and up onto George Street with relevant TTROs. This meant that there was a credibility risk to the Project from: (1) very adverse media and public commentary if Princes Street works did in fact not commence when scheduled; and (2) a works programme delay impact which threatened overrun into the CEC "black" period for any tram works on Princes Street.

8.130 I attended the Friday meeting with Steven Bell, Dennis Murray, Alastair Richards (I believe) and Keith Kilburn from DLA Piper. The discussions at BBS Edinburgh Park went on for some time and became quite heated. I remember exchanging words about BBS's essentially obstructive attitude with Kevin Russell. Martin Foerder, the new BBS Project director, Kevin Russell BB's contract manager, Ian Laing of Pinsent Masons and possibly Martin Sheehan of BB were also present.

8.131 Whatever hopes TIE had to negotiate a solution which did not centre around BBS being paid on a demonstrable time and cost basis evaporated quickly. BBS knew that TIE was under great pressure to have works start and so held their position doggedly, using the SP4 express Pricing Assumptions 11 and 12. This is what the Princes Street Supplemental Agreement confirms, namely a Notified Departure entitling payment for the additional engineering works required to execute the SDS design produced and/or revised post BDDI and deal with obstructions with price to be determined on a demonstrable cost basis for labour, plant and materials using the Bills of Quantity in the Infraco Contract. In other words: no time or price risk carried by BBS and no element of the cost fixed. Steven Bell was very dejected by this outcome and Richard Jeffrey was disappointed that his first major engagement with BBS resulted in them receiving exactly what they wanted.

8.132 On instruction from Steven Bell, I drafted the language for the agreement itself and settled this quickly with Ian Laing. I believe I may have asked Keith Kilburn (DLA Piper, contentious construction) to review the agreement; he had attended the meeting with BBS with me.

8.133 The agreement was short and straightforward. It reflected what TIE had agreed at the meeting on the afternoon of Friday 13th March 2009 at BBS's Edinburgh Park offices. There was no further advice from me or from anyone else required. One of its appendices is a hand-drawn sketch, which shows the SDS design change in simple fashion. The Agreement was signed by TIE and BB

on 20th March 2009; I believe a second version (identical) may have circulated to capture consortium member signatures from Siemens and CAF who played no part in the discussions or correspondence.

8.134 I had reported in brief to Gill Lindsay (on instruction from TIE management) in CEC01033708 in early March 2009. The report informed CEC Legal about Princes Street status - which at the time was that BSC had begun some preliminary works and that TIE had informed me in brief about an upcoming meeting to examine how BSC would work on Princes Street, following a very recent TIE senior management meeting with BB Wiesbaden management. I also commented for CEC on where two DRPs stand. I am asked in Question 98 to elaborate on the content of this email, but I have nothing of any significance to add.

8.135 In spring 2010, there was discovery of defects caused by poor quality concrete pour and sealing in the bed and support of the tram tracks in Princes Street. I recall walking Princes Street from the West End with Tony Rush one morning to see this for myself. This later dispute over Princes Street works therefore did not relate to a Pricing Assumption, but rather defective sub-contractor wo... which was rectified at some point at BBS's cost, I believe.

8.136 I am also referred in Question 98 to a BSC letter (CEC00548448) which arrived with TIE on the 3rd March 2010. I saw this on 5th March 2010 as is clear from my hand written notes on the copy I am asked about. This document is one year later than CEC01033708 and it has nothing at all to do with the Princes Street Supplemental Agreement, under which the on street track installation and overhead pole erection works had already been substantially completed in late November 2009. It may be perhaps relevant to the potential off street supplemental agreement discussed at para. 8.162.

8.137 This BSC letter makes two minor comments on the effect of SP4. I am also asked for my view on these in Question 98. One point correctly referred to how TIE had agreed to deal with MUDFA in SP4. The other correctly stated that SP4 meant that the Infraco Contract was not a fixed price contract.

8.138 I am asked in Question 102 to comment on the contents of my email to Mike Heath dated 11 March 2009 (CEC01032481). My best recollection is that Mike Heath had been engaged by TIE to chair an OGC3 style Peer Review Panel carrying out a review on the Project. He was a PFI/PPP specialist. I believe that I may have met him and colleagues at an earlier review, the date of which escapes me now. My e-mail (CEC01032481) to him responds to questions I list (in the email) which he had raised in relation to the contractual 'stand off' situation as regards BSC's refusal to carry out installation works on Princes Street. I recall that Sharon Fitzgerald and I had been asked to attend a short session with Mike Heath and two other panellists (Willie Gillan and Malcolm Hutchison, I believe) at which we were asked a series of relatively generic questions.

8.139 I do not now recollect clearly if the questions I was answering in CEC01032481 had arisen from an actual meeting or from the fact that Mike Heath had been meeting TIE personnel in another review in March (as in fact is indicated by the paper presented to the TPB on 13th February 2008 about

the planned Peer Review of TIE's readiness for Infraco implementation phase (CEC01246826 at page 30). I rather think the latter because I do not remember leaving any meeting with Mike Heath with outstanding "homework".

8.140 I believe that Susan Clark co-ordinated this exercise which is mentioned in various contemporary TIE Board and Tram Project Board papers I have now seen. I do not recall seeing any comment made or issues raised by CEC in relation to this exercise, essentially a review of TIE's performance as CEC's Project delivery agent. I was not shown the results of the review.

8.141 As is clear from my email of 11th March 2009, I was in the midst of advising TIE on the Princes Street situation and needed to prioritise that job over answering Mike Heath immediately.

8.142 **Work in 2010 - McGrigors / Tony Rush / Re-Pricing Negotiations**

8.143 During the first half of 2010 I was instructed by Richard Jeffrey to attend regular - perhaps weekly - meetings predominantly at TIE's offices, in my capacity as lead partner for TIE's legal adviser, DLA Piper. TIE Project management personnel also attended and ran these sessions. After summer that year, I attended fewer TIE meetings. My own and DLA Piper's input over the course of those nine months until late October 2010 when I became ill can be summarised as:

8.143.1 participating in a variety of workshops/discussions to provide legal input to TIE's formulation and execution of TIE's various strategies to move BSC from continuing contractual stasis towards properly progressing the Project or reaching a position where BSC would be coerced to the negotiating table. Part of that strategy was to use the Infraco Contract to reach a factual point where TIE had its best arguable case where BSC were in material and continuing breach of contract;

8.143.2 writing the first draft of a number of option papers (as a model for TIE's own personnel to use or as contract analyses for TIE) to capture initial discussion in order to identify and evaluate in archetypical SWOT analyses the commercial, financial, technical and legal advantages and downsides of specific courses of action by TIE;

8.143.3 stimulating discussion within the TIE management group about commercially intelligent choices and tactics and how BSC might respond to these;

8.143.4 over a 4 month period mid-year 2010, providing on-going intensive legal support to Tony Rush and his team to develop and enact Project Carlisle and to process the INTCs which TIE could not or had not processed or challenged itself, in order to turn these contractual blockers back onto BSC for use in issuing Remediable Termination Notices

8.143.5 at intervals and on specific instruction from TIE, briefing Senior Counsel for consultations on TIE's contractual strategy;

8.143.6 advising TIE on the protection of its rights against SDS;

8.143.7 supervising the work of DLA Piper team on the Infraco Contract support for TIE and monitoring DLA Piper's work on the TIE - BSC adjudications, DRPs and on key contract administration issues;

8.143.8 providing informal objective feed-back to TIE senior management on negotiations with BSC and, when instructed, a measure of "blue sky thinking" for TIE's consideration;

8.143.9 where specifically instructed by TIE to do so, briefing CEC Legal on TIE's position as regards DRP and adjudications and Project Pitchfork, both orally and by invitation to attend meetings and consultation with Counsel; and

8.143.10 acting as a communication channel between TIE senior management and Tony Rush, when called upon to do so because of differing working style, confusion over priorities or personality clashes. This occurred when Tony Rush considered that his needs for Project information were not being answered by TIE quickly enough because of what he saw as TIE navel-gazing.

8.144 From its perspective as TIE's legal adviser, DLA Piper's focus was on advising TIE on how to use all its contractual rights to the fullest advantage – which, in my opinion then and now, TIE had not done on any of the three central contracts: Infraco, MUDFA and SDS - both prior to 14th May 2008 and after that date.

8.145 **Project Carlisle**

8.146 I have discussed TIE's appointment of Tony Rush above.[150] His remit was to trouble-shoot a solution to the impasse and drive a set of re-pricing negotiations. This was Project Carlisle and it continued, from memory, for approximately 7 months, I think from April to mid-October 2010.

8.147 Carlisle was about trying to arrive at a commercial solution which could be agreed between the parties. It involved attempting to achieve some kind of arrangement where BBS would finish the scoped and designed project to a guaranteed maximum price, to a timetable and to a construct programme. The aim was ultimately to allow for a PSCD on the tram scheme sometime in late 2012. That date was bouncing around. Clearly TIE wanted the earliest possible date but the parties were trying to come to an agreement. This was clearly one of the most contentious areas.

8.148 Part of Carlisle was dealing with all of the Notified Departures and pushing them back at BBS requiring their proper and technically substantiated estimate and advising they were in contractual default if they did not do so. What we were looking for at that point in Carlisle were enough material breaches to turn BBS's actions into a massive continuous material breach. At that point, TIE intended to issue a contractual RTN or series of RTNs to BBS to say "*you are on a knife edge on termination*". This became known as 'Project Notice'.

8.149 Tony Rush's strategy for Carlisle was to drive a price out of BBS for something that TIE might be able to afford, which looked at the idea of a truncated scope. What I was there to do was to

[150] Para 8.73

support Tony in articulating what Carlisle would be (hence the heads of terms document). I also had some practical use here as a point of information beyond straight legal advice because I had been with the Project for a long period of time. I was able occasionally to say to Tony and to TIE "*Do not go through that door with BBS. That is a no-go area. If you go in there you are going to get their hackles up and they will not come to the table.*" or "this a weak *area for BSC, perhaps it can be probed*"

8.150 There were various phases of Project Carlisle. An important phase was the building up and taking hold of the various Notified Departures that were stalled and choosing the ones where TIE had strong arguments under Clause 80 and other applicable Infraco provisions. The effort was aimed at putting TIE in a position to put BBS on formal contractual notice that they were in material breach at various levels in order to undermine their confidence. We built up a sufficient conglomeration of those breaches and then TIE served notices, after waiting the appropriate time under the contract for proper Estimates, requiring the information be provided within 'x' days, failing which BBS would be in material breach of the contract. In some cases TIE issued an explicit instruction to proceed under Clause 37.

8.151 The other important phase in Carlisle was Tony Rush understanding, by inference, where BSC were, what exactly it was they wanted, and forcing the issue by producing a set of heads of terms of potential negotiating points. DLA were heavily involved in trying to produce a workable document as to what TIE wanted to talk about, what negotiating levers they had, what TIE's strong points were and where BBS's weaknesses might be. That was backed up by the discovery of defects in the track-laying in Princes Street in September 2010, the decision on how to use those defects as a public pressure point on BBS, and whether it should be the subject of a further remediable termination notice.

8.152 Pitchfork and Carlisle began to overlap for the obvious reason that a component of both plans was administering the Infraco Contract robustly – in fact far more robustly and methodically than TIE had done prior to Tony Rush's arrival.

8.153 For me, Carlisle was much more important than Challenge. We had been over and over the reasons for the Infraco contract's approach to allocation of responsibility for change. In my opinion, Carlisle was what people should have been concentrating on. TIE needed to force the issue with BBS and see what the optimal position was. TIE needed solution options and comparisons and Tony Rush was working on this.

8.154 I spent many hours in meetings on Pitchfork, considering what would happen if the contract was terminated, what would happen if the Project was truncated, how could it be truncated, what damage would be suffered if it was truncated, if you removed scope from BB, what would they do, should CAF be told to stop or stay production etc. In these meetings different variants on the commercial issues were examined to reconfigure the Project so that it was either affordable or attractive to BSC to finish, without their claim that they were going to make a massive loss unless they received a payment of £100m.

8.155 One of the first things that Tony Rush wanted to look at with me was whether there was any ammunition in the contract that had previously been underused. Tony Rush was supported by DLA, with TIE's approval, out of our Glasgow office for about a five-month period as he worked through Carlisle. What we were doing in Glasgow was building up TIE's contractual answers to the Notified Departures claims. This was to be used as a negotiating tool. Tony Rush was immediately concerned to have TIE's resources to back his efforts on Carlisle. He became quickly frustrated if, and when, he felt TIE were holding back on engaging with him to assist his methods.

8.156 The first problem encountered on Carlisle was Tony Rush clashing with TIE about their ability to support him in a suitably adroit, informed, continual and quick fashion. There was an issue about Tony communicating clearly to TIE. TIE possibly had a different style of project personnel than he was used to - I simply do not know. He was openly extremely critical of TIE as an organisation in meetings with TIE and privately with me when discussing what he regarded as having happened with the Infraco contract during 2008 and 2009. He did not understand at all the idea that TIE would have entered into the Wiesbaden agreement without consulting DLA, its lawyers.

8.157 In terms of my view on who was right and who was wrong, it was a clash of styles. TIE had a great many responsibilities that it was struggling with in terms of administering the contract at that point. The personnel responsible for Wiesbaden had left. And I consider that there was an abiding TIE resourcing problem in servicing the demands made on TIE's personnel.

8.158 In Tony's mind, he was engaged to achieve a result and his work took priority over anything else. Tony was clear in his mind about what was important amongst these TIE initiatives. One issue with Carlisle was the starting point of information gathering (which Tony Rush needed to do quickly in order to be efficient and to exert pressure on BSC showing them that he meant business and knew his game – and theirs). There was a delay in getting engagement with BBS. I do not think it was a problem in itself. I think BBS just wondered why they should be talking to somebody who was very new on the scene.

8.159 Tony took on the role of systematically attacking the INTCs to force BBS to respond or risk default notice for failing to comply with Clause 80 and with an agglomeration of these notices a material breach warning or other contractual sanction. Tony had, from TIE's perspective, novel ways of using the contract. He wanted to be in charge of that. He wanted to pool together as quickly as possible a conglomeration of issues under the Notified Departure backlog which could be flipped into numerous technical, but material and intentional, breaches by the Infraco. That was essentially what I had told TIE to do in 2008/09. TIE could not do this because they could not process the information quickly enough. I do not believe that Dennis Murray had the resources at his disposal.

8.160 My associate Jo Glover spent a solid block of two months in DLA Piper's Glasgow offices working with Tony Rush and two colleagues (and TIE's quantity surveyors) creating the necessary contractual replies and warnings to BBS in order to undermine BBS's confidence. Tony spoke to me plainly and often about how his view was that TIE had been far too timid and disorganised over

a long period of time and had simply allowed BBS to dominate the administration of the Infraco Contract.

8.161 **Off-Street Supplemental Agreement – Inquiry Question 115**

8.162 I do not now recall playing a central role in TIE's preparations for discussions with BSC regarding how, and if, they and TIE might want to vary the Infraco Contract further. From memory, Tony Rush was certainly interested in any means to create momentum. Since MUDFA delay and its related problematic situation continued to obstruct delivering clean and sequential access to site on street, he asked my opinion about TIE making a separate agreement with BSC to test if a working relationship could be developed - for it was very clear that TIE and the Project desperately needed to show output to the public and wider stakeholders. This took shape as the possibility of an Off Street Supplemental Agreement. I do not know to what extent TIE were enthusiastic about this.

8.163 I sent the e-mail I am asked about (CEC00656394) on Sunday 10th January 2010, immediately on my return from leave over New Year. I was sharing some preliminary thoughts, no more. My thinking at that point was that if what Tony had in mind was TIE identifying and isolating sections of the Works for which there was competent approved SDS Design to Issued For Construction standard and no hindrance from ongoing or delayed MUDFA works, TIE could instruct BSC to proceed, once any arguments they made about non-sequential or inefficient working were dealt with and cost and programme fixed e.g. under either a variation or further supplemental agreement.

8.164 In order to answer better how this evolved, I would require to see the further advice I gave alongside what I was asked to review by Tony Rush. I do not recall now to what degree, if any, the concept of this off street supplemental agreement was pursued within Project Carlisle.

8.165 The question put to me posits that BSC in fact never carried out any on street works under the original contractual arrangements. DLA Piper was not TIE's engineering or technical adviser and so I cannot confirm this, save that the Princes Street tracks were laid and related OHLE supports constructed between late March and late November 2009 and that these were the first on street works I knew about. I knew also that Siemens subcontractor (BAM) had done some limited ground preparation for off street tracking laying construction works, I recall, near Broomhouse Drive. These works, I remember, were visible (and on-going for a time) from the Edinburgh-Glasgow mainline railway.

8.166 I do not know why TIE decided not to pursue the idea of an off street supplemental agreement, but I do not believe that the original PSSA price would have been a central material factor, as put to me in Question 115. Off street works – in some cases on a fully segregated way - were different in character for very obvious technical reasons and could have been priced at contract rates if supported by an SDS design at IFC stage.

8.167 My view is that the PSSA payment by TIE was not a claim by BSC (as is stated by the final part of Question 115). It was in fact TIE's acceptance of a contractual payment application by BSC under the Infraco Contract (as varied by the PSSA) on the basis of contractor's demonstrable costs for carrying out the works, using the rates in the contractual Bills of Quantity. TIE had the contractual right – repeated in the PSSA - to monitor and interrogate weekly what BSC's subcontractor was doing on Princes Street, all their costings and what their rate of progress was.

8.168 **Termination of the Infraco Contract – Inquiry Question 125**

8.169 It is suggested to me in Inquiry Question 125 that the idea of termination of the Infraco Contract emerges from Richard Jeffrey's email of 14 June 2010 (CEC00302039). Richard Jeffrey's was requesting advice before his upcoming meeting with John Swinney, Finance Minister. My response to CEC00302039.0001 - twenty five minutes after it was sent to me - in fact makes it clear that DLA Piper had already been instructed by TIE to provide TIE with two pieces of written advice on termination of the Infraco Contract (and had done so), one year apart: April 2009 and February 2010 (see para 8.60).

8.170 The question of the termination of the Infraco Contract as a legal step emerged as a consequence of TIE, initially on its own course of examining options and then a year on within Tony Rush's initiatives, considering all its financial, commercial and technical options. TIE considered this both as an end game in itself and as a lever to bring BSC to the negotiating table under Project Carlisle. So far as I am aware, TIE briefed CEC about this and certainly CEC Legal attended consultations with Senior Counsel on this aspect of Infraco Contract administration. In the end, TIE did not take this further and I was not party to that decision or any further discussion about termination.

8.171 I do not recall myself having any specific discussions with TIE regarding the termination of the MUDFA contract. The SDS contract would terminate as a matter of course under any Infraco Contract termination - since SDS were in contract with BSC post-novation. An option was also discussed in various meetings I attended with TIE management, which looked at the replacement of BB within the consortium and I believe that this was also part of the approaches made to Siemens (Michael Flynn) by Ed Kitzman, as the Project Carlisle spokesman. I was not entirely clear how Ed Kitzman fitted in and I do not recall meeting him - but Tony Rush deployed him as a go-between, with the idea that he could speak to both parties' strengths and weaknesses as a facilitator. I seem to recall that around the time that TIE issued the Remediable Termination Notices and had a response from BSC to Carlisle, Richard Jeffrey instructed that Tony Rush stop deploying Ed Kitzman.

8.172 **Inquiry Question 121**

8.173 I am asked why Tony Rush, on 30 July 2010, sent a particular Carlisle paper (CEC00337645) to DLA Piper while only copying TIE management. I attach no significance to this at all. Both TIE and Tony Rush were very conscious of the scope of FOI(S)A (for reasons explained at para. 8.63). Consequently, I recommended that drafts, questions and papers about Pitchfork - and the same sorts of documents when generated by Tony Rush on Carlisle and the RTN strategy in particular –

30 July 2010 should be 29 July 2010

should be marked so as to provide legal privilege and could also be routed through DLA Piper in order to give TIE the best plausible argument under FOISA Sections 30 and 36 to deny disclosure. Two examples of TIE heeding that advice are CEC00076511 and 00099403; two examples of DLA Piper communications using the same protection for TIE are CEC00212352 and CEC00302039. Hence Tony Rush sending me (or DLA Piper personnel) this type of documentation and only copying TIE never indicates that TIE's involvement was lesser; on the contrary. By this stage, BSC had been to see CEC direct to complain about TIE's Project management and I believe that there was some evidence that they had instructed agents to seek Project information under FOI(S) Act 2002 requests.

00099403 should be CEC00099403

8.174 I also read from the document that Tony was proposing to show his paper to Richard Jeffrey later that morning and it is his summary for all parties to see after BBS had first responded to Carlisle. It may well also have been that we had part of the documentation on the DLA Piper system - if it required amendment overnight or quickly. Ultimately, this is a question for Tony Rush.

8.175 I notice at the bottom there is a note: "*For Andrew, say nothing*". This is a specific reference to the M80 Close dinner I was due to attend, I think, that night, and the fact that I had told TIE that there would be BB employees at that event, including Richard Walker - I cannot recall if Scott McFadzen had recovered from a very serious car accident – and Daniel Haussermann. I describe this at para. 7.127

8.176 **Inquiry Question 120**

8.177 The Inquiry's question about CEC00218055 and CEC00098706 – emails from Tony Rush to me on 21 & 22 September 2010 – asks whether Tony Rush was the one making decisions as to strategy and tactics. I have discussed Tony Rush's appointment and approach above.[151] If the question means "without consulting TIE", I do not think that was the case. If you look at the subject matter it says "*Princes Street Update - Sent on behalf of Richard Jeffrey*". I take from that that this is something that Tony had shared with Richard, had a discussion with him and Richard had requested that I get briefed on this. Tony wrote fast, Tony moved fast, Tony communicated fast. He wrote to me when it was convenient. If the inference in the Inquiry's question is somehow that he was trying to cut people out by writing to me, this is not correct.

8.178 **Inquiry Question 127**

8.179 Question 127 asks me to comment on various documents relating to Projects Pitchfork, Carlisle and more generally to the disputes between TIE and BBS post-Infraco Close.

8.180 *I am asked in Question 127(a) to comment on/explain the email from Tony Rush to me dated 28th October 2010 (CEC00213619):*

8.180.1 The email sets out a note of an agreed set of actions to be carried out with TIE, and on behalf of TIE, in order to further the objectives of the Carlisle project. It contains five

[151] At paras. 8.73 *et seq*

different topic headings and actions under each of those headings. Those actions really speak for themselves.

8.180.2 The section under "*Infraco responses and claims*" discusses TIE's responses to BBS's replies to the remediable termination breach notices on the INTCs. That had been on-going work by Tony Rush's team. They were supported by DLA and Mike Patterson (who was one of the Quantity Surveyors at TIE).

8.180.3 The section under "*Experts' Reports (Scope Attached)*" concerns two experts who had been instructed by TIE for the purpose of underpinning TIE's technical position on the Princess Street defects, i.e. the defects that came to light in September 2010 after BBS had claimed inclement weather had affected the installation in 2009. I do not know what happened to this matter since I had left before this progressed.

8.180.4 With regards to the section under "*249 Team*", basically, this was the quantity surveyors and valuers who were working on building up the backlog of INTCs (whi(TIE had not responded to or had not been able to respond to) and turning those INTCs back at BB identifying material and intentional breaches of contract for failure to produce an adequate estimate. I note Mike Patterson had reported what was happening. There had been a kind of systematic forensic examination and choice of INTCs to see where BBS's position would be weakest. 99 of them had been looked at and he gave a status report. Tony concluded by saying he has sent in a spreadsheet. I do not think I saw that spreadsheet.

8.180.5 With regards to the section under "*Termination*", Tony was talking about a conference with Richard Keen QC. I am not certain which conference he was talking about. The termination of the contract was an on-going theme in Pitchfork and Carlisle, as I discuss above.

8.180.6 I received this email very shortly before (or possibly after) leaving on medical advi(for one month's leave of absence. I had express instruction not to communicate with my office and not to communicate with any clients. I have no recollection therefore of being involved in any follow-up on these matters.

8.181 *I am asked in Question 127(b) to explain the email from me to Richard Jeffrey dated 8th October 2010 (CEC00099403) which I sent two days before departing on leave to Washington DC:*

8.181.1 In this particular email I am volunteering my views to Richard Jeffrey on how Richard Walker may be thinking about an upcoming meeting. In his email at 8:12am, Richard Jeffrey reports to various TIE executives, and to Tony Rush, what he has been told by Richard Walker on behalf of BBS, namely that BBS is prepared to engage on a structure for an exit for BB alone from the consortium. In other words, the civils contractor was going to walk away under agreed terms, but Siemens and CAF would remain in position. That had been talked about within the context of Pitchfork and was

something that Tony Rush was very alive to. There might well have been differing opinions within the consortium as to a solution. CAF was already busy manufacturing trams, Siemens has not really engaged on the Project very much, other than possibly ordering equipment, and we know what BB's position was. Richard Jeffrey also reports *"they (BB) want out ASAP, a clean break."*

8.181.2 The third bullet point is relevant where Richard Jeffrey stated "*They do not want to discuss Carlisle, there is no appetite for it, it is going nowhere.*" He then congratulated Tony on getting us to this point. In other words, Carlisle had forced into the open that BB alone may want out. Richard then stated that Jochaim Keysberg (BB Wiesbaden) wanted to talk to him. This email sets the scene for a meeting that was going to come very shortly between Richard Jeffrey and David Mackay and senior executives from BBS. I recall that ultimately there were two meetings. There was a kind of warm up meeting between a man called Darcy and a man called Wakefield. Then there was a meeting involving senior people from BB in Germany. I was not involved in that as I was in America on leave.

8.181.3 There is then a short email from me to Richard Jeffrey (CEC00210648) where I offer to discuss matters as a 'confidential sounding board'. TIE had at that point indicated, at senior executive level, that if BB carried on the way they were going the performance bond might get called up. That was as a result of me putting this into Richard Jeffrey's and David Mackay's way of thinking and it was the first time TIE had mentioned this to BSC. What I could see happening was BB considering an exit which was not going to be painless for TIE. It was going to be very public and very difficult. Richard Jeffrey was the Chief Executive of TIE at that point and I was offering my personal support, any commentary, or anything else I could do to help Richard in making these decisions. Tony would clearly be extremely disappointed with Richard Jeffrey signalling that TIE was content, as he did in that note, simply to abandon Carlisle. Tony's response to that would very probably be essentially "*BB are saying they are not interested but we can make them interested*". I knew that Tony Rush might well react badly to that. TIE were basically saying his work had not really achieved very much. The reason I sent that email to Richard was to let him know that I would be happy to act, as I had in the past, as an intermediary or an additional place where Tony Rush could vent.

8.181.4 I notice that in Richard Jeffrey's email on 8th October at 8.12am he says "*Strictly confidential, I gave Walker my word, Ed is not in the loop. Please respect this.*" Ed Kitzman was Tony Rush's man on the ground. I was never entirely clear where he came from or what TIE thought about it because it was not my business. Ed Kitzman had met with Michael Flynn, Richard Walker and other executives of BBS to warm them up to the idea of Carlisle in the first place. Tony Rush, and possibly TIE, had been using Ed Kitzman as their go-between. He was an independent person. He was

not employed by TIE as far as I know, nor was he employed by BSC. He was a negotiator. This is another signal from Richard Jeffrey basically standing Tony down.

8.182 *I am asked in question 127(c) about an email to me from Jo Glover, my associate at DLA Piper, dated 24th September 2009:*

8.182.1 No document reference is given but I have located the document I believe the Inquiry means: 24th September 2010. Jo is providing TIE, Tony Rush and me with the TIE counter-proposal to BSC's proposal of 11th September 2010. The draft letter had been prepared by Tony Rush with input from me. The draft TIE GMP Change Order had been prepared by me with TIE and Tony Rush's input as was the case with the GMP Scope of Works. The suite represented what TIE was intending to submit (on Tony Rush's advice) to BSC in order to open negotiations for agreement with BSC for the completion of the tram scheme with amended scope, a guaranteed maximum price and agreed programme. It followed TIE's proposal made on 7th September and BSC's 11th September 2010 reply.

8.183 *I am asked in Question 127(d) about a Project Pitchfork meeting minuted on 23 September 2010*:

8.183.1 No document reference is provided but I have located this. It is the TIE meeting (with attendees noted) at which TIE's approach to using the documentation which is describe immediately above was discussed and agreed. This is shown in action 1 on the first page. The meeting also considered and agreed a variety of actions regarding RTNs, Counsel consultations, warning notices, use of bond and parent company guarantee, review of DRPs and stakeholders briefing. The note also highlighted what they had paid at novation and the use of Infraco contractual levers (application of LADs and an audit on SDS performance) – in short, contractual sanctions which DLA Piper had been recommending that TIE deploy for a considerable length of time. I note in particular the comment under "Carlisle": "Approach on RTN's obviously working". That is to say BSC were beginning to feel vulnerable and prepared to op(negotiations.

8.184 *I am asked in Question 127(e) to explain my email to Nick Smith of 16 September 2010 (CEC00034471) and attachments (CEC00034472 and CEC00034473):*

8.184.1 Attached to my email are two pieces of advice from DLA to TIE. One is a year old and the other one was contemporaneous. The one dated 16 September 2010 was written by me as DLA (CEC00034473) and the introduction shows what we were instructed by TIE to report on. Essentially Graeme Bissett and TIE believed that the Project had now entered into governance Phase 2.

8.184.2 This was not advice being tendered to CEC Legal, it was DLA Piper advice to TIE and TEL which was being shared, on instruction from TIE (Richard Jeffrey), with CEC Legal. What CEC Legal did with that advice, I do not know. In the e-mail the words:

"Our advice" means DLA Piper advice which we had been instructed to produce for TIE because Graeme Bissett was in charge of the governance structure. He was the liaison. I was not reporting, and had never reported, to CEC on these matters..

8.184.3 Nick Smith, who received the report within CEC Legal, was the one member of CEC Legal, from my perspective as TIE's legal advisor, who stayed relatively proactive and responsive (in particular from mid-2009 onwards). Nick contacted me from time to time to ask where TIE had reached with the adjudications and for a periodic update on Project Pitchfork. I had instructions from Richard Jeffrey to release and share DLA Piper material to CEC Legal as long as he was kept informed.

8.184.4 I do not know what Nick Smith's remit was, though earlier on Nick had been stationed at TIE for a time. For long periods it was unclear to me (especially through the procurement and contract negotiation stage) who within CEC Legal (aside from Gill Lindsay - who was frequently unable to attend LAC meetings at TIE due to her other commitments) might actually have responsibility in terms of any oversight CEC Legal wanted. It seemed to bounce around. This email was from Nick who had clearly been instructed within CEC, to look at governance. For what particular reason and why at that particular point I do not know.

8.184.5 Richard Jeffrey had said to me that he had agreed with his liaison at CEC at this point that TIE would like DLA to send CEC Legal something which explained to them where TIE had reached on governance. I found this odd, since TIE were talking consistently to CEC about governance over a very long period.

8.184.6 It can be seen that I have attached the September 2009 advice note to that email and one year later, I was being asked to refresh the legal commentary on the CEC governance arrangements. This was about the proposed role for Edinburgh Trams Limited (ETL), who were another 100% owned public sector company that had been incorporated - this time by LB - to be the tram operator. I believe that ETL had been incorporated by LB because LB wished to be the controller of the tram scheme. I have already mentioned the odd dynamic that existed between TIE and LB, an example being, LB initially registering formal objection to the tram scheme at parliamentary stage.

8.184.7 By September 2009 it had been abundantly clear that the Infraco contractual and engineering relationship with BBS was suffering. Under the Infraco contract, there was a simple provision which said that if TIE changed the DPOFA operator, TIE needed to notify the Infraco because they were ultimately going to need to interact with a different party in circumstances where an operator incident might cause damage to the infrastructure. I was working with Alastair Richards at this point to make this transition work smoothly so as to prevent any opportunity for BSC, particularly Siemens, to raise objection.

8.184.8 For commercial reasons (which Alastair ultimately dealt with), Transdev were not happy with being terminated. However, the DPOFA contract had been designed to give TIE the option to cut them while they were still in their role as a consultant. DPOFA first phase was basically a time and cost contract drafted to avoid Transdev claiming losses in the event of it being terminated. Alastair exercised this option. My concern was that BBS would take issue with Transdev's being terminated and TIE then assigning the DPOFA contract to a wholly owned CEC subsidiary. In the end, everything went fine.

8.184.9 The September 2010 advice to TIE basically provides an update of the position. It shows the topics that were dealt with in the original September 2009 governance. Not much had changed.

8.184.10 One can see that there were a number of different legal areas being dealt with, notably competition law and procurement. I draw attention to paragraph 3.3 on the assignation of the DPOFA contract from Transdev to ETL. This was something that I was discussing with Alastair Richards. There were a number of provisions in the Infraco contract dealing with the fact that during the operation phase of the Infraco contract there was a need for Infraco to have a contractual interface with the operator of the tram. The active member of 'Infraco' referred to in paragraph 3.3 at that point would more than likely have been Siemens. Siemens would be controlling, for example, the tram vehicle interface with the City traffic lights, controlling the overheads, controlling the power and controlling entry and exit from the depot, as well as maintaining all these elements of the tram scheme. The 'Operator' would be the party operating the trams. There had to be something dealing in the Infraco contract with the interface between these two parties.

8.184.11 The basic situation had been, as I set out in 3.5 of the DLA Piper advice, that ETL was owned by LB. It had been set up by LB to give them leverage to show they were immediately happy to take over Transdev's role. I believe they probably had legal advice that they could avoid public procurement issues by having a wholly-owned Project delivery agent ready. If they had not done that, and had instead bid for it themselves, there would have been an issue under the Transport Act 1985. Purely from a procurement law standpoint in late 2009, ETL was transferred into 100% TEL ownership. There was still a legal problem if LB retained ownership of ETL. If it did, it would have a tram system and a dominant city bus operation and consequently not be a single-purpose company. What we were advising on was a way to configure how ETL would be used. ETL were being positioned as a TEL subsidiary, as opposed to a LB subsidiary, to defuse any procurement issue, should LB to be appointed the tram network operator without an advertised competition. It was not a conclusive argument that LB and TEL were sister companies. It had been put forward by somebody that it did not matter because all the organisations are all in the family. DLA Piper advised that that was not good enough for procurement law purposes.

8.184.12 In summary, CEC was a public authority and it could not be assigning the operation of the tram network to another public authority company, without getting into procurement law issues. This was not an elevation of the role of TEL, it had been an on-going discussion. LB, from the beginning, wanted to run the tram scheme. They had not wanted TIE involved in it at all. Why else would they have incorporated ETL? I attended a number of meetings with executives from LB where I was being, as TIE's lawyer, grilled about competition law. There was an instruction that went to Richard Green QC on competition law in London, about these types of issues and DLA's opinion on why it was a good idea to have TIE as a single-purpose company, 100% owned by the Council, handling this as opposed to LB. Senior Counsel's opinion validated DLA Piper's advice. LB, as a matter of Executive Board and Director level policy, wanted to demonstrate that it was in fact independent from the CEC. This was, in my opinion, a risk, not a benefit, under procurement law jurisprudence.

8.185 *I am asked in Question 127(f) to explain/comment on the e-mail and attachment from Martin Foerder to Steve Bell forwarded to me and others on 13 September 2010 in relation to Project Carlisle (TIE00667409) and (TIE00667410):*

8.185.1 Martin Foerder was, at that point, Steven Bell's counterpart and the BB Project Director. Julie Smith (David Mackay's PA) copies this email from Foerder to basically the entire group of senior management at TIE. She also copies in Jo Glover and myself. Attached to that cover email is Foerder's letter which is addressed to Steven Bell.

8.185.2 There had been a number of discussions at this point around Carlisle and the document is 108 pages long. I recall that as part of the terms being discussed there was what was called a guaranteed maximum price of £405.5m and an additional €5.4 million to complete a truncated scheme from the airport to Haymarket by sometime in late 2012, but I am not competent, was not competent at the time (and was not asked by TIE) to comment on 108 pages of technical, engineering and commercial information and estimating, which was being produced in response to a lengthy period of negotiations at senior level in TIE and BSC. I had not been involved in those negotiations and the many interventions and figures development/calculation sessions carried out by Tony Rush and presumably other members of his team as well as TIE management. I do not consider that I am the right person for the Inquiry to ask for an explanation of this very lengthy technical, financial and commercial document in which I had virtually no contemporary involvement.

8.186 *I am asked in Question 127(g) to comment on/explain the email from Tony Rush to me dated 7th September 2010 (CEC00098384):*

8.186.1 This email comes approximately a week before Martin Foerder's letter discussed immediately above. This is a set of three emails in which Tony Rush has been asked by David Mackay and Richard Jeffrey of TIE to prepare some kind of stage-setting

letter. Ken Reid (BB), was Gerhard Becker's successor at BB AG's international division. He was essentially Richard Walker's superior several management levels above. I cannot remember who Goss was, but he was a pretty senior figure in Siemens AG. The names of David Mackay's and Richard Jeffrey's counterparts changed from time to time. On the face of the letter, it was very clear that TIE had asked Tony to prepare a draft as a scene-setter for those meetings.

8.186.2 He has asked for my comment on what I think about the content of the letter. I give my brief view, but I am not expressing views on technical or commercial matters; it is essentially a tone and sense review and check for obvious possible missing issues. At this point I was in Vienna on other business with DLA. I advised that if TIE was trying to close these matters out in negotiation with an agenda, they should make sure there was a drop-hands on the adjudications and any open matters under DRP. In other words, they needed to avoid a situation where TIE thought it had settled everything and BB came back and relied somehow on the outcomes of the adjudications or open DRPs.

8.187 *I am asked in Question 127(h) to comment on/explain the email from Tony Rush to me dated 3rd September 2010 (CEC00207451), the email to me from Tony Rush on 11th August 2010 (CEC00215951) and the email string between us both on 5th August 2010 (CEC00337896):*

8.187.1 I had a pretty good relationship with Tony Rush. We were absolutely determined to give TIE the best of what we had in terms of legal advice and commercial momentum. CEC00207451 is Tony's email to me of 3rd September 2010 in which he tells me TIE have served the first RTN. The RTNs were planned and agreed by TIE. Tony was instructed by TIE to get these ready and serve them as the culmination of the workstream "Notice" as I discuss above[152].

8.187.2 I am asked about the 'clandestine agreement' that is under discussion. This was an agreement between BB and SDS. Its existence had been discovered following admission by BBS in a meeting. Tony and I had for a long time thought that there might be some kind of arrangement sitting between BB and SDS dealing with the way in which design development and, in particular, entirely new designs, came into being. The purpose of that agreement might be to basically circumvent Clause 10 and Schedule Part 14 in the Infraco contract. In other words, a drawing would appear suddenly with an entirely new design on it so that it would create an INTC, being a design outside BDDI. Its existence was admitted by a Siemens senior executive and BBS and PB at first refused to disclose the agreement. I was pretty adamant about seeing it I was debating in this email with Tony Rush what it might mean and what could be done with it. Obviously my first thinking was that it was a very serious matter and it could be used by TIE instantly in their negotiating position with BB. It was not, and could not be, my complete thinking, because I had not seen the agreement, but

[152] Para. 8.148 *et seq*

you can see that I suggest that TIE issued a RTN on the clandestine agreement: remedy would of course be its disclosure. My thinking was that TIE may be able to issue a termination notice if BB did not either show us the agreement or explain to us what was contained within it.

8.187.3 I note points 8 and 9 of my email on 3rd September 2010 at 12:32 pm. These are legal points which I investigated, researched and got expert input on. A Prohibited Act under the contract was anything that was illegal under statute. One of the things was that the contractor could not enter into a cartel with other parties when bidding. The reason I wanted to see the agreement is because of the potential serious nature of this issue. Rigging arrangements on design development was a breach of contract and an act of extreme bad faith. It might well have been a collusive delictual act and possibly a criminal offence. Delictual collusion is a complicated area and I am not going to try and summarise legal advice on that: basically it can be difficult to prove. Fraud can also be a criminal offence. This is serious and would have been grounds for Infraco contract termination. That is why I wanted to see the agreement. I was exchanging ideas with Tony about how serious this is and how it might be used.

8.187.4 The email from Richard Jeffrey to Tony Rush and me on 11th August 2010 (CEC00215951) is Richard Jeffrey's telling us that the clandestine agreement had been admitted. Richard Jeffrey is asking for advice from both Tony and me as to what this could mean. Darcy was, I think, the Executive Chairman of BB UK Ltd. He was technically Richard Walker's boss in the UK. He may have also held a senior management position under Ken Reid at BB AG International. He was probably one corporate level above Richard Walker. Richard Jeffrey had met Darcy and Wakefield (who was somebody very senior in Siemens UK).

8.187.5 I do not know why the existence of the agreement came out as I was not at the meeting where it was admitted to exist. It is conceivable that BSC were concerned about it, had taken legal advice and had concluded that it would be better if the agreement was disclosed quickly, but casually. Richard Jeffrey is asking Tony Rush and myself if the existence of an agreement alone is grounds to issue an RTN and the answer to that was clearly no, because we did not know what was in it. It was, however, sufficient for me to take instructions from TIE to issue a DLA Piper letter immediately to Steve Reynolds. In the event, the agreement proved more mundane than first thought and its mere existence did not constitute grounds for any further contractual action or warnings.

8.187.6 This was the same matter which was being considered in the email string between Tony and I on 5th August 2010 (CEC00337896). I cannot recall what exactly was in my letter to Steve Reynolds. I suspect it was requesting a copy of the agreement. Tony's email of 5th August 2010 is Tony saying that Russell might have had responsibility for

entering into this agreement, in which case it would be an act of bad faith by the Project Director in Edinburgh.

8.188 *I am asked in Question 127(i) to comment on / explain the email from Brandon Nolan attaching Lord Dervaird's adjudication decision on the Murrayfield underpass:*

8.188.1 This is an email from McGrigors sending a copy of the Dervaird adjudication decision. I cannot provide comment on this. The content is self-evident. McGrigors had conduct of the adjudication and no doubt advised TIE and/or CEC. I was not shown the advice nor was their view on the decision discussed with DLA Piper in any depth.

8.189 *I am asked in Question 127(j) to comment on/explain the cover email from me (CEC00337188) attaching the set of instructions to Richard Keen QC dated 22 June 2010 (CEC00337189):*

8.189.1 The document is a 17-page comprehensive set of instructions from DLA acting for TIE, accompanied by five bundles of documentation and several proposed draft letters for the client, TIE, to use. The instructions contain various summaries of factual positions and references to relevant legal authorities and jurisprudence alongside DLA's views. The document is entitled "Instructions to senior counsel to advise on grounds for termination of the Infraco contract." The context was that TIE had instructed DLA to obtain Senior Counsel's view on the road to termination under the Infraco Contract. This was in the context of remediable termination notices as part of the process in which serious negotiations were going on under Carlisle. Here Carlisle and Pitchfork converged.

8.190 *I am asked in Question 127(k) to explain/comment on my email to Brandon Nolan of 21 February 2010, recording a discussion with Willie Gallagher (CEC00649800):*

8.190.1 The context of this email is that TIE, in particular Richard Jeffrey and David Mackay, wished to carry out an investigation into what had happened at Wiesbaden. This could have been part of Challenge. I do not know why, but they wished to have lawyers on behalf of TIE contact Willie Gallagher, Geoff Gilbert and Matthew Crosse. I was instructed to contact Willie Gallagher and this email is a note of the conversation that I had with him over the telephone on a Sunday to ask him about his recollections of the meeting in Wiesbaden in December 2007 and what happened as a result of that meeting. Willie, as I say in the opening paragraph of my email, appears to have been sent a timeline and extracts of Geoff Gilbert's e-mail traffic at the time by Stewart McGarrity or McGrigors.

8.190.2 The email records Willie Gallagher's account to me of what he remembered happening at Wiesbaden and after it. This conversation is discussed at para 7.386 *et seq.* Since it was McGrigors who were conducting an audit or gathering information for a report to someone (I was not told whom), I sent the email to Brandon Nolan. I mention at the

beginning of the email that I will do a further note on this, but I do not recall now whether I did.

8.191 *I am asked by Question 127 (l) to explain and/or comment on and narrate a history of a sequence of 16 numbered documents (CEC00605552 to CEC00605568) which are said to provide an overview of Pitchfork:*

8.191.1 The Question contains a referencing error: 658 when I believe 568 is intended.

8.191.2 This list contains 16 documents (and attachments) totalling 47 pages. All of these are either TIE internal documents, notes/minutes of Project meetings or TIE-BSC Infraco contract administration correspondence. None are addressed to DLA Piper and DLA Piper did not attend any of these meetings and did not generate any of the documents. With only two exceptions[153], it is clear on their face that none of these papers that the Inquiry would like me to explain and comment on was either sent or copied to me at the time they were written.

8.191.3 Pitchfork was TIE's initiative. I am not in a position to say if this selection of documents represents an overview of Pitchfork or not. What I know about Pitchfork is set out above, see in particular at paragraph 8.69.2 I do not recall this sobriquet being used until Richard Jeffrey's arrival in March 2009 and all these documents predate that.

8.191.4 CEC00605553, Stewart McGarrity's short e-mail of 25th January 2010 to six TIE managers and Tony Rush (but not copied to DLA Piper), states succinctly what he believed his purpose was in drawing together part of this set of documentation: "*...building the file on BSC and therefore of particular relevance to Tony Rush's work stream, I have assembled some relevant history.*"

8.191.5 To whom at TIE Stewart sent his 25th January 2010 email and the reasons why he sent it to these persons are questions for TIE. I received an email from him three weeks later (CEC00605552), but since this document has no train, I cannot say what the attachments to it were. The email itself contained no specific instruction to DLA Piper. I seem to recall that McGrigors said to TIE that they would provide some language that they advised would cover emails with the aim of preserving commercial confidentiality.

8.191.6 My comments on each of the 16 documents are set out below, following the order they appear in the Inquiry's list. I consider that they show various snapshots of TIE Project and TIE corporate and Project management's effort over a period of roughly 9 months to confront, mitigate and overcome: the difficulties compounding from the failure to address the progressive SDS design programme version changes; BSC's consistent, explained but intransigent position over not mobilising to proceed with the Infraco Works; BSC's positions with regards to BDDI to IFC, Notified Departures and

[153] CEC00605552 and CEC00605568

estimating and TIE's views; the engrained problematic impact of continuing SDS design production and CEC Planning and Roads Authority approvals and MUDFA delays; and attempts to understand and/or agree the time and cost implications of these problems and to schedule various linked management meetings to examine and isolate issues and to plan and agree how solutions might be found. The documents show the central role from mid-October 2008 onwards that TIE's Finance Director, Stewart McGarrity, began to play in galvanising TIE's Project and corporate management to take action towards financial clarity and outcomes.

8.191.7 In parts, some of the documents discuss issues I was made aware of at the time. But I did not have detailed technical, financial, programming and commercial background information to inform me, nor was DLA Piper a party to TIE's internal discussions on these matters. As TIE's legal adviser, it was not DLA Piper's remit to gather, respond to or analyse that kind of information. Some of the documents also record: (i) BSC's statements and claims about certain facts and the operation of the Infraco contract and (ii) expressions of TIE's positions and views (predominantly through Stewart McGarrity's eyes and ears) about those issues, facts and BSC's views on them. I have already provided in this statement my own evidence on many of these subjects in considerable depth.

8.191.8 With the two exceptions mentioned, it is now impossible for me to say with any confidence what, if anything, I saw contemporaneously from amongst this segment of TIE's internal and external project management documentation. I was no longer on secondment at TIE in this period. I was not therefore present at TIE's Infraco Project or executive management meetings. Nor would it have been usual or cost effective for TIE to have had DLA Piper present during technical, commercial and financial discussions and related Project progress and planning meetings. Consequently, DLA Piper was reactive to and reliant upon clear requests from TIE to provide legal advice. It was not until around early February 2009 that DLA Piper became closely involved in TIE's contractual correspondence with BSC, as I describe at para 8.109.

8.191.9 I turn to the documents referred to me:

8.191.9.1 *CEC00605554*: This document is a set of Project management minutes produced by TIE in June 2008, less than a month after Infraco Contract signature. DLA Piper was not at this meeting. My comments on agenda items are:

- *Phase 1b*: I have given my evidence on this matter at 13.2. I have explained DLA Piper's involvement, following TIE's instructions in the second week of May 2008. Those instructions resulted from an original agreement made with BBS in August 2007. This arrangement appears to have been known only to Matthew Crosse and Geoff Gilbert at TIE. TIE00679381 makes it clear that in early May 2008

neither Willie Gallagher nor Steven Bell knew about or understood this agreement with BSC made in August 2007. It also makes it clear that BSC's view (expressed by Dr. Keysberg) on what the agreement was differed to Geoff Gilbert's.

I do not know what TIE discussed with BSC at this particular June 2008 Project management meeting and was not asked to advise on the subject at the time. Around a year later in July 2009, I recall being asked verbally by TIE management what would happen if TIE reneged on Infraco Contract Clause 85.1 and Schedule Part 37 and did not pay BSC. My advice to TIE management was that this would be a breach of contract by TIE, entitling BSC to take contractual sanction. There was some verbal discussion there and then (I believe with Stewart McGarrity, Steven Bell and perhaps Dennis Murray) as to whether TIE could attach some extra-contractual commercial conditions to this payment of £3.2 million or whether BSC's lack of works progress could justify TIE withholding the money. These discussions were inconclusive and I was not asked about the subject again. I believe TIE made the payment.

- *Infraco subcontractor terms and conditions*: one month after Infraco Contract award, TIE appears to be addressing this issue with BB. I have highlighted my advice to TIE on this matter and have explained its significance at paras. 7.35 and 7.133*et seq*. I have explained why I advised TIE to attack this BSC failing prior to Infraco contract award. I have also explained how I had advised TIE to use Clause 67.13 which contained the client sanctions to withhold payment if the Infraco failed to provide subcontractor collateral warranties. It is absolutely clear in early August 2008 (CEC00593053) that BSC were still dragging their heels on this matter. TIE had lost any leverage to say "produce this properly now as the precondition to close, as you are instructed to do so in the ITN and as is a condition to your status as preferred bidder'.' If TIE had dealt with this matter firmly in April 2008 as DLA Piper had advised, none of these arguments could have arisen.

- *Design programme for Consents and Approvals*: If I understand the minute correctly, it confirms that a month after Infraco contract award, TIE were still engaged in attempting to agree a programme with BSC to start negotiations over the overall impact of delayed SDS design production and CEC Planning and Roads Authority approvals. I would have expected the contractual basis of TIE's position for this discussion to be Schedule Part 14 (Review Procedure and Design

Management Plan) and the use of Clause 10. It is for TIE and for CEC to explain to the Inquiry how they considered leaving this known and important exercise until after Infraco Contract award protected TIE and CEC's financial interests and the Project from BSC's contractual claims based on compounding, interlinked delays.

8.191.9.2 *CEC00605555:* is an e-mail from Stewart McGarrity to four TIE colleagues summarising his telephone call with Michael Flynn of BSC on 14th October 2008. Stewart reports that BSC wish to engage with TIE on agreeing the value of the impact of the SDS design delivery programme version changes from V26 to V31. He records that BSC say they do not understand why TIE cannot engage on this exercise.

8.191.9.3 *My comment*: this is the issue on which, seven months earlier, I provided my advice to TIE on 31st March 2008 about the impact on the Infraco construction programme of the SDS design delivery programme version change from v26 to v28.[154] TIE had agreed at that time this would be a TIE Change. To restate: my opinion was that TIE needed to conduct an assessment exercise urgently, with the immediate intent of identifying and agreeing with BSC as many of the time and cost impacts as they could before contract award. And TIE's Commercial Director agreed with me at that time. (See para 7.298 *et seq*).

Here - five months after contract award - we see the SDS design delivery programme has been adjusted three more times since 14th May 2008 from v28 to v31. This increased the likelihood of BSC asserting additional, cumulative and more complex disruption and stand-by claims. This is indeed exactly what BSC did, as the notes of these various meetings show, in particular the meetings on 9th and 10th February 2009.

SDS Design Programme v26 to v28 and then to v31 were significant client changes linked to BSC's construction programme. It is clear that this is why, in my opinion, BSC pressed for and secured TIE's agreement to the version change being a Notified Departure before contract award. It is also my opinion that for a client to leave any client required changes for discussion regarding impact on contractor's programme until after contract signature is an open invitation to the contractor to make its version of events factually dominant. And it offers opportunity to deflect attention away from (or submerge) any contractor's contributory responsibility for delay and additional cost.

[154] Para 7.366

Stewart's note also contains a short synopsis of how TIE had found reliable and productive engagement with BSC very difficult indeed pre-contract award, how this still continued and how the intervention of BB Germany had not produced any "leverage" for a change in this behaviour. I agree with this assessment. It was a warning sign for TIE and I had explained to TIE management why at the time: BB UK Limited's very modest track record on major projects in the UK and the German approach to overseas contracting (See paras. 7.88 & 7.343.1).

8.191.9.4 *CEC00605556*: expresses BSC's view on how to go about: addressing cost and delay impacts using five individual month-long baselines; 'unblocking' Approvals (shorthand for CEC Planning's logjam on their handling of SDS design submittals); issuing emergency changes and relieving BSC's alleged cash flow issue; and addressing a 'to be agreed' list of top 10 problems. I have no comment, save that we do not see TIE's response to this here.

8.191.9.5 *CEC0060557:* Stewart McGarrity's e-mail summarises his ultimate responsibility and, in my opinion, a cardinal reason for his direct involvement in these matters: "*obviously a key part of what I'm expected to deliver is the overall picture of where our £512 million budget is going*". The attachment to this email is a short 17th October 2008 report from Frank McFadden, TIE's Infraco contract manager. He states: there are 27 locations where BSC believe that there is an SDS design/Approval blockage and there is to be a Project meeting with BSC on 23rd October 2008 to develop a plan to remove these obstacles.

CEC0060557 should be CEC00605557

My comment: two of these blocks are Carrick Knowe Bridge and Network Rail interface. The former reached an unfavourable adjudication award one year later in November 2009. The latter - apparently now in dispute with BSC - had been cited by Matthew Crosse as a key reason why BBS's October 2007 BAFO submission was commercially superior to Tramlines BAFO submission (see para. 7.361).

8.191.9.6 *CEC0060558*: This document precedes CEC00605555 by a day. It is a cover mail with a 4 page contemporary note by Stewart McGarrity to five TIE colleagues setting out his views on a variety of issues as at 13th October 2008. He saw concerted action by TIE and BSC towards solutions as key. Such comments as I have on what Stewart wrote are after each item as follows:

CEC0060558 should be CEC00605558

- The programme extension and additional cost impacts of SDS Design Delivery Programme changes from v26-v31 remained unresolved. The note says that BSC's position was "*well documented*

and analysed" and that "*there is no disputing that BSC are entitled to an EOT and costs*"

My comment: we read that BSC's current position was that it was entitled to additional payment of £5.3 million with a 9 week EOT. TIE's current view was £2.6 million with a 7.5 week EOT. TIE had identified the principal difference as being the BSC subcontractors' formal agreements and mobilisation issue (since BSC mobilisation on site was in fact the subcontractors[155]). No agreement was reached on the call the following day, see above on CEC0060555). I refer to my comment on CEC00605555 above.

- Clause 80: the note discusses BSC's views about how the parties have approached the issue of TIE being unable to assess and agree the occurrence of a Notified Departure, in particular on SDS design revisions. I was aware at the time that some TIE-BSC discussions were on foot and, as part of this, that BSC proposed an amendment to the Infraco Contract. I do recall seeing this draft proposal prepared by Pinsent Masons and discussing it with Dennis Murray at the time – probably in mid-October 2008. I do not remember its detail, other than it favoured BSC's views and position. Stewart McGarrity's conclusion reached in his note is that BSC's draft contractualised proposal to amend the Infraco should be 'binned'.

  My comment: that is essentially the instruction I received from TIE management on this matter and it accorded with my views. (Please also see my evidence on Clause 80 at para 7.518*et seq*). It is also instructive, in my opinion, that Stewart concludes that it is not Clause 80 itself that is the source of problems – it is the number of Notified Departures (SDS design development assertions and other falli Assumptions) and the approach BSC is taking by providing late and very exaggerated Clause 80.2/3 estimates. This is the same conclusion that Tony Rush reached very quickly in early 2010. He then began the systematic attack on the inadequacy of those Estimates as Project Notice and the foundation for the Remediable Termination Notices.

- MUDFA: the note alerted TIE management to the fact that there were multiple delays and problems with utilities diversions being an obstacle to Infraco mobilisation. One is specifically highlighted: SDS were asserting that they had produced design for South Gyle

[155] See paragraphs 7.35 and 7.133

Underpass utilities relying upon information about utilities released to them by the TIE MUDFA team.

My comment: if this is correct and the release was not caveated properly, this reversed – or at best seriously diluted - the absolute contractual responsibility for design production that SDS had under the SDS contract and the novated SDS Contract.

- BDDI Infraco Proposals IFC drawings: the note contains a commentary on these matters. I have provided my views on these issues at some length elsewhere in my evidence. I highlight however one observation that Stewart McGarrity makes:

- **This is complicated by the fact that alarmingly there may well have been a large number changes of substance in the design leading up to IFCs which it may be difficult to classify as design development but unless I am misinformed we have no register of such changes which we can use to evaluate these in advance of a submission from one of BSCs army of commercial guys.**
- **We need**
  - **A tactic to unblock the definition of the base date designs – can we link it to v26-v31 resolution?**
  - **A means of identifying and evaluating in £s where we may be exposed to design changes in substance up to IFC. This should be extended to areas where we don't actually have IFC yet e.g. Picardy Place.**

This is precisely the point I had made to TIE management about SP4 PA1 as I have described in detail above: that BSC would interpret normal design development to the letter in their favour. And so: we read here that TIE has no means of checking the revisions being made by SDS to BDDI designs (no doubt in part because TIE had no proper agreed record of what the design drawings comprising BDDI had been, see para. 7.329. This situation was despite TIE having been client for the SDS Contract for over two years with the full range of control provisions available (see paras 5.19 *et seq*); agreeing at novation to pay SDS an additional £4 million pounds to just novate and complete its design (though SDS was already contractually obliged to do so); having the clients' design supervision rights under the provisions of Clause 10 and Schedule Part 14 of the Infraco Contract. For example:

10.3 The Infraco shall allow tie's Representative, at any reasonable time, a reasonable opportunity to view any Deliverable at any stage of development, and this opportunity shall be made available to tie's Representative as soon as reasonably practicable following receipt of any written request from tie's Representative.

10.4 The Infraco shall establish and maintain an extranet which tie, any tie Parties and any other party reasonably required by tie may access remotely by computer (through an appropriate login/security regime) to view any Deliverables including any drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables.

The note ends by saying in red boldline that TIE needs to have its teams engaged with a deadline for outcome by end October to mid November 2008 with a view to Tram Project Board reporting.

8.191.9.7 *CEC0060559*: is a letter from Willie Gallagher to Richard Walker's letter (13th October 2008). It makes a number of high level observations and a call for co-operation on which I have no comment.

CEC0060559 should be CEC00605559

8.191.9.8 *CEC0060560*: is Richard Walker's letter the day earlier setting out various BSC positions:

CEC0060560 should be CEC00605560

- Misalignment workshops are still required to solve and isolate how SDS Design production is not matching the Infraco construction programme;
- MUDFA remains in the way of BSC being able to plan meaningfully;
- Level of detail required by TIE for Estimates is overwhelming BSC resources which are being increased to manage this.

My comment: however obdurate BSC may have been about claims about post-BDDI design development, the continuing lack of completed and approved SDS designs and the chronic delay to MUDFA works were a central obstacle to their construction programme.

8.191.9.9 *CEC00605561*: Stewart McGarrity notes that he and Steven Bell are to meet again with BSC. In passing, he mentions the name of a senior BB Germany executive who was at the December 2007 Wiesbaden meeting – Dr. Keysberg.

My comment: Willie Gallagher could not recall this name – or indeed any names - when I spoke to him in February 2010. See my email 21st February 2010 (CEC00694800) and paras 7.386 *et seq*.

CEC00694800 should be CEC00649800

8.191.9.10 *CEC0060562*: Notes of a meeting on 16/17th December 2008 confirm that:

CEC0060562 should be CEC00605562

- TIE is expecting BSC to mobilise on Princes Street in early January 2009. TIE had agreed at Wiesbaden and thereafter at PA12 in SP4 that: full depth reconstruction on Princes Street after tram track installation was not included in the construction works price. Hence BSC immediately sought their contractual entitlement to payment of demonstrable costs in the PSSA.

- TIE is to issue a TIE Change order for Carrick Knowe Bridge. My comment: this matter had been recorded as a key blocker on 17th October 2008. Two months later, TIE appears to have agreed the issue of a TIE Change Order. But nearly a year later, on 16th November 2009, an adjudication award found in BSC's favour.

- 250 outstanding Notified Departures are to be processed by 16th January 2009 by TIE in co-operation with BSC. My comment: by early February 2009, CEC00605563 reports that this had not happened. See below.

8.191.9.10.1 *CEC00605563*: just shy of two months later, Stewart McGarrity reports on 9th February 2009: "*nothing of substance having been achieved*", a meeting had been planned with BSC (Richard Walker). However, in CEC00605565, an email from Steven Bell to Richard Walker, we see that there appears to have been difficulty in agreeing an agenda for that meeting with BSC - in that Richard Walker did not agree with Steven Bell's slides.

My comment: a summary slide sheet on TIE's six key discussion points shows status between the parties as: 1 positive (Princes Street), 2 negatives and 3 question marks.

8.191.9.11 *CEC0065565 and CEC0065567*: record the failure of a scheduled appointment between David Mackay (TIE Chairman) and Dr. Keysberg. The note of a substitute telephone call revealed a gulf between TIE and BSC's views as to the significance of the disputed matters. The parallel project management level meeting (CEC0065568) revealed that this gulf had a price tag: ca £50 - £80 million.

CEC0065565 and CEC0065567 should be CEC00605565 and CEC00605567 CEC0065568 should be CEC00605568

My comment: it was around this time that I had one of several conversations with David Mackay (see paras 8.42 and 8.52) and advised my view on what was at the base of BSC's arguments: Wiesbaden.

8.191.9.12 *CEC00605568*: is a set of notes from Stewart McGarrity on TIE – BSC meetings held on 9/10th February 2009 where the parties heard each other's position statements again, but were unable to agree anything. I did not attend this meeting. But I knew it was planned and I recall being briefed by TIE about its outcome, which was one of continuing impasse. A week later I received a copy of these notes of the meeting for information, but no specific instruction for DLA Piper. At that point, I became more involved in TIE's correspondence with BSC, both at Project and executive levels. In my opinion - then and now - whatever merits BSC believed that their contractual position had, the consortium demonstrated an intransigence and a manifestly uncooperative approach at this point. Stewart McGarrity notes that:

- BSC's position on normal design development is 'very different to ours'. My comment: I remark here again that the definition language in the Wiesbaden agreement regarding normal design development is word for word identical to that used in SP4, PA1. BSC regarded pretty much every SDS design drawing revision post BDDI to be outwith normal design development. TIE did not. At this point, DLA Piper's advice to TIE on the issue was as I had advised in February and March 2008 prior to contract award.

- BSC were complaining that TIE Changes were not producing money and that it was impossible for them to produce a sequential economical construction programme because of the impact of multiple design changes, SDS design production delay and continuing MUDFA delay and obstruction and unexpected poor subsurface conditions on street. My comment: there was nothing new about this position, save that it appears BSC were concerned about their cash flow and they were concerned by the volume of SDS design revisions.

- BSC asserted that there was no obligation on them to justify that a Notified Departure was a TIE Change. My comment: BSC required to assert that one of 43 Assumptions had fallen for there to be a Notified Departure. To justify the assertion required a statement from BSC about practical engineering matters or technical facts – including, for example, a statement how a design drawing had been revised from BDDI. If TIE disagreed with that assertion, TIE required to challenge

it and if BSC insisted, TIE needed to dispute this and take the issue into DRP.

- BSC commented that they had doubts about TIE having a budget to complete the Project as intended and that TIE was in need of project management support. This was refuted by Steven Bell. My comment: I became aware that BSC had begun negative verbal and written commentary regarding the quality of TIE's Project management and TIE's resourcing levels in late 2008. This deteriorated as the Project moved into 2009 and DLA Piper advised TIE in relation to the potentially defamatory nature of some of BSC's **public** commentary and BSC's breach of Clauses 6.3 and 7.3.16 of the Infraco Contract.

- BSC said they considered that CEC must have been misled about or had misunderstood the risk transfer to the contractor. Stewart McGarrity notes that he had re-read the Close Report and was 'doubly happy with how we reported it". My comment: DLA Piper had no involvement in these meetings. Stewart's use of the word "we" can only mean TIE, confirming again who owned and had prepared the Close Report (see paras. 11.139 *et seq*).

- BSC recommended suspending construction to allow completion of SDS design and utilities diversions and then BSC would return and re-price the Project. Stewart noted that Andrew Fitchie would have issues about this '*standing the test of procurement rules*'. My comment: Not at this point, but some time later, DLA Piper were asked by TIE to advise on procurement implications - not of suspending the works, since a six month suspension could have been within the ambit of the Clause 87 of the Infraco Contract, but rather of BSC being requested to submit new pricing after a suspension. **Our** advice to TIE was that if the Project scope and ERs remained the same, this approach would indeed be extremely difficult for TIE to justify under applicable EU regulations, without calling for a full competitive re-bid with concomitant cost and delay.

- Richard Walker had maintained that the only reason there was any progress on Infraco Works was because of BSC's efforts under a gentleman's agreement with Willie Gallagher in September 2008. My comment: I knew nothing about a gentleman's agreement as I have said at para. 8.50.

- Richard Walker also stated that an additional £8 million included in the Wiesbaden construction price had had nothing to do with normal design development. Stewart McGarrity notes that he challenged

Walker by asking: if this £8 million was not to cover SDS design development post BDDI, what had it represented? Walker replied that he could not recall - but thought it had been a commercial agreement or a "*negotiated price increase*". My comment: Richard Walker's reply was perhaps evasive. However, he had not authored the Wiesbaden document. At Annex B, Appendix A1, that document (CEC02085660) shows a sum of £8 million agreed by TIE as a "*premium for current provisional items*" with a comment line: "*negotiated sum for firming up all elements*". As I have said at paras. 7.398 *et seq*, neither SDS design generally nor its normal development post BDDI were among the 22 provisional sum items listed by Annex B Appendix A4 of the Wiesbaden Agreement.

So: the factual answer to Stewart McGarrity's question to Richard Walker on 9th February 2009 was: the relevant document shows that the £8 million had not been added to the BBS BAFO construction price of £208m in order to capture the cost of all normal design development post BDDI. It had instead been conceded by TIE in exchange for BB '*firming up all elements*' of the listed Provisional Sums to a global £10,170,000. Exactly what this meant, I find difficult to comprehend, since a provisional sum is by nature not firm. In my opinion, it is a question for Messrs. Crosse, Gallagher and Gilbert to answer.

This meeting continued the following day, 10th February 2009 with BSC repeating many of its points. The actual outcome of the two day meeting appears to have been that BSC, as a consortium, were to produce a route map on how and when they would deliver the Project under the existing contract to resolve issues. BB expressed concern about their ability to do so by 17th February 2009 due to some difficulty engaging with Siemens. My comment: the theme of a consortium approach - as opposed to TIE dealing with two separate suppliers - was an unhelpful and disruptive theme, which emerged in late 2007 and continued.

On further points discussed, the notes record:

- BSC put forward two proposals: a cost plus, piecemeal approach or 6-12 month suspension of the works to allow completion of design and MUDFA.

- BSC stated that the disruption to construction programme was so great that pricing bore no comparison to original

tender allowances, a position on which TIE vehemently disagreed.

- Both parties confirmed they had legal advice on BDDI to IFC.

- BSC did not accept that they were required to explain a Notified Departure and they wanted acceptance of TIE Change before BSC began its Estimate. My comment: even if BSC's position seemingly expressed here was correct - that no factual validation of a Notified Departure was required of them - a Notified Departure was in of itself a TIE Notice of Change (see Clause 80.24) and the Infraco's contractual obligation to deliver a proper Estimate to TIE under Clause 80.2 was already triggered, the Infraco itself possessing all the information needed to generate that Estimate. Contractual acceptance by TIE of any kind of TIE Change is different: it follows on from TIE's agreement of the Infraco's Estimate delivered pursuant to Clause 80.2 and the issue by TIE of the relevant TIE Change Order (Clause 80.13).

- BSC stated that they had a £50-80 million exposure, offering a rough breakdown: £20m Notified Departures/TIE Changes, £20m EOT of 70 weeks; £10m delay disruption. Germany would not allow them to proceed without recovery of the £50-80 million shortfall and BB stressed that TIE should not imagine that an offer of £20m would solve matters. Again, these numbers related only to BB, not to Siemens. Stewart McGarrity noted to colleagues that TIE had no visibility into the Notified Departure/TIE Change figures.

- Richard Walker again stated that there had been a general acceptance of a £50-£100m shortfall in price pre-contract (TIE refuted this). My comment: these BSC positions are consistent with my two conversations in December 2007 and mid February 2008 with Richard Walker and with my advice to TIE on how BB Germany would control matters post Wiesbaden. I have described these in para. 7.123 *et seq.* Personally, I gave no impression of acceptance to Richard Walker nor could he have thought I had any authority to do so. I have related the gist of my response to him in my evidence.

- BSC requested an extension of time of six months in order to address internal financial reporting requirements on LADs exposure. TIE rejected this for lack of substantiation. BSC recommended TIE seek stakeholders' approval for affordable scope. My comment: I have given my evidence on where the idea for truncation came from at para. 8.60 which is matched by this February 2009 discussion about 'affordable scope'.

The note then summarises at some length that: TIE (Steven Bell) proposed and explained TIE's granular approach to breaking down possibilities of part on-street, part off-street working. Despite considerable care and time on this in the meeting, BSC expressed no interest in engaging. BSC also commented that they had saved TIE money by not mobilising.

My comment: it had been clear for six months that BSC were not willing to commit on any construction works programme which exposed them to absorbing the cost of inefficient working. However, in CEC00605556, four months earlier, BSC had set out their view on a 'granular' approach: five month-long baselines to look at individual time and cost impacts. So: TIE wanted a granular approach to works progress opportunities and commitment. BSC had wanted a granular approach to their entitlement to money and EOT.

As Stewart McGarrity states on page 1 of CEC0060558 "*the balloon then went up*". My comment: I understand the balloon to be BSC's refusal to mobilise to carry out works on Princes Street. My evidence at paras. 8.109 *et seq* relates wh happened next from DLA Piper's perspective.

CEC0060558 should be CEC00605558

8.192 I am asked in Question 127(m) why no action was taken in response to Richard Jeffrey suggesting that action should be taken to clarify the meaning of SP4 in his email of 26th January 2010 (CEC00551040):

8.192.1 The other recipients of that email external to TIE were Brandon Nolan at McGrigors and Tony Rush. Clarifying SP4 PA1 required a dispassionate experienced independent engineering view, not even more lawyer discussions. I do not know what other parties' sent that email did in response to Richard Jeffrey's suggestion, but DLA Piper had already advised that TIE should instruct an engineering expert specifically on the issue of normal design development within SP4.

8.192.2 I was instructed by TIE to identify a further expert engineering witness. I did so after consultation with colleagues within the DLA Piper UK Construction and Engineering Group. That expert was Robin Blois-Brooke who produced his draft report. I contacted, briefed and retained Robin-Blois Brooke as an engineering expert on TIE's behalf. TIE received his report which demonstrates precisely what he was asked in instructions drafted by DLA Piper and approved by Steven Bell at TIE.

8.192.3 I do not now recall why TIE did not deploy the arguments in the Blois-Brooke report nor do I know why TIE decided to pay, in spite of these expert views available to it. My last contact with Mr. Blois-Brooke was in late October 2010 very shortly before I went on leave on health grounds.

8.193 **Reports on Design Liability (Questions 130 to 133)**

8.194 I am asked in Question130 to comment on various parts of CEC00548227, a 15 page draft report prepared by Torquil Murray in March 2010 on instruction from Tony Rush. Certainly, the document was sent in draft to me and to others on 1st March 2010 for discussion. DLA Piper played no role in either determining its scope or its preparation. I have no recollection of being asked to discuss it with Torquil (or anyone else) prior to its circulation. I do not recall ever discussing this draft document with TIE, Tony Rush, Torquil Murray or anyone else. Nor did I ever see or discuss any completed or amended version of this document.

8.195 Torquil Murray was introduced to me as an associate of Tony Rush during the period that we were supporting Tony Rush in Glasgow on INTCs, DRPs and Remediable Termination Notices. I had not met him or talked to him when the first of his draft reports appeared and I do not know what his qualifications were, but he worked mainly on various aspects of Carlisle and also on the issue of contractual default notices, possibly somewhat on the Remediable Termination Notices eventually issued in September 2010. I do not know what his terms of engagement were or how and when these were agreed by TIE, nor did I need to know.

8.196 The TM report concludes: "*.....the liability of the SDS Provider under the Contract is somewhat complicated.*" I agree, in part. The responsibilities and liability of the SDS Provider under the SDS Contract was not complicated as I have laid out at paras 5.19 et seq. It reflected the position of a public sector client employing an experienced designer on a large transport project design mandate to deliver a major design under an agreed programme.

8.197 What that conclusion in the draft Torquil Murray report reflects is the contractualised commercial position which TIE had to confront and analyse and then agreed with BSC and SDS at novation as a result of: (i) an entirely incomplete design with 'serious' quality issues (according to BBS); (ii) the CEC Planning consenting process being chronically slow, late and iterative; (iii) MUDFA being seriously late and its required SDS design incomplete or not available; (iv) BSC refusing/and requiring protection from any time and cost consequences whatsoever flowing from the inadequate state of the SDS design and SDS's and CEC Planning's performance up to Infraco Contract signature and beyond; (v) TIE (and CEC's) failings in managing the SDS Contract properly and

complying with its obligations as client; and (vi) the resultant resistance from BSC as regards responsibility for obtaining design Consents. I discuss all of these issues above.

8.198 I do not remember who presented the Torquil Murray draft report, whether it was finalised, or what it was used for. It is replete with reference to matters, issues and details, which the report says required to be studied further and I do not recall seeing any updated version.

8.199 Its context is obvious from its Introduction 1.1 – the accountability of the SDS Provider, which is an issue, as I have explained, I had been pressing TIE to turn its attention to for well over three years. I note that the draft report makes no mention of the Collateral Warranty or the PCG, which TIE held from SDS. Nor does it discuss the 2007 SDS claims and their settlement agreement (February 13th 2008. Nor does the report touch on the SDS Contract or Novation Agreement and the amendments to the SDS Contract itself. Consequently as an analysis of its subject, I have to say that the draft document cannot, on any view, be said to have started from a complete and accurate factual and contractual platform or to be a finished product. That is what I thought about it when I read it first and it is what I think of it now.

8.200 Paragraph 4.17 in the draft Torquil Murray report is, unfortunately, neither factually nor contractually correct. The Infraco Proposals formed a central part of BSC's BAFO bid, being their technical, financial and commercial responses to the ITN and, in particular, BSC's response to the ERs. TIE was in a position (and was contractually entitled) to assess the SDS scheme design (essentially "the Deliverables") against TIE's ERs and the Infraco Proposals. Indeed, TIE Project Directorate must have done so in order to evaluate BSC's Infraco contract BAFO bid and the competence of SDS's design to deliver the ERs. How otherwise could TIE have concluded that the bids were responsive and would deliver what TIE had sought tenders for?

8.201 TIE was also in a position as the client of SDS to know exactly what Deliverables had been given to BBS and Tramlines to prepare their BAFO bids and to know what SDS design continued to be provided to BSC after BAFO, after preferred bidder appointment and, in fact, right up to the 14th May 2008 (though in the event this was mismanaged in my opinion). TIE was also in a position know how SDS design submittals were being handled by CEC Planning and Roads Authority, not least because significant parts of that function – so far as I understand it - was being carried out in TIE's own offices. Prior to novation, SDS was under contract to TIE, not BSC, and had exact progress reporting responsibilities. The fact that TIE decided to amend the ERs post preferred bidder appointment and cause SDS to assert in February 2008 that it could no longer warrant its design was not the fault of SDS or the SDS Contract. TIE was alerted by BB's audit of the SDS design in late 2007/early 2008 that there were issues on quality and had had its own serious issues with SDS in 2005 and 2006.

8.202 Paragraph 4.19 of the Torquil Murray report is also incorrect. The SDS Design Delivery Programme was a core contractual document produced by SDS for TIE, as SDS's client. TIE therefore had every opportunity to satisfy itself (as did CEC Planning) on this programme and, as client, TIE was supposed to, but did not, create a Master Programme to show and dictate SDS design criticalities. As I have said, numerous successive versions of the SDS design delivery

programme were produced and issued by SDS during the performance of the SDS Contract, such that at Infraco Contract close in mid-May 2008, the programme stood at Version 28.

8.203 In round terms, this represented a new revised SDS Design Delivery Programme being issued by SDS every single month from the date of appointment of SDS in October 2005 onwards. TIE must have analysed these and discussed them with CEC Planning/Road authority regularly since many of these revisions must have resulted from client variations and TIE and CEC's failings for which SDS was paid an additional £2.5 million.[156]

8.204 All the Infraco Contract SP4 provision quoted in the report at 4.18 says is: whatever version of the SDS design delivery programme is current at the date of the Novation will be the contractual design delivery programme adopted within the novated relationship between SDS and Infraco – no more, no less. Again, TIE had every opportunity to verify as client that Schedule 15 (Programme) matched the SDS Design Delivery Programme and, indeed, must have verified it, given CEC's Planning/Roads Authority continuing critical responsibility as Approval Body under the Infraco Contract, far out post contract award into 2009/2010. And every opportunity to examine and interrogate how SDS's Design could deliver the ERs, using its own expertise, supported by the expertise of TSS.

8.205 The question asks again about my knowledge of the state of the design at novation in May 2008. I knew that it was seriously late, but DLA Piper was neither TIE's design engineer nor TIE's SDS contract manager. TIE was a Project delivery manager and TIE had appointed TSS to perform this design production control function, both prior to and after the SDS novation. TIE conducted discussions with BSC and with SDS regarding post Infraco Contract award design workshops. DLA Piper was not involved in this nor was it DLA Piper's responsibility to carry out any form of audit on the SDS design delivery. This was TIE's responsibility, especially since BSC had audited the SDS design made available to it and it is obvious, as I have explained in depth in my previous answers, from DLA Piper's advice from January 2008 onwards and again in late March and April 2008 that TIE ought prudently to have been assessing exactly this issue: the cost and programme impact of SDS design changing and developing post Contract award. I strongly suggest that, having set BDDI in November 2007, TIE must have been monitoring what was happening to SDS production of the missing/incomplete or unconsented and missing scheme design. If TIE was not doing this in order to assess and forecast cost and programme implications with some degree of precision and including CEC Planning in this exercise, then - on any reasonable view - this was storing up a very obvious, unpleasant and unbudgeted surprise.

8.206 The fact TIE was obliged to agree to a lengthy series of post contract award workshops in order to set the instructions to SDS on completion of the scheme design after novation and that TIE agreed to pay for this, post novation, indicates the measure to which TIE had required to (and knew) it had surrendered to BSC's position on responsibility for cost and time implications of the SDS design's status. I have also pointed out TIE's documentation at Close and CEC's documentation (the report prepared by CEC City Development and Finance with a request for £633,000 increased budget in

[156] See paras 5.177; 8.219 and 7.424

early 2008) said that: a few days prior to Infraco Contract signature, 87 SDS existing design packages had still not been submitted for approval and that CEC had required more money for its SDS design approval process to continue far into 2009. These facts are entirely at odds with TIE's procurement strategy and the notion that the Infraco contract price was fixed at 14th May 2008.

8.207 The Question also effectively asks me to express a legal opinion - with the hindsight of over eight years - on someone else's views (not, I stress, a person who was involved in the situation in which TIE had put itself and agreed to in 2008 and not a lawyer) on how the SDS Contract (as amended by the novation agreement) and the Infraco Contract operate. I shall do so, under the reserve that I do not consider it my role as a witness in this Inquiry to provide legal opinions.

8.208 I do not agree with the proposition that recovery would be possible wherever there was a change to BDDI, because SP4 does in fact limit this. DLA Piper's views on this and written advice to TIE on the subject are contained in many written reports which are dealt with above.

8.209 I am not in a position to comment on the "other aspects" of Torquil's report generally. This part of the question is too vague to answer. The principle with which BSC approached responding to SDS design developed and issued post-BDDI was set out in the Wiesbaden terms and from January 2008 sat enshrined in the language of PA1and SP4. BDDI was a concept that had been agreed by TIE after BBS's BAFO to begin to accommodate BBS's position that they had only priced what they had been given up to BAFO. DLA Piper played no role in that decision and I have explained what happened as regards the parties' effort to produce a comprehensive list of what was BDDI.

8.210 The fact that TIE had to agree to a design delivery programme that was still so extensive and so late and still subject to designs being developed and revised (i.e. moving to the next level of completion as envisaged under the SDS Contract or answering requirements for CEC Planning/Roads Authority approval was a function of 2005, 2006 and 2007 mismanagement of the SDS Contract, CEC Planning's/Roads Authority performance and Wiesbaden and BDDI. TIE had known this for well over four months by the time V28 came out and a further six weeks lapsed before contract signature.

8.211 I am asked in Question 131 to comment on why the terms of the draft Torquil Murray Report in March 2010 are very different to CEC00801438 and CEC00801439, a cover email and DLA Piper Report written in September 2009. I do not consider that a detailed comparison would be instructive for the Public Inquiry. However, I make these observations

8.211.1 It is obvious from the title of the DLA Piper Report in September 2009 (authored by me in executive summary form, as my email CEC00801438 says) that the paper describes the SDS Provider's contractual liability to TIE for delay in provision of design and for poor design quality.

8.211.2 The reason this DLA Piper report differs from the TM Report in March 2010 is because the draft TM Report examines an entirely different issue as Torquil Murray explains at para 1.3:

"It is accepted that the initial brief was to assess(sic) the SDS liability. Notwithstanding this, the liability for the performance of the SDS Provider that TIE has taken on is also very relevant. Not only under the Infraco Contract but also under the novation agreement. The focus of this report has tended to concentrate on this issue."

8.211.3 As I read it, the entirety of the draft TM Report is about how TIE assumed/retained liability to the Infraco for the performance of SDS – an issue between TIE and Infraco - and not about its title: SDS Provider's liability to TIE.

8.212 Given that TIE had decided to draft and agree SP4 and Clause 80 itself and had agreed that SP4 took precedence over all other contract provisions, DLA Piper advised TIE to deploy available protections in terms of design review and the provision of information for TIE, using Clause 10 and Schedule Part 14. Whether or not CEC ever troubled to engage properly alongside TIE on this essential aspect of post-Infraco award contract administration, I do not know. The inordinate length of time SDS design took to reach completion after 14 May 2008 suggests to me strongly that CEC did not.

8.213 I am asked in Question 132 about CEC00810434, the DLA Piper report issued on 24th July 2009. Specifically: what was the context in which this advice was sought? The context was that TIE had begun DRPs. As is also clear from para 2.1.16 in the report, I recall TIE had been/was attempting a formal mediation with BSC as foreseen under the contractual DRP. While this was ongoing, further individual DRPs were stayed. DLA Piper played no role in this mediation, but BSC had made clear how they would continue to operate the Infraco Contract, as they saw its commercial rationale. The Report, as it states itself, was requested by Steven Bell and its scope was set by TIE. I do not now recall having any specific meeting with TIE to discuss this Report.

8.214 By this time the INTCs were in substantial back log and despite the work on Princes Street under the supplemental agreement, BSC were not progressing the works with due expedition.

8.215 I am asked if I agreed with the view expressed in the report that a term could be implied that would require provision of a certain amount of information by BSC if they claimed that there was a Notified Departure? Yes, it is axiomatic that Infraco would require to produce evidence that a Notified Departure had occurred. The evidence would be dependent upon the type of Notified Departure and, in any event, the fall of many Assumptions would be factually obvious. Furthermore, it is an express contractual obligation pursuant to Clause 80.4 that Infraco provides an Estimate to TIE and in that Estimate the Infraco needs to explain how the Notified Departure justifies more time and more money. Since the very greater part of the INTCs related almost exclusively to post BDDI development of SDS design drawings or new SDS design, the question seems to me to be redundant since Clause 80 (TIE Change) spells out what TIE had agreed Infraco was required to submit. There were, nevertheless, a variety of other important Assumptions in SP4 that related to programme dates or technical conditions. The changes to an agreed set of technical facts are also, in many cases, preconditions to a claim for an INTC; BSC would require also here to state what had happened e.g. the excavation volume at the tram depot had exceeded

80,000m3 or the site had not been pumped and dry at take over by BBS (Assumption 21) or TIE had decided to require another building within the Limits of Deviation to be demolished (Assumption 36).

8.216 The report gives a concise picture of how entitlements as between TIE and Infraco operate as regards delay by the SDS Provider in the provision of its design post novation.

8.217 I am also asked if this point was considered when the contract was being drafted. Neither the Infraco Contract, the SDS Contract nor the draft SDS Novation Agreement, as drafted for issue at ITN in 2007 - and indeed as they stood up to early February 2008 – could have contemplated that TIE would negotiate SP4. That is why I referred to SP4 in early February 2008 as a "contract within a contract[157]". Nor could TIE's ultimate approach on Pricing have been predicted since the procurement strategy foresaw a substantially complete SDS design being novated to the Infraco to construct to deliver the ERs as provided to the bidders under the ITN. It is obvious that a pricing schedule at the issue of any ITN for a DBM contract would never be included, save as a pro forma. It is for the bidder to price and tender their complete proposals for evaluation and conclusion through negotiation (where permissible under procurement rules) achieving the greatest level of contractual fix at preferred bidder appointment.

8.218 As I have stressed with reference to the contemporary documents and facts BSC was absolutely adamant as regards protection – even post novation – from delay in design production. A further £2.5 million was conceded by TIE to BSC on this point, as I have explained at para 7.316This was because SDS design delivery to IFC status was still controlled by the CEC Planning/Roads Authority consenting process. This resulted in the insertion of a LADs arrangement in the SDS Novation Agreement. Following DLA Piper's intervention in early February 2008, BSC agreed to language being inserted in SP4 to prevent an Infraco or Infraco Party breach causing an INTC.

8.219 And so yes, the point was carefully considered and raised by me specifically with Geoff Gilbert at the meeting in April 2008 on further protection for BSC that I refer to at paragraphs 7.316 and 7.317. My intervention was in order to allow TIE at least the remedy of off-setting liquidated damages recoverable by BSC under the amended SDS Contract against SDS, up to a cap of £1,000,000. This was equivalent to one further SDS incentivisation payment (over and above the settled claims payment of £2.5 million paid by TIE) conceded on 13th February 2008. SDS would not agree to more commercially and, under its own close programme, TIE had run out of time to negotiate further.

8.220 Whether TIE ever interrogated BSC about their use of this provision and TIE's right to offset, I do not know. The entitlements sit in the SDS Novation Agreement at Clause 28. My succinct views on all of these matters are contained in the DLA Piper Report CEC00810434.

8.221 I am asked in Question 133 to explain the DLA Piper Note of Advice dated 9th February 2009 (CEC01033533): In context, the Note of Advice was a summary paper. I do not recall now precisely why TIE requested this at that time. I believe that it was in the context of TIE considering

[157] See para. 7.239

DRPs and that Steven Bell, TIE's Project Director, requested it. I do not recall any request from TIE for discussion about this advice once they received it.

8.222 **My Departure from DLA in 2010/11**

8.223 In October 2010 after returning from eight days leave in Washington DC, I fell ill. I was diagnosed as suffering adrenal burn-out, and on medical advice took an agreed month's leave of absence. I heeded strict advice to have no contact with work or my office. During this respite I concluded that I wished to resign. I handed in my notice at DLA Piper which ran from the end of November 2010 to early June 2011. I left DLA Piper on 6th June 2011. Before leaving, I had ordered the entirety of the Tram Project physical papers held by DLA Piper to my satisfaction. I therefore cannot speak to anything beyond that point

9 **TRAM VEHICLES**

9.1 DLA Piper had no involvement in the decision on how many tram vehicles to order.

9.2 Following CAF's selection as preferred bidder, the contract for Trams Supply with CAF was dealt with relatively quickly. A few central technical commercial points were debated, price was fixed and then it was initialled as ready for signature at the main Infraco Contract Close.

9.3 In contrast, there were significant difficulties with BB and Siemens on the Tram Maintenance Contract and maintenance provisions in the Infraco Contract and their need to carry out due diligence on them. In the main, we told them that tram maintenance was non-negotiable because it had already been agreed with CAF and that they had had months to carry out this exercise with the draft tram contracts that had been included in the ITN. In the end CAF joined the BBS consortium so this entire exercise became a dead letter. TIE achieved a small incidental saving here on account of Siemens no longer needing a 'risk allowance' for CAF as its novated supplier.

9.4 The Tram Maintenance Contract was negotiated in great depth with Siemens and we had very close and good instruction and interaction on that from Alastair Richards. I consider that it is instructive that TIE tram supply and maintenance contracts, also prepared by DLA Piper alongside the three other significant implementation contracts – which were negotiated and managed by perhaps the only TIE senior manager with directly relevant tram experience (Alastair Richards notionally on secondment to TIE from TEL) – delivered precisely what was contracted for on time and on budget.

9.5 Alastair Richards also managed the tram vehicle supply contract and dealt with CAF on all commercial aspects including their joining the BBS consortium, as opposed to the novation of the contracts to BBS by TIE, which had been intended originally. He used the DLA Piper drafted contract for that and protected it vigorously from interference by Siemens – who asserted that it was misaligned, seeking various spurious risk premia or contractual shields.

9.6 The majority of the meetings were at Rutland Square where Alastair preferred to work - he said - as there was less distraction from TIE colleagues and requirements to attend internal reporting

meetings. Chris Horsley and Phil Hecht worked with Alastair who could be demanding. He defended CAF in February 2008 when Siemens asserted that CAF were being obstructive about releasing information on their tram traction system and that this was an "integration" issue for which Siemens wanted more money. Aside from Ian Kendall and David Powell, he was the only TIE senior manager who had genuine tram experience. He had been involved in private sector capacity in tram schemes in New York, Copenhagen and the UK, having worked at Raytheon and Keolis.

10 **MANAGEMENT**

10.1 The majority of TIE's construction sector related experience was from the public, not private, sector. Ian Kendall had been by far the most experienced on large projects and the only senior manager with specific experience on the design, procurement, construction and operation of tram projects, from Croydon and Melbourne. With the exception of Alastair Richards and David Powell (who was the Tram Supply Manager, but left after CAF were selected as preferred bidder), I do not recall anyone at TIE having tram scheme procurement and installation experience.

10.2 **TIE's CEO and Chairman**

10.3 TIE's first CEO was Michael Howell who held this position when DLA Piper were appointed. I believe he had been at Parsons Corporation, the heavy engineering concern. During the first year of our mandate, TIE's Chairman was Ewan Brown, with whom I had very limited contact. At some point, his chairmanship ended and it was not, I think, until Willie Gallagher's appointment as Executive Chairman and CEO in mid-2006 that this post was filled again.

10.4 After Royal Assent for the Tram Acts in spring 2006, TIE's management changed significantly. Michael Howell was replaced by Willie Gallagher. I recall a very awkward meeting at DLA Piper's offices, in which Michael Howell was directly challenged by David Mackay as TEL Chairman with regard to his knowledge and proper control over the Project and its procurements. It was the first time I met Willie Gallagher and possibly also David Mackay.

10.5 Willie Gallagher had had his career at Scottish Power. I am not certain of his professional qualifications. He held his position at TIE from mid-2006 until, I recall, November 2008.

10.6 Following Willie Gallagher's departure, David Mackay became *de facto* TIE CEO, as well as interim Chairman until the appointment of Richard Jeffrey as CEO in early March 2009. David had been a successful CEO at John Menzies plc. Richard had been Edinburgh Airport Limited managing director.

10.7 I do not think that the changes of Chairman and Chief Executive at TIE presented any problems for DLA Piper as regards communication of our advice. I never had any doubt that my advice was being heard. I did have doubts as to whether that advice was being used properly, particularly when I repeated the advice and I did not see any change. In terms of changing the Chief Executive and Chairman - Willie Gallagher, David Mackay and Richard Jeffrey each had very different styles. All of them were accessible to me but there was a difference as to what happened with the advice.

There was also a difference in style of asking for advice. As an advisor, there is always a line between volunteering advice and waiting for the client to ask. Those differences were apparent to me with the four Chief Executive Chairmen. With the latter two senior men, I saw DLA Piper's advice accepted, considered and used. With Willie Gallagher, this was far less apparent, particularly in the period post BAFO.

10.8 **Project Directors**

10.9 The various TIE Project Directors were, in chronological order:

10.9.1 Alex Macaulay – Alex was my main contact at TIE at the start of the mandate along with Andrew Callander and Graeme Bissett. Alex Macaulay had been in the CEC transport department and prior to that at Clackmannanshire CC as, I recall, a senior roads engineer. With Ian Kendall's appointment, Alex moved to another and, I think, rather uncomfortable role as TIE's Director of Business Development.

10.9.2 Ian Kendall was TIE's Tram Project Director from mid-2004 to early 2006. He was accordingly the first TIE Project Director with full procurement responsibility at the outset of SDS and MUDFA procurements in 2005 and 2006 and then the tram vehicle procurement. Ian had been engaged on the Croydon-Wimbledon-Beckenham light rail project. I do not recall his title on that project – probably on the commercial side of bid handling for the promoters. He had also been involved in the successful Melbourne tram construction. Ian's appointment was later terminated by TIE. DLA Piper was instructed to deal with his severance agreement. This firing of the Project Manager during the main procurements was a potential public confidence issue for TIE and CEC and required careful and confidential treatment. It was important that the bidders in particular did not sense any procurement frailty, but what this personnel change really impacted negatively was TIE's management of the SDS and MUDFA contracts, both already live, and the way in which the Infraco ITN and negotiated procedure was used by TIE. My instruction from TIE was that Ian Kendall was being dismissed due to serious personality clashes and also, in part, due to the fact that he was promoting his own consultancy company while technically restricted from doing so by his TIE contract. There had been a falling out between Ian Kendall and some original TIE senior personnel, including Alex Macaulay and, I believe, Graeme Bissett, whose opinions Michael Howell (TIE's CEO at that time) respected.

10.9.3 As I recall, there were then gaps with no TIE Tram Project Director before the appointment of Andie Harper - who stayed only 3 months - and then after he resigned. Ian Kendall's view prior to his departure was that TIE did not yet possess the right skills to engineer the SDS and MUDFA contracts, both of which were substantial in their own right and crucial to TIE's overall procurement strategy, and the tram supply procurement. TIE's original but limited personnel had been suitable for Bill promotion and were supported at that earlier stage by two very competent engineering consultancies. But as I have said, Ian Kendall had begun to clash with TIE

management over his view about the urgent need for TIE recruitment at manager level for full-scale procurement and SDS/MUDFA implementation phase. I learnt this from both sides: Ian Kendall and Graeme Bissett and Michael Howell.

10.9.4 Andy Harper – he was introduced to me as Ian Kendall's replacement. I believe that he was only at TIE for around three months and left to go back to England, citing personal reasons. I recall one, maybe two, meetings with Andy;

10.9.5 Matthew Crosse – Matthew worked together as a team with his Commercial Director, Geoff Gilbert. I believe he joined TIE in late 2006 and had left by March 2008, around two months prior to Infraco Close. I have to say I found the timing of this departure very surprising; and

10.9.6 Steven Bell – Steven replaced Matthew Crosse as Project Director (functionally if not actually in title) in mid February 2008, as I recall. He had previously been TIE's Engineering Director from, I believe, 2005 and was still with TIE as Project Director 2010 when my involvement ceased. This promotion was announced by Willie Gallagher with effect from 9th January 2008. It was unclear to me when this in fact did take effect since Matthew Crosse remained at TIE until sometime in March 2008, I believe. I am not entirely sure now when Steven Bell took on the TIE director of engineering role This was not a Board appointment, it was a senior project management role.

10.9.7 Susan Clark was appointed Deputy Project Director. I believe that would have been sometime in 2007, after her role managing TIE's mandate for Transport Scotland (TS) on EARL.

10.10 The changes to the Project Director over time did have a direct impact on the manner in which DLA Piper was able to deliver its advice and on how that advice was used by TIE. When Ian Kendall left there was a void. This was because he had been driving the procurement strategy.[158] He had espoused it, fleshed it out and had taken it forward.

10.11 **Other Key TIE Personnel**

10.12 Graeme Bissett was the Director of Corporate Strategy, but was also a part-time consultant for lengthy periods. He had been at Arthur Anderson, until the Enron meltdown. He only had a limited consultancy with TIE to begin with. TIE deployed him as its author-in-chief for significant reports to the TIE Board and to CEC. Graeme occasionally became extremely frustrated with CEC's slow response time and their demands for information when CEC staff had internal reports to provide.

10.13 Stewart McGarrity, the Finance Director, was an experienced qualified accountant from one of the big firms and he had worked in the 90s in Hong Kong more or less at the same time as me, I recall.

[158] See para 4.93

10.14 Geoff Gilbert was the Commercial Director. He resigned from TIE and left a few days before Infraco Contract signature in May 2008. Geoff was present at most, if not all, of the key Infraco contract negotiations and any 2007/8 contract meetings where contractual and linked commercial/financial matters were discussed. That included any clauses with a financial impact, performance sanctions or risk transfer, for example: consents, design control, change provisions, liability caps, indemnities and performance security; Geoff Gilbert negotiated elements of the Wiesbaden Agreement with BBS and the commercial and contractual components and specific language of SP4 and its PA1, as well as the redraft of Clause 80.

10.15 Bob Dawson was the procurement manager and part of the Project Directorate team. Bob also left the Project in Q2 2008, prior to Infraco contract signature.

10.16 Lesley McCourt was Contract Manager and part of the procurement team recruited by Matthew Crosse. She had left tie by the time of Wiesbaden in December 2007. Dennis Murray later became Contract Manager; I do not recall exactly when Dennis arrived – possibly early February 2008. He was a quantity surveyor but I do not recall his professional background; he became the Infraco Contract manager.

10.17 Damian Sharp joined TIE from transport Scotland where he had been the case officer in charge of EARL. He took responsibility for managing the SDS contract in early 2008. I do not know his qualifications. Tony Glazebrook was the SDS Contract Manager.

10.18 Jim McEwan was recruited by Willie Gallagher as a trouble-shooter and Director of Value Engineering. I believe he had a Scottish Power background

10.19 **Continuity of Management**

10.20 It is my opinion that continuity within TIE was a significant negative issue. The Project Director role changed four times in the space of less than two years so during my time on DLA's mandate there were several different Project Directors, both before and after the award of SDS, MUDFA and the Infraco contracts. In two cases the timing of the change created obvious continuity and handover risk: Kendall followed by Harper, Harper followed by Crosse. There were also frequent changes at lower management levels (and a discernible associated lack of project management continuity) while TIE's Infraco and Tramco procurements were in the market and MUDFA and SDS were under way.

10.21 For example, when the Infraco and Tramco tenders were invited, the procurement unit comprised Ian Kendall and his team. By the time the bids were submitted, Ian Kendall had left with most of his recruited staff. One or two of his team remained but from memory they soon left also.

10.22 One significant frustration and inefficiency DLA Piper experienced was how frequent changes within TIE's project staff required DLA Piper to act repeatedly in order to support TIE as an impromptu knowledge gap filler/contract management hand-over assistant. As examples of many instances, I refer to:

10.22.1 CEC01858524: Sharon Fitzgerald's email on 18th January 2006, 4 months after the SDS contract had been signed. Sharon, not TIE personnel, is explaining to TSS and others the basic commercial and practical rationale for MUDFA, a central part of TIE's procurement strategy.

10.22.2 CEC01769432: One year later and 15 months into the SDS mandate, TIE's Project directorate have asked DLA Piper for (and were immediately given) a summary of the SDS contract. TIE's commercial director comments to the TIE Project Director that the person at TIE who knows most about the SDS contract is a Dundas & Wilson legal secondee, not - as might be expected - the responsible TIE SDS contract manager with relevant infrastructure and system design production and engineering expertise.

10.22.3 After over five months of no DLA Piper involvement in the Project from April to August 2007, TIE senior management suddenly instructed DLA Piper to brief CEC about the status of the draft Infraco Contract under negotiation. This is an example of TIE giving specific instructions for DLA Piper to brief CEC on a particular issue, which I discu above in relation to DLA Piper's duty of care.[159] In this instance, the instruction was because the main TIE staff individual (Leslie McCourt) - who had been engaged by TIE to lead discussions on the draft Infraco Contract with the bidders - was about to leave or had left TIE. We had around 48 hours to try to understand what CEC were expecting and where TIE had reached in its Infraco Contract main terms negotiations with the two bidders. This briefing had serious potential to embarrass TIE in front of CEC and I had no idea if TIE had informed CEC Legal that DLA Piper had not been acting for TIE in the period[160].

10.22.4 This experience was in fact mirrored by periodic urgent direct requests from CEC Legal for information or views on matters that were not DLA Piper's responsibility as TIE's legal adviser: frequently issues concerning SDS Provider design, programming questions, MUDFA works or non-utility third party agreements where CEC Legal and CEC were in fact well-placed to access this information themselves or indeed we responsible for it. I have highlighted some of these throughout this statement and the references are too numerous to mention here.[161] I had agreed with TIE that DLA Piper would judge when to pass these types of inquiry on the appropriate TIE manager or to Susan Clark as a 'clearing house'; or, if the information was a matter which DLA already knew about because of clear instructions from TIE, provide CEC Legal with the information and tell TIE that we had been asked for it. This was not advice; it was simply information transfer.

10.23 With the exception of Ian Kendall, I have no direct knowledge of why the various Project managers and other personnel left TIE. By early 2008, my impression was that the executive management at

[159] Para 4.33]
[160] I discuss this at paras 7.76, 7.118, 11.19 ; and 11.31;
[161] See para. 11.63 for just one example

TIE (Willie Gallagher and Graeme Bissett, in particular) appeared to be fed up receiving rather vague answers from their senior Project team. There was mention of the "silo" effect.

10.24 The lack of continuity within TIE damaged their mid-level personnel's capacity to learn in the roles they had been given. Issues with financial implications – e.g. claims or delays - appeared to be left for considerable periods of time and became intractable or more expensive because they were not addressed. SDS claims was a prime example. My increasing perception was that TIE was determined not to be criticised for engaging outside advisers, but below the TIE senior management, actual manpower, quality and depth of experience was an issue for a project of this size. I discuss three examples regarding engineering, finance and project management below.[162]

10.25 Sharon Fitzgerald, and other members in my team at other levels, had no confidence that any kind of handover was taking place. There typically was not a briefing meeting on a contract when a new member of staff started. One would just suddenly receive a call and somebody would say "I am not running this contract now".

10.26 There were issues not only at contract management level, but at Project direction level as well. A stark example of this was when Matthew Crosse arrived I was never invited as a member of TIE's immediate Project team to meet him. All that happened was that, in April 2007, we were told that we were being stood down. I had not met Matthew Crosse. I had possibly picked up the telephone with Geoff Gilbert. I did not see it as my role as an advisor to say "can I come and have a meeting with you, Mathew Crosse?" That was TIE's job. It was up to TIE to say "the new Project Director will have a briefing meeting". That did not happen. More generally, during my secondment other TIE senior managers referred to the "silo" effect of the Project Directorate's approach to communications within TIE.

10.27 **TIE's Resourcing & Project Management Style**

10.28 My working relationship with the TIE Chairman, Chief Executive and down to Project Directorate level was, without exception, professional, open and cordial on a personal and individual contact level. We also had good positive working relationships with TIE's consultants at various points in the promotion, procurement and implementation phases.

10.29 I was involved in the Project for nine years. I dealt with a great number of people in various organisations at various stages of the Project. I dealt with people with different skillsets and people with different functions. I can say without reservation that my relationship, and DLA Piper's relationship, with all parties and individuals on the Project was always courteous, responsive and constructive, even when under extremely challenging conditions. I believe that TIE Ltd staff with whom we interacted respected and liked me and the DLA Piper team that was working with me.

10.30 During my career, I have always purposely avoided entrenched personal judgments about individuals or communicating informally with other people about an individual's performance unless I am specifically asked to do so by the client or it is absolutely necessary in the interests of the

[162] See paragraph 10.57*et seq* (Engineering) and 10.62 *et seq* (Finance)

Project, the client or my own firm. This applies to this Project as much as any other in my career. Where I had a real definitive and proven view about how an individual's competence, work fit or managerial style was affecting our ability to advise, I said so politely and with the evidence to back it up, see for example para. 10.34.

10.31 I felt and feel comfortable in making judgments on people who I felt were not discharging their duties or making decisions regarding aspects of the Project where DLA Piper had responsibility for an outcome or work product and they had been advised of this and had not acted on our advice. There are specific examples where responsible people who had decisions to make did not make them or, for my purposes, appeared not to be making them. I have commented on this throughout my statement where appropriate and relevant. Some examples include:

10.31.1 TIE's erratic management of the SDS contract over a period of four years and the complete capitulation to pay SDS very substantial claims for client default and not to use the contract levers;

10.31.2 *Design Review*: Infraco Contract Clause 10 and Schedule Part 14: I discuss this at paragraph 7.550;

10.31.3 TIE Quality Assurance on SP4, Milestone Schedule, list of BDDI designs and Provisional Sums: I discuss this at paragraph 7.376;

10.31.4 *TIE's management of the draft Infraco Contract – negotiations during April to August 2007:* which resulted in a serious loss of control, dilution of contractual and commercial positions and contributed directly to the difficulties created by prolonged negotiations with a preferred bidder;

10.31.5 *Milestone Payments*: I discuss this at paragraph 5.59;

10.31.6 *Liquidated Damages*: I discuss TIE's (Bob Dawson's) role at paragraph 7.507 and 7.543.1;

10.31.7 TIE's decision to amend Clause 80 to accommodate BBS's inarticulate concerns despite the terms of the Rutland Square Agreement: I discuss this at paragraphs 7.518 *et seq;*

10.31.8 TIE's management of MUDFA: I discussed the failure to complete the Bill of Quantities and the loss of the ability to obtain a bond from Carillion at 6.47 and 6.68;

10.31.9 TIE's reticence about using contractual levers throughout the entire procurement and implementation phases; and

10.31.10 *Basic agreements with Scottish Power and Cable & Wireless*: I discuss CEC's failure to address my queries on these at paragraph 6.35.

10.32 I have explained above that in my opinion TIE never managed to exert the requisite client control over the MUDFA, SDS or the Infraco Contracts.[163] In the case of the Infraco, this lack of control contributed in a major part to the contractual disputes that erupted and it extended well back into the pre contract award phases in 2007. It was TIE's responsibility to manage these large, complex contracts from Invitation to Tender through to completion of the services, the supply or the construction works in each case. These major contracts were each very different and required requisite different technical disciplines to understand and control their intended output.

10.33 These were not project management tasks that just suddenly appeared in front of TIE. Contract management on this scale (and with this diversity) had been part of TIE's remit and procurement plan for well over four years by the time the Infraco Contract was awarded in May 2008. TIE was the named counterparty on: all of the Project advisory mandates during procurement, all six of the Project major supply and construction contracts I mention above, as well as a significant number of the third party agreements which involved the utilities' diversion work. TIE also conducted the negotiations for the set of Network Rail agreements and with Forth Ports. In total, TIE was the intentional management and reporting hub for around 15 to 20 interrelated technically and commercially demanding and financially important contractual relationships.

10.34 During 2008, I had two or three conversations with Graeme Bissett about TIE's resourcing and skill sets. Graeme asked me whether I thought TIE had the right people and whether they were able to handle the intellectual demands and the pressure. We were right at the start of the most intense period of Infraco, SDS and CAF negotiations on the contracts in early 2008. I told him that, in my opinion, TIE still did not have the right set up and that there were clear information and decision-making bottlenecks and voids. I said I did not understand Matthew Crosse's approach to his role as Project Director. I recall that this discussion took place during a telephone call I made from Cambridge (where I was visiting my son) on a Sunday morning in late February 2008. I believe this was 24th February 2008. I did not enjoy this because I was essentially reporting negatively about others but I considered it my duty to do so because TIE's interests were being affected, as was my ability to advise. I advised Graeme that Geoff Gilbert, TIE's commercial director, was not communicating with his colleagues, in particular Steven Bell and Stewart McGarrity (Stewart had also spoken to me a number of times privately about this). My primary point was that Geoff had been controlling SP4 discussions on the commercial and financial side including drafting the specific language but TIE's Finance Director was saying openly he had deficient information on this important issue and TIE's Engineering Director had been unclear to me about where he thought SP4 had come from.[164]

10.35 I also told Graeme that Geoff was handling the SP4 drafting negotiations (with Bob Dawson) and the main Infraco Contract term negotiations (with me) and this was an extremely difficult schedule for him.

10.36 I also told Graeme – I cannot now recall whether this was on that same call or earlier – that I had reservations about Geoff's number two, Bob Dawson. Bob had been TIE's Infraco procurement

[163] MUDFA – paras. 6.7 *et seq 6.55 et seq*
[164] See paras 7.214 *et seq*

manager since, I believe, spring 2007 and he was involved in discussing SP4 with BBS and producing language. I then did a handwritten note of this call and possibly followed it up with an email. I do not now recall.

10.37 I also had discussions with Willie Gallagher about TIE's resourcing level, both when I started my secondment and during the post Wiesbaden months.

10.38 I saw little difference in TIE's approach to manpower following these discussions. Jim McEwan was an experienced man who arrived at TIE in late 2007, I think. Willie Gallagher knew him from his Scottish Power days, I believe. Jim moved around in terms of the procurement components he was dealing with, though: SDS novation, value engineering, pricing meetings where BBS asked for more money and, latterly in mid-March 2008, SP4, acting as a kind of enforcer. I had discussions with Jim about TIE resourcing; he was pretty outspoken to me about some TIE personnel not being up to scratch, but I never saw his views in written reports, though I am aware he may have produced an audit on TIE's performance. I have commented elsewhere on TIE's reaction to questions at Board level on proposed and actual resourcing.

10.39 I did not regard it as DLA Piper's job to follow up on these conversations regarding TIE's resourcing. It was, however, my job to respond to Graeme Bissett's direct query, which I did. Other than the arrival of Jim McEwan, I did not see any new senior people or a modified approach. What I saw was the Project Director and the Commercial Director responsible for the Wiesbaden "fixed price" deal respectively: leave in February 2008 to take a new appointment and leave in April 2008. Neither was replaced by new recruitment so that when the Infraco Contract went into execution phase in May 2008, there was no TIE Commercial Director. Detailed knowledge of why TIE had taken many key commercial positions in fact left with Geoff Gilbert – and this became abundantly clear in 2009/10 when TIE, Tony Rush and McGrigors attempted to reconstruct what had happened at and following the Wiesbaden meeting in December 2007.[165]

10.40 By February 2008, it was becoming obvious to me that the workload carried by Steven Bell was extremely heavy. He was responsible for MUDFA (and this contract had a very significant cla brewing in addition to its day-to-day progress issues), SDS design production, SP4 technical negotiations and an entire range of engineering issues on key third party agreements matters – Network Rail being just one with the ability to cause immediate programme delay and cost. I believe that this cannot have failed to impact his ability to be on top of, and resolve, multiple important issues under great time pressure.

10.41 The availability of TIE personnel for the different contract negotiations was an issue. I had no authority to accept or negotiate commercial or technical and engineering matters. I referred back always on legal points if no TIE manager was with me in the relevant meeting. At times, if Geoff Gilbert and Steven Bell (or Dennis Murray from February 2008 onwards) couldn't come to meetings, then we did not negotiate the Infraco contract main terms. I do not recall Matthew

[165] See paras 7.383 *et seq*

Crosse, TIE's Project Director, attending any of the Infraco Contract legal and commercial negotiations.

10.42 Working towards Close in 2008, TIE's internal meetings predominantly involved spread-sheets giving status updates, actions and responsible parties, expected completion date and comments. There was an intensification of the tendency to compensate for lack of substantive progress on final agreed positions by micro-management: for example: twice-daily management meetings. Some of that was useful to me to see where TIE's work had reached on the numerous outstanding technical and financial schedules needed for the Infraco Contract– but not twice a day at 9am and 4pm. Attendees were almost invariably the TIE personnel at least in part actually engaged working up the fundamentals and detail of items being discussed and probably negotiated with a counterparty. Sometimes I couldn't attend these sessions as I too was actually doing negotiations. It was not as though these TIE managers had myriad junior staff working autonomously while they were at the meetings. So when managers were at these meetings, they were not progressing in their discussion/negotiation/work product to resolve the issue at hand. Susan Clark, TIE's Deputy Project/Programme Director, prepared agendas and put a whip on attendance. These meetings were sometimes chaired by Willie Gallagher, sometime by Susan Clark herself and sometimes Stewart McGarrity. I do not recall attending any of these meetings chaired by Matthew Crosse, the Project Director.

10.43 It is put to me in Question 16 that my email to Richard Jeffrey of 3 December 2009 (TIE00034122) is evidence of there having been strain in our relationship. I disagree and this was not the case.

10.44 By this point there had been a number of DRPs. TIE had won one and lost the others. Stuart Jordan was a senior contentious construction partner at DLA who had been assisting me with the DRPs and TIE had not warmed to him. They did not like his style. Richard Jeffrey had come to me and requested a fresh person. This is what this email exchange is about. It is not about my relationship with TIE. It is not about the job that DLA were doing in general. It is not about TIE's perception at what DLA were doing. I believe it is the only document of this type sent to me in the two years that Richard Jeffrey was at TIE.

10.45 **June 2010 – Tony Rush / Richard Jeffrey – Inquiry Questions 122, 17 & 18**

10.46 I am asked in Question 122 about my file note of 9 June 2010 in which Tony Rush appears to give quite blunt views about the TIE personnel (DLA00006390). I have discussed TIE's appointment of Tony Rush and his approach above.[166] The document speaks pretty much for itself. Tony Rush had very strong and outspoken views about TIE's competence and speed of action, particularly in view of Tony's specific role to coerce BBS in any way possible – contractual, commercial, technical and financial - to the negotiating table. Tony also told me about his altercation with Stewart McGarrity and he, Tony, did not accept, and was angered by, what had been said by Graeme Bissett regarding there being no one left at TIE who understood with precision what had happened

[166] Paras. 8.73 *et seq*

at Wiesbaden and after it. I took a note of Tony's views in this conversation because it was an important external perspective on what TIE had done and were doing.

10.47 I have been asked in Question 17 about my email of 9 June 2010 to Richard Jeffrey (CEC00336251). This document really speaks for itself. There had been a serious difference of opinion and an altercation between Tony Rush and Stewart McGarrity. There had been a further difficult conversation between Tony Rush and Richard Jeffrey. Richard Jeffrey called me to complain. He then apologised to me as I summarised in this email. It is clear from the email exchange that I had asked Tony Rush to speak to Richard Jeffrey in an attempt to defuse this unproductive situation. Tony had done so because of my intervention, as is recorded in my file note DLA00006390 on which I give comment above. In summary, what Richard Jeffrey had taken from the meeting, which I was in, was that I was somehow supporting or had been a party to giving Tony ammunition, in terms of TIE not doing their job properly. This was not true, but Tony Rush's approach in the meeting drew a very strong reaction from Stewart McGarrity. Stewart was protective of TIE. At that point, I believe that Stewart was also thinking that maybe he would take on the Chief Executive role at some point. He was defensive, and took it very badly that Tony Rush was essentially dictating to him, and other TIE senior managers, that TIE needed to give Tony's Project Carlisle priority.

10.48 On Richard Jeffrey's side, he was protective of his people, but realised that Tony Rush was there to do a difficult job. He had to strike some kind of balance and I came in the middle. There was a great deal of '*Andrew and I*' in Tony's presentation which surprised me a little. In other words, Tony Rush had views and he put me in there too. We had not discussed what he was going to say and I certainly did not think that blunt criticism was going to motivate TIE's senior personnel to help. I told Tony this and I told Richard that that is what I had said to Tony.

10.49 TIE at that point was in the front line of BBS engineering the Infraco contract, the MUDFA contract and the SDS contract. They were also under some kind of microscope, possibly from CEC. TIE Project personnel were under instruction to help Carlisle, which was not always what they saw as a priority.

10.50 I have been asked in Question 18 to explain the background to my email to Richard Jeffrey of 18 June 2010 (CEC00337052) and the email to which it responds (CEC00440581). This email exchange occurred nine days on from the fiery exchange involving Tony Rush and Stewart McGarrity discussed above. Richard Jeffrey sent a round-robin email to all parties asking people for better co-operation. Predominantly it was a signal to Tony Rush to calm down and refrain from inflaming Richard's people as this was not his job. This email is me responding to Richard on behalf of DLA saying I did not believe that we were responsible for a lack of communication, a lack of cooperation or uncooperative behaviour. Richard's reply came back saying "*Andrew. Thanks. This is not a DLA issue. It is an internal issue for me. I understand the pressures you are under too.*" In summary, Richard is saying that DLA are not in the basket of people who are failing to communicate.

10.51 Tony Rush and Richard Jeffrey were very different styles of people. They both tended to let off steam to me about what the other person was or was not doing. That is why my emails are explaining what these senior men are talking to me about and commenting on each other's performance. There were, in fact, a number of occasions in which I was involved in calming tempers during Projects Pitchfork and Carlisle. Tony Rush in particular, but also Richard Jeffrey, telephoned me to vent frustrations about the relationship and so it was that I became a kind of peacekeeper.

10.52 **External Consultants – General**

10.53 I noticed sensitivity within TIE about using consultants. The reason was, I believe, pretty simple: CEC and Transport Scotland regarded TIE as containing specially recruited project management expertise paid for out of their budgets. If TIE went to the market to employ project managers/technical experts, how was TIE in fact adding value? The result of this was, in my opinion, that TIE put itself in a position where it had insufficient support from suitable engineering and financial consultants during the procurement and implementation phases of the Project. I now give several examples of this.

10.54 **External Consultants – Engineering**

The rationale for TSS and TIE's actual use of TSS

10.55 TIE had appointed Scott Wilson as Technical Services Support ("**TSS**"). The concept had always been that TSS would support TIE in the management of the MUDFA and SDS contracts all the way through to Infraco Contract award (and beyond) and replace SDS (as TIE's engineering design specialist consultant) after SDS novation to Infraco. TSS was also to be used during the Infraco procurement to assist TIE in evaluating bids. But TIE did not seem to be deploying TSS in any of these roles – at least it was not at all visible to me if TIE did.[167] If TSS had been deployed to support MUDFA management and SDS management, I consider that this would have given TIE considerably better early control over these two crucial contracts and helped to protect the procurement strategy. I never understood the reason for this reluctance, save possibly on grounds of expense – but, even then, an external consultant with tram specialism could have been deployed surgically by TIE to improve/carry out quality control and programme discipline.

Turner & Townsend

10.56 Post Infraco Contract award, I was aware that Steven Bell was using Turner & Townsend (Gary Easton) on a case-by-case basis to support TIE on MUDFA and I believe in particular the significant Carillion MUDFA prolongation and disruption claim. He asked for my advice and we discussed over the telephone on a number of occasions the procurement risk of TIE (as a public sector entity subject to EU Directives) simply engaging T&T on commissions for engineering services – sometimes one-off, sometimes for a time period, I recall - exceeding legally permissible

[167] A case in point would be Andy Steel of TSS based at TIE's offices, who I think I met three or four times during the entire Infraco contract negotiation period.

de minimis cost thresholds where no formal procurement process had taken place. With TSS on hand and already appointed by TIE, I did not understand this.

Employers Requirements

10.57 Before appointing SDS and TSS, TIE had required Mott Macdonald and Faber Maunsell to work to produce basic Employers Requirements ("ERs") for the Infraco ITN and also some aspects of the ERs for the Tram Supply and Maintenance contracts. I discuss this above.[168]

10.58 Following the initial draft ERs preparation stage, I believe that TIE concluded that they could not afford engineering consultants any longer and Faber Maunsell and Mott Macdonald ceased to be involved.

10.59 It was my impression from TIE management meeting discussions that TIE told CEC that TIE had, or would get, the relevant in-house expertise. Consequently, there were many occasions when DLA Piper was seeking instructions on technical points about tram infrastructure or how T(wished to protect against contractor's ability to claim, where the input and range of UK and international experience of an experienced civil engineering and light rail transportation engineering consultant could have been very useful indeed but was not available to the Project.

10.60 From my vantage point, during the full draft Infraco Contract and draft ITN preparation stage, further development of the ERs was piecemeal, depending on whom TIE had involved as 'hired hands'. And this certainly may explain why there was never real ownership in the document within TIE and, perhaps, why Matthew Crosse considered that he ought to re-write the ERs following his appointment as Project Director in 2006. But since he left TIE after agreeing that BBS would receive an additional £3.2million because of the ERs rewrite, the ownership void remained. I discuss TIE's re-write of the ERs, its impact and its poorly timed commencement and completion above.[169]

10.61 **External Consultants – Finance**

10.62 For every major infrastructure project I have been involved in over 25 years – whether involving loan/bond financing or simply public works/grant funding (as was the case on the Edinburgh Tram) - I have encountered financial advisers supporting the public sector/government party from project inception to contract award and beyond. The discipline and perspective from market experience that this consultant can bring is often instrumental in improving risk transfer and commercial positions during the bid clarification and bid evaluation phase and subsequent contract close.

10.63 During the Tram Bills promotion stage from approximately 2003 until 2006, Grant Thornton were initially instructed as financial advisor. The partner there was John Watt. Grant Thornton were later replaced by PWC. DLA Piper handled the procurement for the appointment of PWC as a financial advisor for TIE during a phase in which TIE was firming up its procurement strategy and preparing the business case to support bill promotion and then funding approval. Tony Rose was the senior

[168] Paragraph 7.405 et seq
[169] See paragraph 7.405 *et seq*

director at PWC. One of the reasons that PWC were chosen was because of their track record on PFI and PPP large infrastructure projects. They were appointed at a time when TIE were considering the idea of external financing for the Project. PWC were engaged to assist TIE with the tram Business Case, which, in addition to the costing estimates, also contained various complex ridership projections and PFI style value-for-money formulae, down to what the optimum distance between tram stops would be and how much passengers would be prepared to pay for journeys on the tram. This work was not part of DLA Piper's mandate but I came to know Tony Rose quite well professionally and later he was also involved advising TIE on the EARL project (DLA Piper in fact advised TIE on the PWC appointment). From what he told me, TIE had been very critical of some of PWC's work on the Project and the relationship had suffered.

10.64 Following Royal Assent to the Tram Bills, PWC's commission for TIE ended, though later in the Project they did some 'ad hoc' work in 2009/10 in relation to tram scheme asset ownership and related tax and leasing issues as instructed by TIE (Graeme Bissett). TIE continued into the main procurement phase (for MUDFA, Tram Supply and Infraco) without an external financial adviser. This was the first time in my experience of large UK (and indeed of international) infrastructure projects where a public sector client had no external independent financial advisory support for the procurement and in particular the bid evaluations and preferred bidder appointment. For example, the public sector joint promoters of the South Hampshire Light Rail project had financial advisers (Ernst & Young, from memory), engineering consultants and Partnerships UK involved from the start to support their relatively small in-house project team.

10.65 Stewart McGarrity, TIE's Finance Director, was an able, energetic man who had Gregor Roberts as his assistant. Stewart was, in my opinion, overworked and therefore spread very thinly. I have already discussed that Stewart observed frequently to me and in TIE management meetings that he was seriously lacking in commercial, financial and sometimes technical information to underpin what TIE needed to present to Transport Scotland in the various reports and Business Case versions and to brief CEC Finance.[170]

10.66 **External Consultants – Legal**

10.67 After the arrival of Matthew Crosse in early 2007, I understood that TIE had done some sort of review of its expenditure on external advisers. Evidently, this was related to the reason for (a) standing DLA Piper down from any involvement in the Infraco procurement in April 2007 (b) TIE employing Lesley McCourt, Bob Dawson and Jonathon Moore as its in-house procurement management team to engage with BBS and Tramlines, the Infraco bidders. Bluntly, as I discuss in more detail above, after four months this intervention had failed. [171] Lesley McCourt had left TIE. Jonathon Moore had told me privately that he felt very inexperienced in this contractual arena and left soon afterwards. This situation resulted directly in Willie Gallagher asking for a DLA Piper secondment and the irrecoverable loss of 5 months negotiating time originally planned for TIE and DLA Piper to engage with the bidders on the Infraco Contract main terms.

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[170] See paragraph 7.225
[171] See paras. 7.84 *et seq*

10.68 **External Consultants during Procurement**

10.69 The Edinburgh Tram ITN required the EU negotiated procedure, not the then more recently introduced competitive dialogue process. The negotiated procedure relies upon a parallel set of financial, commercial, technical and legal engagements with the tendering groups and refinement after the first bids are submitted. Often, the contractual, commercial and financial aspects of this exercise create useful and real competitive tension.

10.70 But (i) TIE decided that PWC's commission as adviser would not continue for very long beyond the end of the parliamentary stage, i.e. once Royal Assent for the Edinburgh Tram Acts was in place (ii) the immaturity of the SDS design and the MUDFA status allowed the bidders to be completely relaxed on reserving their pricing or providing indicative costings only and to qualify their BAFOs so heavily, that TIE needed to use significant assumptions to fill gaps and to arrive at notional bidder positions competent for basic evaluation and comparison. "Normalisation" was a term TIE used *and* the presence of an experienced external financial consultant would have supported TIE here, in my opinion(iii) TIE excluded its legal adviser, DLA Piper for a five month period fro. procurement between April and late August 2007.

10.71 Another indicator, then, of TIE and CEC, its owner's, confidence in TIE's ability to shape, comprehend, close and implement the Project is the fact that TIE carried out the engineering and financial evaluations of the two BAFOs without external financial consultant input. I am unaware of what, if any, input TSS was asked for by TIE for the formal bid evaluations.

10.72 The bid evaluations were Project tasks that were done by the two of the three TIE executives who were responsible for Wiesbaden - Matthew Crosse and Geoff Gilbert. They were clearly authorised by TIE executive management as fully able and confident to assess, understand, communicate about and agree on pricing, risk allocation, technical matters and commercial outcome. The Wiesbaden Agreement and related discussions are an obvious example.

10.73 **TIE's Management of Risk and Cost**

10.74 During the early stages of DLA Piper's involvement, TIE had its own lengthy high level risk matrix, which sought to show risks to successful bill promotion and to some extent how risks in later stages might be allocated between public sector and private sector, and where risks would be shared. This client-side tool would have been developed in a standard way in a PPP/PFI project to identify also procurement and implementation phase risks. Mark Bourke (Risk Manager) maintained this at TIE, although before his arrival I had begun to help TIE build up a basic risk register. The first high level risks were, for example, that there would be: too many objections to the enabling legislation or a lack of contractor market interest or no central funding or funding reduced by other competing projects prioritised by new local or central government.

10.75 Mark Bourne had left TIE, I believe, by mid-2007. This risk register document, or its successor, might have been used by TIE as the basis of its QRA, which I have seen reference to in some Project papers. I do not know since I was never asked to review this QRA tool or to give any input

for it about legal or contractual risk and have never seen it. I do not know where this original Risk Register ended up. I believe that Mark Hamill took on a similar function, but DLA piper had very little contact from him and I do not recall ever being sent work product by him.. CEC Legal appeared mistakenly to believe that DLA Piper would have detailed insight into TIE's commercial, technical and financial risk management processes. As I have sought to explain in my statement, it was not within DLA Piper's remit as legal adviser to assess financial, commercial or engineering risks or give advice about apportionment of financial contingency to different risk or assumption outcomes. I made this abundantly clear to CEC Legal on several occasions in response to general queries over "key risks" and "how these were to be managed and assessed as to cost impact".[172]

11 LOCAL GOVERNANCE

11.1 Introduction

11.2 Conceptually, CEC appeared to want to treat the tram as a third party's project, not theirs, with TIE as a kind of corporate buffer. Indeed, at the onset, CEC Planning asserted that they were a legally separate body from CEC itself and seemed to me to have a curiously adversarial approach regarding the Project. I have already discussed these issues in detail above.

11.3 Key CEC Personnel

11.4 I comment here that DLA Piper received no specific guidance on who at CEC had Project responsibility. There were no protocols or instructions on how our advice to TIE was to be delivered. CEC, if it wished, had the opportunity on a weekly basis at the Legal Affairs Committee (LAC) meeting (arranged by TIE) to hear DLA Piper's views on the progress on contract negotiations with both bidders in autumn 2007 and latterly with BBS as preferred bidder from October 2007 onwards. Often CEC did not attend these sessions.

11.5 I have listed below the CEC officers with whom I had contact on the Project but my instruction from TIE was that DLA Piper's contact point within CEC was CEC Legal. DLA Piper adhered to that instruction. The dates refer to the approximate period of my contact and I have indicated how much contact.

11.5.1 Gill Lindsay – appointed Council Solicitor, I believe, in 2007 (whose reporting line I understood was to Jim Inch, Head of Corporate Services); my nominated contact at CEC from late August 2007, she appeared heavily committed on many CEC projects and tasks and often did not attend tram LAC meetings. I have described my interaction with her in some detail elsewhere. Most contact was from October 2007 to May 2008, with various reports to TIE sent to her about Project impasse and DRPs during 2009. Average 'ad hoc' contact perhaps twice a month; I met her on perhaps two or three occasions at CEC offices. I do not recall when she left CEC.

[172] See for example para. 11.62

11.5.2 Colin McKenzie – a Senior Solicitor and Gill Lindsay's alternate; he was primarily concerned with writing CEC formal documentation for Council meetings and reports and handling TIE's Operating Agreement. Contact from 2006 to 2008. Average contact perhaps every two months;

11.5.3 Donald McGougan – Chief Finance Officer; October 2007 to May 2008; he became more visible to me on the Project after my secondment started – infrequent contact; occasionally met him at TIE's offices with TIE's corporate senior executives.

11.5.4 Keith Rimmer - Head of Transport. 2003-2006. Perhaps two or three contacts during the early part of Bill promotion; also met him at EARL legal advisory tender interview.

11.5.5 Rebecca Andrews – Finance/City Development December 2007 to mid-2009. She attended the key meeting in mid-December 2007. Infrequent contact;

11.5.6 Alan Coyle - Finance Officer August 2007 to mid-2009. Infrequent contact - though 2008, I recall, he attended some Legal Affairs Committee meetings;

11.5.7 Nick Smith – Solicitor; 2006 to 2009. 2006 infrequent; 2007 - 2010 once a month. For a period of time he was 'embedded' at TIE. I do not now recall for how long. The arrangement ceased around the time the Infraco procurement began, I believe. In 2009, Nick managed the production of a report commissioned by CEC from Dundas & Wilson on the Infraco Contract. (The report concluded that the contract had no deficiencies, specifically in relation to termination, contractual warnings and change). I believe Nick provided me with a copy. He spoke with me periodically about the DRP and adjudications in 2009 and attended at least one conference with Senior Counsel, I recall;

11.5.8 Duncan Fraser – He was seconded to TIE and was TIE's chief liaison with City Development. I understood his role mushroomed into other areas. He would ask me to update him on issues when he came across me in TIE's offices. 2005 - 2007 perhaps once every three months;

11.5.9 Andy Conway – CEC City Development who I understand was imbedded at TIE with responsibility for CEC Planning role in design approval; very infrequent contact.

11.5.10 Alan Squair CEC Legal: one or perhaps two contacts early on in 2004/5;

11.5.11 Lex Harrison and Max Thomson: one or two meetings regarding transport integration and other discrete Project matters, to the best of my recollection in 2005; and

11.5.12 Alastair Maclean – Gill Lindsay's successor; in mid to late 2009; one/two meetings to brief him on the impasse and then on adjudications status.

11.5.13 Andrew Holmes - Director of City Development and Tram Monitoring Officer. One meeting on 12th December 2007. Possibly one or two other informal occasions during his tenure.

11.6 In reviewing the Tram Project Board minutes of 19th December 2007 (CEC01363703 pages 5 – 8), I see that CEC sought 2008/09 cost cover from the Project budget for two more legal personnel at a cost of £100,000 for 'backfilling' two positions (previously held by Alan Squair and Colin Mckenzie). What the Inquiry may find odd is that the report to the Tram Project Board on 9th January 2008 (CEC01363703 pages 9-12) from CEC (authored by Andy Conway and Alan Coyle, CEC Finance) explaining the need for these CEC legal functions lists that their function is to cover tasks that were already long completed or were intermittent or scarcely legal functions at all. I had neither met nor heard from Alan Squair on the Project for well over two years at this point.

11.7 **DLA Piper Interaction with CEC**

11.8 I have already discussed the basis of DLA Piper's appointment to legal advisor to TIE as the Project's delivery agent, the duty of care extended by DLA Piper to CEC and the basis upon it was discharged.[173] CEC did not require any distinct reporting line from DLA Piper. They were entirely content, after 2006 Royal Assent to the Bills when the major procurements managed by TIE began in earnest, that TIE continued to be advised by DLA Piper direct.

11.9 I can summarise my interaction with CEC over the seven and a half years of my Project involvement in this way:

2003 to 2006

11.10 As to be expected since DLA Piper were advising TIE, I had very little direct contact with CEC Legal indeed during this period. Such interaction as I had with CEC was on specific points where the bill promotion activity intersected with procurement and, in isolated cases, on competition law. Two typical examples would be:

11.10.1 the need for clarity in legislative and contract drafting regarding potential strict liability for tram infrastructure in the public thoroughfare (for CEC in its statutory capacities of Roads Authority and owner of the tram scheme); and

11.10.2 the need to ensure that CEC could properly and clearly delegate its authority under the enabling Acts to TIE to procure and manage the tram scheme.

11.11 I also met some CEC staff (I believe Alan Squair Legal and Colin McKenzie Legal and Lex Harrison and Max Thomson later) I believe in the context of DLA Piper's detailed work in 2004/5 on competition law matters and discussion on Edinburgh integrated transport involving Lothian Bus and possibly in 2005/2006 on third party agreements.

[173] In particulars paras. 4.22 - 4.52

11.12 There were some CEC attendees at early procurement workshops organised by TIE in 2004. I do not now recall whom but most likely some were those persons I mention.

11.13 I had irregular contact with Colin McKenzie over an extended period of time, concerned with TIE and CEC's very lengthy and frequently inconclusive discussions over the provisions of the TIE Operating Agreement which, at one point, centred around directors' personal liability. Matters always appeared to sit with CEC Legal and to be circling the question of how much control CEC wished to exert over TIE's business operations and what the exact relationship of TIE and TEL, sister subsidiaries of CEC, should be. Graeme Bissett was in charge of this for TIE. The papers will show an inordinate amount of correspondence, draft papers and waiting time on this subject.

11.14 I am asked in Question 95 to comment on an email which I sent to Willie Gallagher at TIE on 10 December 2007 (CEC01500899) where I wrote that I was worried about CEC's capacity. This arose in the context of a discussion about the TIE/CEC operating agreement. During the five years I had been involved as TIE's lawyer, CEC had failed to reach agreement with TIE on TIE's Operating Agreement – a simple and cardinal document for TIE's legitimacy as Project delivery agent. It was not agreed by CEC and TIE until several months after the Infraco Contract was signed and it had been through 29 draft versions. I had in fact registered my concern with Graeme Bissett and others that TIE was paying for DLA Piper to attend numerous meetings with CEC and CEC Legal on this subject - which achieved nothing and were an unhelpful distraction from Project tasks.

11.15 BBS' lawyers were at that point beginning basic due diligence on TIE's authority to enter into contract (and CEC's guarantee) and part of this would be examining the public record of what was actually minuted and resolved at the Full Council meeting. If there was no signed Operating Agreement, BBS would have been within their rights to question CEC's delegation and TIE's authority to contract. I could imagine a line of questioning: how could the Full Council be delegating TIE powers under the Tram Acts to enter into the Infraco Contract if this Project delivery agent was not specifically authorised to negotiate and manage the Infraco Contract? Compounding this was the fact that TIE was already counterparty to SDS, MUDFA, DPOFA, TSS and utilities agreements. CEC did not seem to understand or have any urgency to do anything about this issue which was essential for resolution ahead of Infraco signature, a simple practical and very clear legal point. It was also an issue of credibility for both TIE and CEC.

11.16 There had been a multitude of incidents, delays, late and urgent calls for information, lost documents and ill-informed interventions after long periods of silence – some of which I have mentioned. This created a dysfunctional environment that ate up valuable time and cost the Project needless advisory fees. Through CEC Legal, CEC raised issues or asked for information, but often it was obscure what that information was to be used for and whether the issue was resolved for them by information provided. Sometimes, CEC itself possessed the information it asked for.

11.17 I was really concerned about this. It was not simply that Ian Laing and Suzanne Moir would be doing due diligence on it. I was concerned about it as to the visibility within the procurement. It seemed impossible to bring CEC, or whoever was in charge of making this decision to sign the

operating agreement. CEC did not have any urgency about finishing this. That, for me, resulted in being seriously worried about the capacity of CEC to run with the Project.

11.18 But, from my perspective, the single largest CEC impact on the project as a whole was CEC Planning and Roads Authority's chronic underperformance on processing and granting design and other Consents under its long-understood and central role in the SDS Design approval process as Planning Authority and Roads Authority.[174]

2007 to 2008

11.19 In the first two quarters of 2007, I do not recall any contact with CEC, other than the isolated matter on third party agreements I mention at paragraph 3.22. DLA Piper was no longer involved in the Infraco procurement. In late August 2007, TIE (Willie Gallagher) asked for a workshop on the Infraco procurement to be attended by CEC legal and finance staff in the peculiar situation where DLA Piper had not been working on the Project for well over four months.[175] Following this workshop and my own secondment to TIE, my direct "*ad hoc*" contact with Gill Lindsay at CEC Legal began. This remained on a sporadic basis through individual meetings or phone calls interspersed later – in 2008 –with TIE's Legal Affairs Committee meetings. There was also the important pre-Wiesbaden December 2007 meeting with CEC 'Project Executive Team' which I have described at paragraphs 7.145 *et seq*. During Q1 and Q2 of 2008, I had periodic contact (accompanying TIE) with CEC finance officers in connection with the BBS money demands, as I have described earlier.

11.20 From early February 2008 to Infraco Contract close in mid-May 2008, I was aware that CEC were briefed by TIE senior executives regarding BSC's demands for increased construction, installation and supply price. If CEC were concerned and focused on their exposure beyond £545 million their actions over a period of four months appear to me remarkably passive: i.e. simply accepting as inevitable what TIE told them about the need to concede price increases on four separate occasions after Wiesbaden. These increases were conceded well after TIE had informed CEC that the construction price was "95% fixed".

11.21 I am not aware of any CEC personnel ever attending any of the specific negotiations with BB and then with Siemens and then again twice with BB - which all led to price increases - not even the Tram Monitoring Officer whose control function was specifically stated in TIE's Operating Agreement. In my opinion, the presence of very senior corporate BB and Siemens Germany executives gave CEC the proper opportunity to intervene as the Promoter and the statutory owner of the tram scheme. I am left to question CEC's decision to stay at home at these critical moments.

2009 and 2010

11.22 On TIE's instructions, I had more contact with CEC Legal to brief them on TIE's plans for using the DRP with adjudications and Pitchfork alongside the Infraco Contract, some informal discussion

[174] See for example paragraphs 5.96; 5.148 *et seq;* 6.9; 7.114 *et seq*; & 7.551 *et seq*
[175] Paragraphs 7.76 *et seq*

with Alan Coyle about DRP and two brief meetings with Alastair McLean – one shortly after he took office at CEC (more of a personal introduction) and one regarding the impasse on BBS's refusal to mobilise and adjudications. I was asked by TIE to provide CEC with copies of reports we made to TIE. CEC Legal were informed by TIE (and I believe sent the full set of the detailed instructions and papers delivered to Richard Keen QC Dean of Faulty). His advice was sought by TIE on the issue of remediable termination notices and generally the use of the Infraco Contract to bring pressure to bear on BBS and potential termination by TIE of the Infraco Contract). This was looked at as an option within Richard Jeffrey's initiative "Pitchfork". as a result of DLA Piper's advice and then was at the centre of Tony Rush's work on 'Notice'.. I have in mind that Nick Smith (CEC Legal) was invited to and attended one of the consultations along with Steven Bell and myself.

11.23 It has been suggested to me by the Inquiry that Senior Counsel may have advised against termination. This is incorrect. Neither of the two Senior Counsel instructed gave such advice. Senior Counsel advised that the factual grounds would require careful preparation. What we examined with Counsel, in the round, was termination as an option which could be used as a well planned negotiating tool. The contract is absolutely clear. It is up to the employer to issue his notice and say "give me a plan to fix your breach". Even if the contractor, on the end of a Remediable Termination Notice, does not produce an acceptable plan the contract does not oblige the employer to terminate. The employer can do anything they wish to. Richard Keen QC's view was, if you are going to issue Remediable Termination Notices, you will need to show material breaches based on good and tenable factual information about BSC's behaviours under contractual warning. There were very detailed instructions to Counsel where DLA, on behalf of TIE, were seeking Counsel's view on materiality and how TIE might be able to agglomerate minor but deliberate and continual breaches into a serious material breach of contract. If TIE wanted to use the termination provisions, they needed to be very certain of the factual situation and whether the notices could be sustained when analysed and/or challenged critically.

11.24 I am asked in Question 94 to explain my call to Gill Lindsay on 31 March 2009 as recorded in my file note CEC01031217. This call took place as a result of indications that I had received that CEC had asserted to TIE that they may have been misled or had not received timely advice or reporting. This was at the time of TIE and BSC's March 2009 Princes Street mobilisation dispute and soon after TIE had signed the Princes Street Supplemental Agreement (see paras. 8.109 et seq). This stand-off had been highly visible to CEC, as well as the eventual requirement for TIE to accede to BSC's demand for payment for these works on a demonstrable cost basis. It is reasonable to assume that when TIE reported the outcome to CEC, questions were asked of TIE. But I played no role in that nor was I instructed to.

11.25 I do not now recall precisely what I had been told or by whom. But it was important enough for me to seek and receive direct reassurance about DLA Piper's reporting from Gill as my normal designated point of contact at CEC. The original emphasis in the note is showing that I stressed to Gill Lindsay on that call that TIE had taken the decisions on pricing, variation entitlements and commercial positions, not DLA Piper. The reason I did so was that there had in the past appeared to be confusion in CEC and in Gill Lindsay's mind as to what DLA Piper, as TIE's legal adviser,

was competent to decide and to report about. I wished to make it very clear that BSC's position on cost responsibility for the Princes Street work was not some surprise resulting from an omission in the Infraco Contract.

11.26 It is instructive to read (CEC00097693.0001) TIE's CEO, Richard Jeffrey, writing internally on 30th August 2010 to his managers and to me after receipt by TIE of CEC Legal's lengthy e-mail (CEC00097693.0002): "*I have explained to Dave Anderson [of CEC] that I consider this e-mail unhelpful and symptomatic of the CEC input lacking focus...*" TIE Management frequently made similar complaints regarding input from CEC at earlier stages of the Project.

CEC00097693 should be CEC00098063

11.27 **TIE Board and Tram Project Board meetings**

11.28 Throughout my involvement in the Project, I attended a small number of TIE Board meetings by invitation, from memory during 2006 to early 2008. There were CEC officers and Councillors present at these meetings but I was not present to speak at these meetings specifically and so I would not regard that as contact as a TIE adviser with CEC in any true sense. Clearly, if I was called on to provide particular DLA Piper advice to TIE for a TIE Board meeting, CEC officials/elected members present heard it or read it, if TIE provided this. As an example: I provided a short presentation to TIE's Board on the legal component of TIE's formal BAFO evaluations in October 2007.

11.29 I do not recall ever attending (or being asked to provide specific advice to TIE for) a Tram Project Board meeting or any of TEL / CEC's other internal Project oversight sub-committee meetings or being invited to do so.

11.30 **First Discussions with Gill Lindsay, Council Solicitor, and August 2007 Workshop**

11.31 I believe that Gill Lindsay may have taken up her position at CEC Legal in early summer 2007. I recall going to see her for the first time before Infraco BAFO - and this may have been with Sharon and/or Chris Horsley - for the workshop meeting on 30th August 2007. This entailed taking CEC Legal and CEC Finance through TIE's procurement strategy again, how the contract suite worked and how completion of SDS scheme design (and so CEC Planning's role as the central design approvals, planning and consenting authority), as evident from the beginning of TIE's procurement strategy decisions in 2004/5, SDS design production and its approval, SDS novation and MUDFA progression were time and quality critical to the Infraco procurement phase (specifically to the two bidders' ability to price their offers with minimum reservations/qualification), the intended risk transfer and post award Project execution programme.

11.32 We were instructed to do this workshop by TIE at very short notice and minimal explanation as to what CEC wanted. It came just after DLA Piper had been re-engaged having been "stood down" for five months.[176] I got a call from Willie Gallagher saying *"CEC Legal want to have a workshop on the status of the Infraco contract."* I recall thinking in response to that request that we could give them a briefing at workshop on the Infraco contract as it was in May 2007, five months ago. There

[176] See paras. 7.41 *et seq*

was very little time indeed before the workshop to establish with clarity what TIE's negotiation team had done with the bidders while DLA Piper had not been instructed. We were put in an extremely difficult position by this request from TIE but were able to draw together the document I discuss in 11.33 below.

11.33 In advance of the workshop, by e-mail dated 29 August 2007 (CEC01560935), I sent Alasdair Sim and Susan Clark a report on the Development of the Contractual Risk Allocation in the Infraco Contract (CEC01560936), asking for this documentation to be sent through to CEC because their firewall would not accept it. It was forwarded to Gill Lindsay the next day ahead of the workshop. I am asked about this in Question 56. I had no idea when I was asked by Willie Gallagher to set up this workshop who from CEC was going to attend, I thought that it was a briefing for CEC Legal on the contract. I cannot now recall who attended. I note the people who were copied with these documents - Rebecca Andrew, Duncan Fraser, Andrew Holmes and Jim Inch (Director of Corporate Services) – were all senior CEC officers. The CEC staff who came to the workshop appeared satisfied with the content and outcome of the meeting. Andrew Holmes and Jim Inch did not attend the workshop. I never met or spoke to Jim Inch during the 7 full years I worked on the Project.

11.34 DLA Piper was given next to zero time to prepare for the workshop. This report was me trying to summarise what we could see were major alterations to the risk allocation position that had sat in the Infraco contract when it was issued six months earlier. I had no idea what it was exactly that CEC wanted to talk about. I was responding to a request from TIE to meet with CEC and talk about the status of the Infraco contract. I was not aware from any other TIE communication that particular risks or matters were of concern to the Council, since I had never been in discussion with them. I had had no engagement with CEC of this type on the Project.

11.35 In response to the final part of Question 56, I do not recall any discussion at all in this particular workshop about the effect of the decision by Transport Scotland to state expressly that they would not pay a penny more than £500m. I had attended meetings also attended by Transport Scotland officers during TIE's development of the Project's procurement strategy in early 2005. These were not Project funding meetings in any event and DLA Piper had no direct contact thereafter, nor reason to have such contact. Examination of the funding available for the Project was not as it became clear at the meeting, in any case, the core purpose of the August workshop meeting nor was it a part of DLA Piper's remit. Everyone involved in the Project knew that the Council was the junior funding partner and that, if there was a cost overrun, TS were not going to put their hand in their pocket. At the workshop, CEC Legal primary interest appeared to be in the commercial third party agreements (as opposed to the utilities), for which we were not responsible as lawyers. It was D&W who were doing that work and had been since early 2003.

11.36 It was at this 30th August 2007 meeting, since I had an audience which included people from CEC Finance, that I discussed the specifics of the guarantee that CEC would need to provide to get behind TIE's payment obligations. TIE was a one-parent company, 100% owned by CEC which had a nominal amount of issued share capital and neither balance sheet assets nor access to

funding of its own. CEC Legal had been provided with a draft guarantee in around June 2007, but by December 2007, CEC Legal had still not come back with their comments on that draft document. That was important because I needed to release a draft of it to BBS: I knew perfectly well that that document would need to be approved, not simply at BB UK level, but it would need to go to the main Boards of BB in Wiesbaden and Siemens AG in Frankfurt for an approval and I had told CEC Legal this. What I did not want was that document being 'lawyered' by someone in Germany after the full Council in Edinburgh had given their approval to it. I had to speak to Gill Lindsay to highlight that the Council needed to be aware that there needed to be a document which set out a full guarantee of payment obligations in behind TIE, subject to market standard protections for CEC as the guarantor. I used this meeting as an opportunity for me to get that important ancillary document into play and make sure that CEC Finance, not just CEC Legal, knew that this was a document they would have to consider and approve soon.

11.37 At the workshop, we also went over the rationale for TSS: to provide TIE with a continuing experienced engineering resource both during the lead up to Infraco Contract award and post SDS novation to Infraco.

11.38 After the workshop, I agreed with TIE that I would offer Gill Lindsay informal updates by telephone. I gave information, not advice and I was completely clear to Gill Lindsay about this. TIE knew about this and was in favour of it because they felt this would lessen the unpredictable often last minute requests for information from CEC Legal. And it is instructive that CEC Legal were contacting TIE, not DLA Piper, for this information. But, in the end, this informal protocol was frequently overtaken by events or disturbed by conflicting schedule demands – not necessarily mine. I probably spoke with Gill Lindsay in this way half a dozen times between December 2007 and May 2008.

11.39 Before leaving the topic of this meeting, I refer also to my evidence at para 11.141 et seq. regarding the CEC internal SWOP5 reports that CEC had produced and its Director of Corporate Services had sign off. Not documents or reporting DLA Piper knew of. The Inquiry may find these documents useful.

11.40 Following the Infraco Contract workshop on 30th August 2007 I had a further meeting with Gill Lindsay on the afternoon of Tuesday 4th September 2007. The email traffic shows that I had been waiting for her to detail to me what she wanted to go over, in addition to what had been covered in the risk workshop on Thursday 30th August 2007. In reply to me chasing, her e-mail sent at 12.34pm is in essence what she had in the way of more inquiries; my replies to these queries are paraphrased in the e-mail I sent to TIE (Bissett, Clark and Gallagher), 24 minutes later that day.

11.41 And so: on Tuesday afternoon 4th September 2007 in her Coburn Street office, I talked Gill Lindsay through:

11.41.1 how Owner Controlled Insurance Policies (OCIP) worked at basic level and explained that Heath Lambert had been engaged by TIE to arrange the policies to give TIE

control and to prevent the usual premiums charged by contractors for Project insurances being multiplied by the consortium effect;

11.41.2 how OCIP did not and could not cover commercially assumed cost/time risk that CEC as TIE's owner, would take in any contract;

11.41.3 The Infraco, almost certainly, would require that CEC guarantee TIE's payment obligations; "letter of comfort" in her language;

11.42 This is when I gave the advice, detailed at para. 7.118, that I could not advise at this point if the Infraco Contract, in particular, would be fit for signature by the end of the year. I explained that TIE were working with Transport Scotland on the grant funding and that TIE itself would no doubt have a variety of technical, commercial and financial assessment tools to apply, as soon as BAFOs were returned, and determine whether the bids were affordable or not and to evaluate the bids against one another.

11.43 **TIE's Reporting to CEC**

11.44 I mention this topic - not because I or anyone else at DLA Piper was responsible for TIE's reports to its owner - but because I have observations on the effect of these reporting lines on DLA Piper's work as an adviser to TIE. DLA Piper did not have a set role in that reporting framework since DLA Piper was not advising CEC.

11.45 TIE had reporting obligations under its Operating Agreement with CEC (CEC01351476). This included reporting on a four weekly basis pursuant to section 2.26 reporting to the Tram Monitoring Officer (Director of City Development) pursuant to section 2.22.

11.46 From my perspective, TIE's reporting process to CEC occurred on various levels sitting in the Governance structure and through different, sometimes informal, means. For example:

11.46.1 periodic formal meetings of the TIE Board (which comprised *inter alia* officers from TI and CEC officers and elected members and experienced non-executive directors);

11.46.2 periodic formal meetings of the Tram Project Board (a subset/mix of TIE's executive officers, TEL's officers and CEC officials, plus other CEC officers/managers not members the TIE's Board);

11.46.3 periodic meetings of another tram sub-committee at CEC, I believe. It took me some time to understand what these three bodies did that was different. In some cases, the same individuals attended the meetings in slightly different capacities and the meetings seemed often to be scheduled back-to-back on the same day;

11.46.4 periodic meetings of TEL and its Board – attended by TIE and LB corporate officers;

11.46.5 *ad hoc* meetings and telephone calls between CEC officers or staff and TIE direct – often Willie Gallagher, David Mackay and the TIE Project Director with Head of City

Development CEC, the CEC CFO and others. An example is minuted in the TIE Board minutes of 17th December 2007 and I mention another important occasion at paragraph 7.155.

11.46.6 budget meetings between Stewart McGarrity of TIE and Rebecca Andrews and Alan Coyle of CEC;

11.46.7 the on-going presence of CEC Planners at TIE, in the context of SDS tram design production and CEC Planning's responsibility for all SDS design approvals;

11.46.8 CEC secondees/presence at TIE (such as Andy Conway, Duncan Fraser and Nick Smith); and

11.46.9 CEC's own Strategic Work Programme under which designated responsible CEC personnel reported on the Project through the Director of Corporate Services to a body called the CEC Policy and Strategy Committee.

11.47 TIE (Graeme Bissett and Stewart McGarrity in particular) told me TIE wanted CEC Legal to engage, with a view to cutting down the isolated, often urgent long distance queries made of DLA Piper and inquiries to TIE from CEC Legal. These appeared to arise when CEC was preparing internal reports or perhaps when CEC Legal had been asked a question internally. There was at one point a plan for CEC to come to TIE Project management meetings and update themselves. TIE eventually wanted DLA Piper to have organised engagement with CEC Legal, in conjunction with themselves, through the TIE Legal Affairs Committee, where DLA Piper gave oral updates, if and when CEC attended. However, often CEC did not send any representatives. Latterly in 2008, it was at some of these sessions that I briefed Gill Lindsay of CEC Legal in person.

11.48 **DLA Piper Letters**

22 October 2007 Letter – Inquiry Question 55

11.49 In October 2007, DLA Piper was instructed by TIE to provide a letter and contractual risk matrix to DLA Piper's main and agreed point of contact at CEC, CEC Legal, about the Infraco contract. I was then asked by Gill Lindsay by email on 9th October to provide a letter addressed to CEC which essentially summarised the state of the Project as regards its financial, commercial and legal risk profile. The letter was to be part of CEC staff's report prior to a full Council meeting to vote on Project approval. This was approximately one month on from the Infraco Contract workshop and our 4th September and 12th October meetings (see paras. 11.31 - 11.42 and 11.49). I had already explained to Gill Lindsay on 12th October that as TIE's legal advisers we could not provide comment or advice that encompassed a wide range of issues well outside our responsibility as TIE's legal advisers. I asked Gill Lindsay when we spoke what level of detail she would require from DLA Piper. We agreed I would provide a draft letter for discussion which I did (CEC01542790) and Gill Lindsay said this met her purposes. I mentioned the option of providing a contractual risk matrix and explained what this was. At this stage we already had the contractual

risk matrix based upon the draft Infraco Contract issued with ITN. Gill Lindsay replied that the contractual risk matrix document was suitable.

11.50 In response to my initial draft, CEC Legal told me that CEC Legal used the contractual risk matrix for internal reporting purposes. Gill Lindsay said that was what she needed internally. To this extent, in October 2007, CEC Legal in fact had already dictated the topics to be covered by DLA Piper's subsequent letters in December 2007, March, April and May 2008 discussed immediately below. Nobody at CEC Legal (or elsewhere in CEC) asked for a detailed clause-by clause analysis of risk transfer. Nor did TIE instruct this. That was why each subsequent letter followed the same format and contained the same overview comments.

11.51 I am asked in Question 55 what I mean by the second and third paragraphs which read as follows:

> The key risks associated with the tram network infrastructure installation contract (and its major subcontracts for design, tram supply and system and tram maintenance during operational phase) are neither different nor more pronounced than to those encountered by the promoters and constructors on any other UK tram or urban on-street light rail scheme. This has allowed **tie** to take careful account of precedent where relevant as regards risk treatment.
>
> The identification of risk and the development of its commercial and legal treatment through to the final fully negotiated contracts will have been systematically tracked by the use of Risk Allocation Matrices, as the basis for translating the underlying technical and commercial deal reached by **tie** into contractual form. The detailed contractual apportionment of risk and responsibility between the public and private sector remains the subject of structured negotiations up to and beyond the selection of a preferred bidder. **tie**'s procurement strategy aims at an outcome on risk retention and transfer which is balanced, transparent and market aligned, while taking account of the inevitable tension between affordability and the true cost of an idealised risk transfer position for CEC.

11.52 I believe the language is simple and clear and I had discussed in advance with the key recipient what I would be saying. The messages in the letter are:

11.52.1 TIE has had the benefit of studying and contact with other light rail scheme promoters to understand how the contracting consortium will approach the procurement and execution phases;

11.52.2 Ahead of TIE, there remains a phase of important detailed negotiations which TIE will need to manage. These negotiations both pre and post preferred bidder will determine the technical and commercial approach on risk apportionment and its financial frame. This position, settled by TIE, will translate into the contractual documentation. The risk matrices are a tool to show how TIE's agreements with BSC have been reflected in the Infraco Contract. The actual risk and responsibility transfer to the private sector achieved at contract close will need to match affordability and , above all, the reality of how TIE has managed its procurements and commercial, financial and technical negotiation outcomes; and

11.52.3 Intensive work will be required for the next three months to achieve an Infraco Contract award in January 2008.

Inquiry Supplementary Questions 1 – 9

11.53 In Supplementary Questions 1 to 9 inclusive I am asked about a series of advice letters written by DLA Piper to CEC Legal between March 2008 and May 2008. The Questions ask me about three such advice letters, but DLA Piper actually provided five such letters in this period reporting to CEC Legal as instructed by TIE. These letters were dated 12 March 2008 (CEC01351479); 18 March 2008 (CEC01351480); 20 March 2008 (CEC0544971); 28 April 2008 (CEC01351481); and 12 May 2008.

CEC0544971 should be CEC01544970

11.54 The provision of these letters was not a deviation from DLA Piper's terms of appointment. It was an instruction from TIE which was perfectly in line with the duty of care letters. The DLA Piper letter at actual Close is addressed to both TIE and CEC Legal, reflecting precisely what all the letters state:

> final stage of the procurement commenced in October 2006. In accordance with our agreement with the Council we have taken instructions from tie on all matters on the basis that those instructions are consistent in all respects with the Council's instructions and interests.

11.55 The reason there were five DLA Piper letters in the space of two months in early spring 2008 was because each time in Q1 and Q2 2008 TIE announced a Close date and then failed to achieve that date, DLA Piper was urgently instructed to provide a further DLA Piper letter, proximate to the new planned Close date. In March 2008 this was against a moving backdrop of obvious open positions on multiple financial, commercial and technical issues, as well as BBS's obvious and on-going quest to improve its construction price –well known by CEC senior personnel.

12th March 2008 Letter – Supplementary Questions 3 – 7 and Questions 9 & 87

11.56 By the time the DLA Piper letter dated 12th March 2008 was issued, as well the meetings and agreed approach in October 2007:

11.56.1 I had had a specific meeting with Gill Lindsay on Tuesday 11th March to go over its text and scope. CEC Legal agreed with me on Tuesday 11th March 2008 that what was in the DLA Piper draft report letter accorded with what CEC required and it was on this basis that the DLA Piper 12th March 2008 letter was issued. And in that discussion, I asked Gill Lindsay to clarify each aspect of her email of 9th March to Graeme Bissett, so that CEC's requirements were met. And I pointed out to Gill Lindsay what would not be included in DLA Piper's letter and why. As is mentioned in that email to Graeme Bissett, we also went over the SDS novation arrangements as they stood at that precise point, how these operated in conjunction with the draft Infraco Contract and the position as regards design produced post BDDI and post novation.

11.56.2 I was also asked by Gill Lindsay to include a statement in the DLA Piper letter that the terms of the Infraco Contract reflected what TIE had negotiated. I included that statement in both the 12th March 2008 and 14th May 2008 letters.

11.56.3 I had spoken to Gill Lindsay at 10.30pm on Sunday 9th March 2008 also to go over the draft letter (the agenda for that discussion is apparent from her e-mail DLA00006379).

11.56.4 In addition, on or about Saturday 8th March 2008, as is clear from my e-mail to Susan Clark that day, TIE also sent me part of a document prepared by CEC setting out certain matters that CEC wished addressed in TIE's reporting due for a Tram Project Board meeting in four days' time. I discuss this in more detail below.[177]

11.56.5 There were also further individual telephone calls that I had with Graeme Bissett about specific points.

11.57 The results of those calls and discussions sit in the letters themselves. The DLA Piper letter reflect what I understood from those various discussions that CEC wanted.

11.58 What I had understood from CEC Legal was that DLA Piper would be asked to provide a letter in similar form to the 17th December 2007 letter[178] and the contractual risk matrices. CEC01500974 confirms my discussion with Gill Lindsay regarding the desired content of the DLA Piper letter of 17th December 2007 and the copying of this letter to TIE's two senior management participants in the Wiesbaden meeting. I received no comment from any of the addressees.

11.59 And so, in summary: TIE had been in contact with CEC to discuss how their legal adviser should approach the provision of a letter addressed to CEC. The letter remained based upon what CEC Legal had indicated was an acceptable set of topics in October 2007 and in December 2007. This assortment of discussion and relayed requests did inform what I included in the DLA Piper letters. And it is obvious comparing the requests with the letters that I included what CEC wished to have included – to the extent that the request was something on which DLA Piper was retained and was competent to comment.

11.60 I saw parts of formal CEC Officer reports, but never their internal legal commentaries. I saw it as incumbent on CEC Legal to tell DLA Piper if the content, structure and detail of what was being provided by the DLA Piper letters was deficient in some way so that we could have addressed the problem. Not the other way around, with DLA Piper guessing what CEC Legal might need. That is why the letters were provided in draft form for CEC Legal to see before issue.

11.61 I mention above that TIE sent me parts of a document prepared by CEC setting out matters that CEC wished addressed in TIE's reporting. My email to Susan Clark on 8th March 2008 (CEC01516428) is my immediate response to being sent (or possibly simply shown) the document sent by CEC to TIE: *"Points on the CEC multi-coloured document"*. My e-mail contains a set of DLA Piper comments on matters which CEC have appeared to put to TIE as regards the content of

[177] Paragraph 11.61
[178] Paragraph 7.576

TIE's own Close Report and about which TIE now seeks comment from DLA Piper. In my email, I make absolutely clear the fact that DLA Piper cannot - and will not - comment on numerous CEC points/focus issues – and I say why.

11.62 The email from me highlights the underlying points about:

11.62.1 CEC Legal's expectation that TIE should use its Project legal adviser to provide comment on issues which would be inappropriate for a legal adviser to provide advice/comment on. They are issues which TIE alone was competent to report on and issues which lay within SDS Provider contractual reporting and assessment remit and the competence of independent engineering and financial advisers;

11.62.2 my very clear explanation to TIE about what DLA Piper was retained and competent to advise on; and

11.62.3 TIE management's notion that telling DLA Piper about the existence of an issue and receiving factual comment or a logic review – as opposed to express legal advice - might satisfy CEC's questions to TIE.

11.63 I remark on the following more specific points in my e-mail:

11.63.1 CEC (through CEC Legal) appeared to believe that DLA Piper could report as to whether: CEC had "the best deal possible" and that the ERs (the core engineering, technical, systems and tram vehicle performance technical requirements document) 'aligned' with the Infraco Contract. My email explains why this was not within DLA Piper's remit;

11.63.2 DLA Piper was to opine on whether the Grant Funding letter under which CEC drew Project funding (on which DLA Piper had played no role in negotiating, but on which D&W had advised Transport Scotland) was 'consistent' with the Infraco Contract;

11.63.3 CEC wished DLA Piper to advise about the content/effect of the various Third Party Agreements that had been negotiated and drafted by D&W under direct instruction from CEC themselves and managed by Alastair Simms at TIE;

11.63.4 CEC had forgotten to engage with Edinburgh Airport Limited regarding the conclusion of an important binding agreement on the position of the airport tram stop and EAL's future right to move this in the event of a reconfiguration of the terminal (clearly a point on which EAL needed to be made fully responsible for cost and direct losses if this involved removal of infrastructure and track). DLA Piper had to deal with this issue rapidly and urgently, liaising with D&W to secure a Minute of Agreement between CEC and EAL to be reflected in Infraco Contract Schedule 43.

11.64 From this list, I was endeavouring to interpret what it was that CEC Legal required, what points were within DLA Piper's legal remit and how DLA Piper could support TIE's response.

11.65 I continued to liaise with Gill Lindsay regarding what CEC Legal required from these letters. For example, my email to TIE senior managers on 12th May 2008 records that I had spoken to Gill Lindsay for over an hour about the content of DLA Piper's letter to be issued and of which she held a draft. One explicit focus was on financial information which I told her was not something that DLA Piper could or would report on. She accepted this and confirmed that what was written in the letter itself met CEC requirements. In my email I also say explicitly that: the letter is and will be a DLA Piper letter –not a TIE crafted letter and certainly not a CEC Legal crafted letter.

11.66 I am asked in Inquiry Question 87 about a series of emails from Graeme Bissett suggesting some changes to the draft DLA Piper letter issued on 12th March 2008 letter. Graeme was a senior executive in TIE and was in charge of TIE's reporting function as CEC's Project Delivery agent. I see nothing unusual about TIE discussing what will be in the DLA to CEC Legal letter since TIE instructed DLA Piper to send the letter and had express knowledge of what CEC wished to have covered. Graeme Bissett was talking to Gill Lindsay about her requirements from CEC Legal's perspective. I am aware that Graeme Bissett discussed the preparation and content of TIE's closing report with other CEC personnel - but I was not party to those discussions. This is evident, as examples: from Graeme Bissett's e-mail of 10th March 2008 (CEC01393819) and my e-mail to Susan Clark dated Saturday, 8th March 2008 (CEC01516428).

11.67 Graeme Bissett was not dictating what should be said in the DLA Piper letter. He was commenting on the draft of what DLA Piper proposed to issue. Graeme Bisset did not produce the attachment (CEC 01541243) to his email CEC01541242. I did and he sent observations on it. CEC and CEC Legal both knew that Graeme Bissett was in touch with DLA Piper on this matter. The letter was not, as is phrased in the Question 87, "purporting to be from DLA to CEC". It was from DLA to CEC (and TIE). May I re-emphasise that these DLA Piper letters and this letter in particular were shared in draft with the express purpose of allowing CEC and TIE to see what DLA Piper were covering in their letter.

11.68 CEC Legal and other CEC staff were fully aware that TIE were communicating with DLA Piper about this DLA Piper letter for CEC at projected Close. DLA Piper were being required to include their letter comment on the status of the Infraco Contract suite - which included documentation that TIE alone had negotiated and settled and TIE alone had produced or required BBS to produce and had accepted.

11.69 It would be impossible for legal advisers to produce this form of letter without consultation with their client – in this instance, TIE who had prepared some of the documentation being sent out with the DLA Piper letter addressed to CEC Legal and to TIE: TIE's Close Report and TIE's Infraco Contract Suite report. For example, we see clearly from CEC01428370 that the sections 2 and 3 in the proposed TIE report on "Infraco Contract Suite and CEC Guarantee" came from the initial draft Close Report that had been prepared by TIE in January 2008.

CEC01428370 should be CEC01428730

11.70 The communication between DLA Piper and TIE over this and the other DLA Piper letters to CEC was, in my opinion, appropriate and entirely transparent. CEC Legal received a draft with invitation to comment on all DLA Piper letters addressed to CEC for the close process. Where I felt that TIE

was going too far, I said so either verbally in discussion with Graeme Bissett or, for example, by my email to Graeme Bissett and copied to TIE senior management on 12 May 2008:

> At the end of the day gents, it is DLAP's letter and I need to write it on the basis of what I have been instructed is the outturn and Friday's deal as analysed by Graeme's Close Report from tie's perspective.

To the best of my recollection, there were no detailed exchanges regarding DLA Piper providing a letter and report to CEC with any TIE personnel other than Graeme Bissett, who was the nominated TIE corporate management point of contact. It may well be that I discussed certain practical aspects impacting DLA Piper's ability to advise and report with Susan Clark: such as timing of delivery, status of TIE's work on outstanding draft Infraco Contract Schedule Parts, Infraco Programme or the position as regards missing documentation for which CEC had responsibility.

11.71 As to the actual comments from Graeme Bissett shown in CEC01541243, which I am referred to, I find it very difficult to identify these in the version of this document available. They appear minimal when I compare the document manually to the text of the DLA Piper letter actually issued - CEC01351479.

11.72 I am asked in Supplementary Question 5 why Graeme Bissett emailed the draft letter to various Council personnel on 10 March 2008 (CEC01393819) along with the Close Report and risk matrix. Why he did this is a question for him. But it is my view that he did so in his role as the clear senior manager/co-ordinator of TIE's Close reporting process to its owner. I am asked why it was Graeme rather than me who emailed these documents round. My answer is because:

11.72.1 TIE, not DLA Piper, held the relationships with different parties within CEC in particular the Tram Monitoring Officer, the CEC Project Executive Group and CEC Finance; TIE, not DLA Piper was managing TIE's process for Close;

11.72.2 TIE, not DLA Piper, was receiving information from CEC as to what CEC required from TIE in terms of close reporting (e.g. CEC's composite note to TIE);

11.72.3 DLA Piper was instructed to have one point of contact at CEC – CEC Legal. TIE did not want DLA Piper to have multiple contacts at CEC and was extremely clear about this from November 2002 onwards. The background context by 2008 was TIE's instructions to me (primarily from Stewart McGarrity, but also Graeme Bissett and Susan Clark) that they did not want their legal adviser overburdened by inquiries from CEC Legal, or for TIE to be spending Project budget money on unplanned CEC approaches to DLA Piper for information; and

11.72.4 TIE had agreed with CEC, the Project Promoter and TIE's owner, that TIE would handle the process of Close reporting in this way as from January 2008

11.73 As a result, there was no instance at all that I recall where DLA Piper sent any reports or other Project related documentation (with one exception: a much earlier paper on street maintenance responsibilities to Duncan Fraser) to any of the first six addressees listed on CEC01393819 who were Andrew Holmes (Director of City Planning), Andy Conway (CEC City Development responsible for CEC interface on SDS Design Planning and Consents), Donald McGougan (Director of City Finance), Duncan Fraser (TIE – CEC liaison), Alan Coyle (CEC Finance) and Rebecca Andrews (CEC Finance). The other two addressees are CEC Legal. DLA Piper is not copied on the e mail which is entirely consistent with TIE managing its own process.

11.74 In this way CEC senior staff – in fact the same group that I had met on 12th December 2007 as the 'CEC Project Executive Group' (see paras 7.145 *et seq*) – had a preview of the proposed DLA Piper letter. If there was any matter they wished addressed, here was the opportunity to raise it with TIE and for TIE to do so with DLA Piper.

11.75 The Inquiry has noted in Supplementary Question 6 that a DLA Piper reference was present on the early drafts of the 12 March 2008 letter but was not on the final version. I attach no significance whatsoever to this administrative point regarding a different document identifier. The draft letter had been sent to TIE's Graeme Bissett at 11.20am in the morning of 11th March 2008, after I had discussed it with Gill Lindsay. Having heard nothing from TIE and nothing more from CEC Legal, I then asked my team assistant, during normal working hours to prepare the document for my signature. Graeme Bissett e-mailed me with minor comments (CEC01541242 and attachments) at 10.30pm in the evening of 11th March. And so, at that late hour I needed to prioritise to consider these on my return from negotiation meetings and possibly a TIE Project management meeting at Citypoint in order to release a DLA Piper letter the following day. It may be that the draft was sent to the DLA Piper late/overnight document production unit for a specific 'house style' check - in which case the standard partner matter master file reference would not necessarily appear on an engrossment. The full signature on the issued letter is mine in the normal manner (on behalf of the firm) as the responsible DLA Piper client partner. The reference is not material in any sense to the content, meaning or status of the letter.

11.76 I am asked in Supplementary Question 3 if there was a specific request for the DLA Piper 12th March 2008 letter (CEC01351479) to cover procurement challenge risk. Yes, there was. CEC Legal had been in touch with TIE about the risk of procurement challenge because I had made it clear to CEC staff (at the time of the first move by Siemens for a price increase) and to TIE in February 2008 and then again in early March 2008 that acceding to BBS's straightforward demands for more money post BAFO would create vulnerability to a challenge under EU Directives by the reserve bidder or, for that matter, any curious or disgruntled member of the public. Furthermore, I had taken part in at least one telephone call in February between TIE and CEC in which I had given my view on this topic discussed following Siemens price increase demand on February 6th 2008. The advice sits at Section 10 in the letter itself and also I refer directly to it in my

email of 9th March 2008 to TIE senior managers[179]). As I have said, this 12th March 2008 letter was written two days after I had given Jim McEwan my advice on the subject also.

11.77 I am referred in Supplemental Question 4 to a draft of the 12 March 2008 letter dated 10 March (CEC01393822) and asked a number of questions about differences between the draft wording and the final wording. It is entirely natural, given the time pressure that existed due to TIE's requirements and CEC Legal's sudden list of topics (see my e-mail to Susan Clark at TIE dated 8th March 2008) that the final version of the DLA Piper letter should exhibit some changes. CEC Legal (and other relevant CEC personnel) were intentionally provided with this draft DLA Piper letter, with full opportunity to read it and ask questions and raise points if they wished to. None were communicated to DLA Piper. I comment on the particular changes identified by the Inquiry as follows:

11.77.1 I added the text at the end of the first paragraph ("In accordance with our agreement with the Council we have taken instructions from TIE on all matters on the basis that those instructions are consistent in all respects with the Council's instructions and interests") when preparing the final version because I wanted to make the point clearly that TIE and CEC were synonymous so far as DLA Piper was concerned and that the issuing of the letter was consistent with how DLA Piper had accepted and continued to accept instructions under its mandate from TIE.

11.77.2 I added the statement under the heading "Programme" explaining DLA Piper's role in settling the Infraco contract terms to make what DLA Piper's remit had been as TIE's legal adviser clear. Furthermore, I wished to make the point that it was TIE's judgment that matters could be completed to allow a Infraco Contract Close two days after Easter Monday, not DLA Piper's, as is apparent from this extract from the letter:

[179] Paragraph 11.153

> In our view the draft agreements in their current state adequately capture the commercial positions which tie has achieved. In our opinion, in order for tie to issue a notification of intent to award, the following tasks need to be urgently attended to tomorrow, resulting in BBS' agreement on:
>
> - removal of all remaining major issues on Infraco and Tramco Contracts (these are all known items);
> - completion of pricing negotiation;
> - production of the agreed Master Programme;
> - finalisation of Employer's Requirements;
> - pricing for Phase 1b;
> - close on Network Rail APA;
> - agreed treatment of NR immunisation; and
> - receipt of final Infraco Proposals.
>
> Clearly this is a full and ambitious day's effort. BBS should be requested to confirm their commitment to close by latest 26 March (24 March be[fore] Easter weekend). That commitment would exclude any further visits to any of these core elements of the ETN contract suite.

BBS did not give TIE that commitment and no Close happened.

11.77.3 I also stated in the letter my view that legal matters could be concluded to service an end March Close, but I expressed no opinion on the close of the "myriad commercial matters" with which TIE had been and was still dealing. That included, SP4 Assumptions 2 to 43 (some of which were still emerging as is clear from the email traffic and TIE's discussions with BBS and Pinsent Masons).

11.77.4 The change from "*no significant legal issues outstanding on the Infraco contract*" to "*limited legal issues outstanding*" was because the first version was a draft and I reflected about what was in fact still sitting with the Issues list. As discussed above, I was asked to provide views on contractual documentation and commercial terms th[at] were still showing continual movement, notably price and programme, as well as detailed provisions, SDS novation arrangements, Siemens pedantic on-going review of the maintenance provisions, first discussions with Network Rail, to name examples. The phrase "*limited legal issues*" was based on my judgment (after six months' involvement with BBS) on what remained; "limited" could not be an exact measurement. I was looking at where matters had stood in January 2008 (and ignoring the set of technical and financial contract Schedule Parts which still required to be produced by TIE and BBS) and making a judgment on speed of progress that had prevailed up until that point to current status on outstanding main contract terms.[180]

[180] See paragraph 7.214.4

11.77.5 The complete set of legal/contractual issues that I summarised as outstanding would have been shown in the Issues List at that time, and in the travelling draft Infraco Contract – both of which were circulated by DLA Piper immediately after every negotiating session (see para. 7.91). I would like to point out specifically that CEC Legal received copies of these and had ample opportunity to read into live issues and ask about them at Legal Affairs Committee meetings.

11.77.6 The draft noted that the novation agreement resulted in retained SDS performance risk for TIE. This was removed from the final version because by 12th March 2008 I had reflected and considered that the performance risk had been clarified by TIE's engagement with PB and BBS at which I had been present myself, supporting TIE personnel (Geoff Gilbert, Steven Bell and, in part, Jim McEwan) as I explain at paras 5.209 - 5.210. When we entered that meeting SDS were still refusing to warrant their design and BB were saying that they would not novate a designer who could not/would not stand by its design. When we left it, their position had softened and discussion on the novation had begun properly. This is case-in-point on how I was being asked to write letters to comment cogently on a dynamic and unsettled position. My email to Gill Lindsay issuing DLA Piper's letter dated 12 March 2008 confirms the recent progress with SDS. It refers to negotiations earlier that day and states: "...one major win was SDS' commitment on novation which includes substantially completed terms and conditions of novation."

11.77.7 After reading the 12th March 2008 letter again, I consider that the discussion point with regard to SDS performance risk is amplified, not deleted, at Section 7 of the final version. This was because there had been some success in the negotiations between 10th and 12th March 2008 – due in fact to DLA Piper's persistence in the negotiations – in reducing TIE's exposure. I note specifically the final two points in that section. The language indicates that DLA Piper was reporting on a desired TIE position on liquidated damages, not an as yet agreed one. This is another example of an important and obvious open commercial position, one day away from TIE's chosen date for Notification of Contract Award:

- If through its own fault or dilatoriness SDS is late in delivering a design into the CEC Consent process and this in turn delays the issue of construction drawings to BBS, BBS will be entitled to apply liquidated damages up to an agreed level (currently proposed by tie at £1,000,000 and with an approximate minimum rate of £20,000 per week).

- BBS would have recovery risk on such liquidated and ascertained damages[1] but beyond the cap, tie would be required to recompense BBS.

B

- The current position is that any damages or loss suffered by BBS beyond the £10,000,000 cap under SDS novated contract (in relation to deficiency in SDS design) would be a tie risk.

11.78 I am asked in Question 9 to explain a specific change in DLA Piper's letter dated 12 March 2008 to Gill Lindsay (CEC01347797) from the wording which was contained in a different draft of the same letter the previous day (CEC01541243).

11.79 I would point out also that the cited sentence in the question put to me omits what I see as important words: "*subject to the above*" which includes the two preceding paragraphs giving context:

> positions at opposing ends of the negotiating spectrum. BBS have taken a most risk averse stance, due to their developing first hand views on SDS performance to date, in particular in relation to design Consent achievement, but also in relation to important aspects of scheme design quality.
>
> BBS have insisted on reinforced contractual protection (in our view overplayed) and commercial support in the form of tie accepting compensation entitlement for BBS in the event of SDS default on its design production and Consent delivery obligations, which risk to tie is discussed further in section 7 below. This is predominately a function of SDS serial underperformance throughout its mandate and also at a time when the need for due and proper performance has been under close bidder scrutiny.

11.80 The revised language reflects the fact that after intense negotiations, there was an agreed form of Novation Agreement, which did indeed transfer responsibility for design related cost implications to BBS, subject to the clear qualifications in SP4, known about since Wiesbaden. The 'design responsibility' for BSC post-novation entailed design production oversight as the new SDS client and the management of SDS, using the SDS contract to monitor SDS progressing the designs through the phases to arrive at a consented design at Issued For Construction stage. In other words, BSC assumed responsibility for design production post-novation of SDS. CEC Planning /Roads Authority itself would continue to be intimately involved in the design approvals. This is

entirely separate from the issue of the cost and time implications of all design production post-BDDI, which is what PA1 in SP4 dealt with.

11.81 The following paragraph stresses the context of the letter: time constraint for its production; the imminent award notices; and DLA Piper's clear position on convergence of interests and the basis on which it was entitled to proceed in discharging its duty of care to TIE and CEC:

> towards tie's planned close date of 24 March 2008. It has been produced under heavy time constraint which will explain the measure of overlap between this letter and Annex A. We are instructed that tie's intention is to issue a notification of intent to award the Infraco Contract and the Tramco Contracts on 13 March 2008. This letter therefore provides our view on the status of the contract suite and its readiness for this final stage of the procurement commenced in October 2006. In accordance with our agreement with the Council we have taken instructions from tie on all matters on the basis that those instructions are consistent in all respects with the Council's instructions and interests.

11.82 The letter was a straightforward update on what had just occurred in negotiations led by TIE, with a summary of how matters had landed.

11.83 I emphasise that this letter was intended to be a summary, not a blow-by-blow account of what TIE had agreed to commercially. Indeed, it was impossible to report on an outcome because TIE was continuing to negotiate and make more very significant financial concessions e.g. three days earlier, TIE had conceded a further £8.6 million as a consequence of BBS' pre Rutland Square demands. The very last sentence states explicitly that matters are not stable or complete.

11.84 A detailed account from DLA Piper was not what CEC Legal were expecting: the content and scope of this letter had been discussed by me with CEC Legal and with TIE and what it was to cover had been agreed.

11.85 I also note that the document sent as Annex A to CEC01347797 and under cover of that letter is clearly flagged (on page 2), as TIE's draft document, not DLA Piper's, and a simple and clear explanation is given as to why it is being sent under cover of a DLA Piper letter: i.e. to protect its commercial sensitivity against any request under FOI(S)A 2002.

18th March 2008 Letter - Supplementary Question 8

11.86 A further letter was issued on 18 March 2008 (CEC01229872) and it is put to me in Supplementary Question 8 that this *"reflected recent negotiations but contained no material changes"*. The significance of this letter is that TIE had now announced that there would be an Infraco Contract close on 31st March 2008. The letter informed CEC that DLA Piper considered that TIE could issue the formal OJEU notice of intent to award (something that I had cautioned against TIE doing prematurely in January and February 2008) and the letter explains why. This was part of DLA Piper's advice on procurement risk, since the Notice of Award triggered an automatic right to debrief for the losing bidder, Tramlines, and I discuss this specifically in the letter.

11.87 The 18 March 2008 letter also described the principal actions in that short period since the 12th March 2008 letter. Not much in fact: the issue surrounding the ERs had subsided (largely due to DLA Piper's intervention to remove Siemens' spurious arguments and TIE's agreement to pay BBS more money on account of the revised ERs (See paras 7.405 *et seq*). However, TIE and BBS were still negotiating and bolting down the technical and commercial components of SP4 and the various Assumptions: numbers 2 through 43 - as well as attempting to draw up the Bills of Quantity, a Milestone Payment Schedule and awaiting various key pieces of information from BBS, agree levels of LADs and produce first drafts of numerous contract Schedule Parts.

11.88 Furthermore, in two aspects, the letter gave CEC Legal important information which TIE had reported in front of DLA Piper in TIE weekly management meetings: i) BBS had committed to a qualified construction programme with a PSCD and; ii) that TIE "*will confirm the settled pricing for all major fixed elements of the Infraco Contract*". I relied upon TIE's information to me, and believe I was entitled to do so, in making my statement about TIE's ability to achieve Close.

28th April 2008 Letter – Supplementary Question 9 and Question 42

11.89 DLA Piper's letter of 28 April 2008 (CEC01312368) says that, "As they stand, the terms and conditions represent a clear reflection of the positions which have been negotiated by TIE and are competent to protect and enforce those positions." I would highlight that it says "negotiated by TIE". This letter requires context. It was written, yet again urgently, to support an Infraco Contract close date, which did not happen because TIE chose to entertain a further demand for a price increase from BSC. (See paras 7.493 *et seq*).

11.90 On page 3, at heading 5 "Risk", the letter says: "Following on from our letter of 12 March, we would observe that delay caused by SDS Design production and CEC consenting process has resulted in BBS requiring contractual protection and a set of assumptions surrounding programme and pricing". As I discuss above, the delay in SDS design production and consenting prior to BAFO and the status of existing SDS design post BAFO had led directly to Wiesbaden and to BB in particular taking the firm position that it could not accurately price scope, or commit to constructi programme or construction methodology. TIE therefore contracted with BSC on the basis of a series of Assumptions, qualifications, provisional sums and reservations regarding BSC's construction price and its programme: in essence SP4.

11.91 I am asked in Supplementary Question 9 to explain by reference to a draft version of this letter (CEC01351481) why "blame" for the need for a new construction programme and variation was being attributed to SDS and CEC. I should point out that nowhere in the DLA Piper letter is the word "blame" used. However, my answer is that SDS and CEC Planning and road authority's performance were under TIE's management responsibility, so far as design production within the procurement strategy and during the pre-Infraco Contract signature period was concerned, and even after that date, so far as CEC Planning/Roads Authority was concerned. CEC Planning/Roads Authority had an absolutely central role in supporting design production. This is discussed in more detail at paras. 5.96 - 5.97 and 5.128 *et seq*. SDS had full contractual responsibility for design production for MUDFA and Infraco works and for obtaining Consents (as I

have explained at para. 5.48 *et seq*). CEC Planning was the central approvals authority and the Roads Authority as regards all SDS Design. Responsibility for delay in the delivery of consented design and the need for the 28th version of the design delivery (and related consenting programme) could not lie logically, contractually and practically anywhere else except than with SDS, CEC Planning/Roads Authority and TIE.

11.92 This DLA Piper letter was not the place to debate or describe in front of CEC Legal what contributory responsibility SDS might have, how CEC Planning/Roads Authority had performed over the two and a half years to date or why TIE had not managed its SDS Provider using the SDS contract aptly.[181] All of this, as I describe earlier was well known to the parties involved.

11.93 My letter goes on to say that "TIE are prepared for the BBS request for an immediate significant contractual variation to accommodate a new construction programme needed as a consequence of the SDS consents programme which will eventuate, as well as for the management of contractual Notified Departures when (and if) any of the programme related pricing assumptions fall."

11.94 I am asked about the use of the word "prepared" in Supplementary Question 9. I used the word "prepared" in the sense of "knew that it would receive". It was TIE's responsibility to assess, plan for and manage the financial and commercial outcome of this situation as well as MUDFA, with input from its parent's Planning and Roads Authority. DLA Piper had no role, as I have observed, in what TIE intended to do in practice about the time, cost and programme disruption claims that BBS would undoubtedly found on V28, and the rest of the 43 SP4 Assumptions. The issues were technical, factual and commercial and concerned design work, MUDFA interface, engineering choices and practicalities and the Infraco's construction programme. To my knowledge, there had been specific meetings and discussions between TIE, SDS and BSC about the imminent version change to the SDS Design delivery programme. My discussion and advice for TIE's management on this specific matter was my detailed email one month before (paras. 7.300 *et seq*).

11.95 The preparation by TIE I was referring to were these normal assessment, planning and management that were the 'bread and butter' of any project delivery agent, as well as what I had heard TIE referring to as QRA activities. I therefore believed TIE was undertaking because of what was being discussed at TIE management meetings and in Project communications. TIE's internal discussion about this activity continued throughout Q1 and Q2 2008, TIE having agreed to the principles of SP4 five months before in Wiesbaden. This is evidenced, for example, by Stewart McGarrity's comment in CEC01286695. This was written 5 days before DLA Piper's letter of 28th April 2008 though I did not see this document at the time since it was TIE internal process:

> • **Provisional and VE items** - As we all know a well orchestrated resolution of design, value and timing of all provisional and VE items with a wary eye on the programme is an absolutely critical part of our post close management and I know you have your man on the case. I do not have "the knowledge" when it comes to the detail behind some of engineering and design related items but trust our collective brains do and can mitigate against us being picked off by BBS post contract. Should be on the agenda for all Snr management meetings.

[181] Paras. 5.91 *et seq* and 8.10 *et seq*

11.96 It is put to me in Question 42 that DLA Piper's 28 April 2008 letter gives the impression that requests by BSC could be "fought off". I do not agree at all with this interpretation of the letter. It simply reports what I knew: BSC would be preparing a range of Notified Departures and that TIE were fully aware that these contractual claims were going to arrive. Fighting off fully documented and reasoned contractual claims (not 'requests') based on an Assumption that had fallen would depend on the factual, engineering and commercial basis for each claim and its contractual basis, not on generalities. What I had said in my email on 31st March 2008 to Jim McEwan gave my precise view on who would be in the driving seat as regards Notified Departures. Geoff Gilbert, Steven Bell and Jim McEwan had been handling SP4 discussions for over four months, with TIE agreeing each one of the 43 technical, commercial and financial assumptions. It is, in my view, reasonable for the Project legal advisor to assume that his/her client is systematically analysing and estimating the cost and programme implications of these types of decisions.

11.97 On page 5 at paragraph 11.3 the DLA Piper letter says that. "The Pricing Schedule (Infraco Contract Schedule Part 4) has been extensively discussed over the past six weeks and is now settled as are its key assumptions, value engineering items, provisional sums and fixed prices. TIE has assessed the likely financial impact of the assumptions not holding true and triggering changes." The discussions referred to are those that TIE conducted and led with BBS and their advisers and I refer to at paras. 7.229 et seq. As to the basis for saying that TIE had assessed the likely financial impacts, this is discussed elsewhere, see paras. 7.307 - 7.318 in particular. Again, as legal adviser hearing TIE discuss what it was doing in management meetings, I believe it was entirely reasonable for me to assume that TIE had carried out this assessment and had been sharing that information regularly and appropriately with CEC under the governance structure. Indeed, it is stated in TIE's reports that CEC personnel have been engaging closely with TIE during negotiations. It was not my place to challenge that statement.

11.98 It is put to me in Supplemental Question 9 that *"no notice was given to CEC"* as to the financial impacts of SP4. I do not and did not know what TIE reported to CEC during the period January to April 2008 on these subjects. My lack of insight was consistent with TIE Project Directorate's approach to sharing financial information (see, for example, TIE's Close report section explaining how TIE's evaluations at BAFO were kept as individual, confidential tasks). I consider that as TIE's legal adviser, DLA Piper had no remit or responsibility to give notice to CEC of financial impacts or to monitor when or what TIE was reporting to CEC and I had no different instructions to do so here. TIE was CEC's Project delivery agent and was responsible for generating and reporting information which it decided CEC should be given or which CEC asked for. Whether that information was shared with DLA Piper or not was entirely TIE's decision.

11.99 I have explained what I know about the budgeted independent advisory support TIE had *immediately* available for attempting to assess financial and commercial impacts e.g. both SDS and TSS.[182]

[182] Paras. 10.62 *et seq*

11.100 There is also the contractual risk matrix attached which is referred to on the final page. The letter clearly states that the risk matrix "*is not a substitute for study of the Contract Suite and is intended as an aide to the main components of risk allocation. It does not reproduce the commercial detail in the Contract Suite on which TIE has reported separately*". I wrote this specifically to make it clear that TIE was responsible for explaining technical, commercial and financial outcomes and positions. I discuss the risk matrix below.

11.101 Throughout the whole process of ITN issue (with its own detailed contract terms matrix), negotiating and signing the Infraco Contract, CEC Legal never made comment to me about any particular detailed provision in the contract. They appeared not interested and had confirmed to DLA Piper that the contractual risk matrices were sufficient for their purposes. CEC Legal received draft Infraco Contract versions at regular intervals. They appeared to focus on the DLA Piper risk matrix, I believe, but never discussed it with me or Phil Hecht in my team who was in charge of updating the matrix as the Infraco contract main terms settled into final form. Lastly, in my view, the Infraco contractual risk matrix was not, in fact, "high level". It referred to every contractual provision. It could not have been more detailed, short of a paraphrasing of the contract itself. I have explained this in answer to a direct PI question which confuses a project Risk Register and a contractual risk matrix.

12th May 2008 Letter

11.102 DLA Piper's letter of 12 May 2008 was issued two days before the contract was signed. Again, it included a clear reference to the contracts reflecting what TIE had negotiated and TIE produced its own report on the Infraco Contract suite.

11.103 Paragraph 11.3 of this letter repeats the same issues as quoted above when it states that: "The Pricing Schedule (Infraco Contract Schedule Part 4) has been extensively discussed over the past six weeks and is now settled as to its key assumptions, value engineering items, provisional sums and fixed prices. TIE has assessed the likely financial impact of the assumptions not holding true and triggering changes."

11.104 In my opinion, CEC Legal could not possibly have understood this commentary to say that DLA Piper's letters summarised an entirely fixed price contract. What other departments in CEC had been informed by TIE, I did not know exactly. This was not DLA Piper's responsibility, though I could see on occasions from TIE email traffic copies that TIE was engaged with the CEC staff who were part of the Project Executive Group I had met on 12th December 2007. It was, in the end, CEC Legal's choice to accept DLA Piper letters clearly written as an overview. CEC Legal had had every opportunity to interrogate the actual documentation, to attend Project negotiation meetings and to bring into meetings (arranged for them) any issues that they regarded as key. During the seven month period from BAFO to Close, I do not recall receiving a single spontaneous instruction from TIE for DLA Piper to explain a specific issue direct to CEC. And so: the DLA Piper letters did not pretend to, and could not in any way isolate specific issues that DLA Piper somehow would have to surmise CEC Legal needed to know about. That was TIE's function, as it had been for over five years based upon the structure and reporting obligations which CEC had put in place.

Short Notice Advice - Inquiry Question 52

11.105 I am asked in Question 52 whether the need to provide advice to CEC repeatedly at short notice created problems. The question refers to the various DLA letters to CEC advising on the terms of the INFRACO contract discussed above. As discussed above, the reason for these various letters was because at each stage TIE had announced some kind of intended close date for the Infraco contract. This was me, as the lead DLA partner, being instructed by TIE to provide reports to CEC under and in terms of DLA Piper's mandate with TIE. I wish to emphasise again that DLA Piper's contact at CEC was CEC Legal. We had no role in seeing where our advice or commentaries went beyond CEC Legal within CEC.

11.106 When a contract of this size is closing, there is a great deal of legal work to be done. A number of the letters, exchanging views on certain parts of the Infraco contract, were sent well outside normal working hours and, as I have explained at some length, while matters between TIE, BSC and SDS remained unstable, unpredictable and moving. This aspect of TIE and CEC's expectations on what DLA Piper was able to say and when was what caused me most concern. But TIE's programm and expectations gave neither space nor time for reflection and expansive explanations on how difficult this was.

11.107 And so: The requirement to provide information and/or reports to CEC at short notice against a rapidly moving and not final 2007/2008 backdrop of artificial deadlines being set and the commercial, financial and technical decisions that TIE was taking – or not being able to take - in order to maintain a semblance of arriving at its various Close deadlines did indeed cause DLA Piper difficulty in reporting to CEC Legal, when instructed to do so by TIE. The letters were not compromised, but had to be styled on the basis (i) that TIE had been in continual dialogue with CEC about what TIE had been agreeing in terms of commercial, technical and financial outcomes (ii) to follow TIE's approach and instruction that a reasonable level of knowledge and understanding about the Project and the procurement could be assumed (iii) the letters could not and would not (and CEC Legal knew this from my various conversations with Gill Lindsay) somehow fill voids in CEC's information or analysis about the Project and provide general comf that "everything is okay because we say so" (iv) navigate the fact (in March and April 2008) that numerous positions were open and that neither TIE nor BSC were finished their tasks to provide a full set of commercial technical and financial information describing and fixing what they had agreed.

11.108 Please see for example, on CEC01347797 which states that the letter has been produced "under heavy time pressure". It was entirely clear to TIE what time pressure this was creating for DLA Piper because: (i) I told TIE this; and (ii) when these letters were required (12 March, 18th March, 20th March, 28th April), DLA Piper was still negotiating the main terms of the Infraco Contract and TIE was continuing to negotiate commercial and financial terms right up to 12th May and emails and telephone calls and draft documentation – in all cases - were being exchanged, often very late at night after a full day and evening's work.

Meaning and Basis of Advice in DLA Piper Letters – Question 54

11.109 In some of DLA Piper's letters of advice I state that the contracts were "*broadly aligned with the market norm*" and I am asked in Question 54 and Supplementary Question 7 what information was available to me to assess this 'norm'. At that time, DLA Piper had one of the leading UK practices advising the public sector and rolling stock suppliers for urban light rail schemes. DLA Piper was also instructed internationally on rail-based urban transportation. I had access to that knowledge bank, as well as my own considerable experience, and I had also read the National Audit Office's April 2004 report on light rail schemes in the UK[183].

11.110 CEC Legal appeared somewhat fixated on the idea of 'standard'. I explained to Gill Lindsay when I spoke with her (either in the evening of 9th March 2008 or on the morning Tuesday 11th March) that DLA Piper could not advise that: "*the terms of the deal were consistent with market terms for the deal*" or that "*diligence caveats*" could be removed in relation to consents and approvals. This was a summary letter - not an attempt to report on every aspect of the Project and every part of the commercial, technical and legal negotiations that had been going on for nine months without respite.

11.111 I was describing the overall contractual risk allocation in the Infraco Contract as shown in the attached contractual risk allocation matrices. My view was, and remains, that the vast majority of the contractual provisions which had been set at ITN sat (i) either as they had been at ITN or (ii) as DLA Piper had brought them back to, having been re-engaged on the Infraco contract negotiation in late August 2007.[184] This is what I meant by "broadly aligned"

11.112 I am also asked within Question 54 to explain the following qualification to this piece of advice which is contained in some of the DLA Piper letters: "*taking into account the distinct characteristics of the ETN and the attitudes of BBS and SDS to novation*". It is axiomatic that no two UK tram schemes are alike, technically and as regards the commercial basis of agreement reached. By referring to "characteristics", I meant that the ETN had the following obvious and distinct attributes. All of these were well known to CEC and TIE's procurement approach had been structured around them:

11.112.1 TIE had chosen a procurement model that relied upon proper management of SDS and their novation and the efficient timely diversion by MUDFA of the utilities on the tram route city-centre streets.

11.112.2 TIE had begun its process seeking to expedite design preparation with the early appointment of SDS, but maintained the ability to transfer design management responsibility to the Infraco by SDS Provider's novation.

11.112.3 BBS had required significant contractual protection because of chronic SDS design delay and MUDFA programme failure.

[183] See further at 1.2 *et seq* and 4.162
[184] See 7.75 *et seq*

11.112.4 The procurement model utilised advance utilities diversion – but this had not been achieved by TIE.

11.112.5 Unlike NET, Croydon Tramlink and Greater Manchester Metrolink – all of which had PFI arrangements and private sector operators and maintainers and had attracted external funding – the ETN approach to construction, operation and maintenance was a hybrid and no commercial funding was secured;

11.112.6 TIE had decided initially that the tram supplier would not be part of the DBM consortium but CAF was to join the consortium in the end with beneficial impact for TIE; it took all of Siemens mainly spurious argument on integration risk inside the consortium.

11.112.7 The Project had over 90% on-street running as opposed to, for examples: Croydon Tramlink which has 32 out of 39 stops on old urban railway line routes or segregated routes and only a short on street town centre loop around East Croydon mainlin station; or Greater Manchester Metrolink with its subtle use of old industrial age railway line corridors. This made the ETN utilities diversion strategy very important indeed;

11.112.8 CEC Planning and Roads Authority had imposed a degree of control over the design by incorporation of the Tram Design Manual and the City Public Realm within the SDS and Infraco Contracts. This was effectively the Approvals Body dictating parts of scheme design and was at odds with the concept of an output specification (ERs) and the transfer of design responsibility to the private sector;

11.112.9 Edinburgh had a 100% municipally-owned bus company, unlike any other major city in the UK (post the corporatization initiative of the Transport Act 1985) which enjoyed market dominance. Lothian Buses did not favour the tram scheme and this impacted CEC's approach to Project governance.

11.113 I am also asked within Question 54 to explain what I meant by "technical ambiguity (and therefo delay / costs risk) may exist in the interplay between design scope and method of execution." This is a reference, which I believe is clear in context, to TIE Project Directorate's unilateral decision to amend the ERs without any forewarning or instruction to DLA Piper who had been involved with Mott MacDonald and Faber Maunsell in preparing TIE's original Infraco ITN ERs. I have explained the direct consequences of this TIE action at paras 7.405 et seq.

11.114 **DLA Piper's Risk Matrices**

11.115 When DLA Piper was re-engaged by TIE in the late summer of 2007, I had asked Gill Lindsay if CEC wanted to be in ringside seats for the Infraco Contract negotiations. She said that this would not be required because TIE would be reporting to CEC staff on commercial, technical and

financial matters as they evolved and she would use the risk matrices for their assessment of progress on the contractual provisions in the Infraco Contract.[185]

11.116 I had a clear indication from CEC Legal that they liked the idea of this style of contractual risk matrix because it referred directly into the Infraco contract and was dealing with how the contractual provisions allocated responsibilities. The matrix describes where risks should lie if the Infraco Contract was operated sensibly by the client. When and whether those responsibilities carried money behind them and, if so, how much money, was somebody else's job to analyse - typically the client and its financial adviser. That clear indication came from Gill Lindsay (see para. 11.50) and that did not change as is clear from the email exchanges in March 2008.

11.117 The Infraco contractual risk matrix was sent by DLA Piper to CEC Legal under a standing instruction from TIE. This was a document that was for both TIE and CEC.

11.118 A contractual risk matrix is a standard tool for any infrastructure project. It highlights key allocation of responsibility for issues to which time and money attach. It is intended for project management overview. Even a broad level scan of this document shows that considerable time and money exposure lay with the Public Sector for events that were predicted or provided for under the contract.

11.119 Hence the language in DLA Piper's covering letter in May 2008 saying that the contract reflected what TIE had agreed – that was for defined responsibilities for events post contract award to lie with TIE due to SP4 and its Assumptions. The matrix cannot be a substitute for actually reading and understanding the contract. It can only be short-form and invited readers to invest in reading the contract. Often, it is a judgment call in short-hand whether to put ticks in certain boxes as there could be important saving language in any clause. A reasonably competent lawyer/commercial manager/contracts director would know this.

11.120 No risk matrix (or legal advice if that was somehow seen by CEC Legal as a legal advisory function) was required to again repeat what everyone involved at TIE and CEC City Development, CEC Transport, CEC Planning/Roads Authority and City Finance knew regarding the reliance in TIE's procurement strategy upon the successful prior execution/delivery of MUDFA advance works and the importance of the SDS design production and approvals programme, the serious failure in practice to achieve these and the direct consequences for the Infraco construction programme and its price: all of which I have discussed in detail in the relevant sections above.

11.121 TIE's own procurement strategy devised and approved five years earlier was to start based on MUDFA and get that advance works undertaking substantially complete before the Infraco contractor works and to provide the contractor with a completed design from SDS. If TIE failed, the consequence was simple, factual and commercial and not legal: the Infraco would not get a clear de-risked site and would seek to qualify its pricing and its construction programme accordingly: BBS did just that and had been making its position on this known forcefully and without drawing breath from October 2007 onwards.

[185] See paragraphs 11.49 and 11.123 *et seq*

11.122 I am asked in Question 64 about TIE00077024 and CEC01430993. The function of a contractual risk allocation matrix in a project or project financing is to show in a functional manner (as opposed to all embracing description) how the provisions of the dominant contract (the Infraco Contract) placed responsibilities. The placement of responsibilities follows what the client has agreed technically, commercially and financially. I had explained its function to Gill Lindsay in late August, September and October 2007 (See paras. 11.31 *et seq*). It does not, and should not, attempt any form of risk analysis or provide an "overview of risk" or "cost overrun" as the question put to me posits.

11.123 The function of the matrix was carefully explained at the August 2007 workshop. Nobody at that meeting could have taken it that DLA Piper, TIE's lawyers, were briefing them about commercial, financial and technical assessments. My answer to the question "Could this have been drafted in such a way that would have provided a more useful analysis of risk?" is: No. Not within DLA Piper's mandate or any legal advisory mandate. Analysis of risk or cost overrun was not the purpose of this document and was not the job of DLA Piper - and over a period of nine years nobody at TIE or CEC or any external consultants or other lawyers ever suggested it was.

11.124 Contractual risk matrices are snapshots of where a contract is at a particular time. They do not necessarily incorporate the on-going negotiations that DLA Piper were not aware of or involved in. The contractual risk matrix dated 14 December 2007 (CEC01430993) is pre-Wiesbaden and thus pre -SP4. It shows where I believed, at that time, TIE had arrived after a very short period of difficult and somewhat disjointed negotiations with the preferred bidder post-BAFO. In December 2007, the matrix was also a simple reference document to keep DLA Piper focused as to where we thought we had reached. I am not sure whether we sent this document directly to CEC Legal or whether we sent it to TIE who, in turn, passed it on.

11.125 Risk analysis for a project of this nature is not a purely legal advisory function: it comprises a series of decisions about types of risks and requires a combination of commercial, technical, engineering and financial assessments on the likely incidence of an event, its severity and its primary time and cost impacts as well as management and mitigation. Here is an example: there is a very old road to be dug up so that tram tracks can be installed. There is a possibility that this will be more difficult and time consuming than envisaged. Advising how the contract needs to be worded (probably through an unforeseen ground conditions provision) to explain who bears time and cost implications from the old street taking twice as long as planned and priced and requiring far more materials to render it stable after installation is a legal advice function based on accurate instructions. "Cost overrun", i.e. predicting with an estimate and contingency or measuring afterwards how much time and money may be spent in doing so and what other adverse consequence may arise, is not a legal adviser's responsibility.

11.126 This type of project risk analysis exercise would usually be informed by and developed from a project risk register such as TIE began, as I describe at paragraph 10.74 *et seq*. Whereas how responsibility for contemplated and unforeseen events during project execution is to be divided or

mitigated contractually is shown in a contractual risk allocation matrix by examining the applicable provisions which reflect what the parties have agreed.

11.127 The earlier document referred to in Question 64(CEC01560936) sent to CEC Legal under cover of my email on 29 August 2007 was a short summary document entitled: Report on the Development of the Contractual Risk Allocation in the Infraco Contract. It explained what we had been able to find out (in 48 hours) from TIE about what TIE had done during their five months of negotiations with the two bidders in terms of altering the draft Infraco Contract terms from where it had stood at 8th March 2007 - the last time DLA Piper had been involved.

11.128 The document is in fact a compilation of points that we had been informed about by TIE and points taken straight from the existing contractual risk matrix itself. It makes explicit reference to the fact that it should be read in conjunction with the draft Infraco Contract as at 27th August 2007 (which TIE had been controlling and negotiating for 5 months while DLA Piper was disinstructed) and in conjunction with the current contractual risk matrix itself. In short, it was a document that had to reflect what TIE had done to the draft contract since DLA Piper had last been involved - but it was not anything like a substitute for reading the contract itself – as is obvious from its face.

11.129 I disagree strongly with the position that is put to me that this document, (CEC01560936), provides a 'degree of assessment' that is in some way better than TIE00077024 and CEC01430993. It does not, in any one of its 33 points, make a risk assessment. It informs the reader succinctly:

11.129.1 what changes TIE has made to the draft Infraco Contract since its issue with the ITN. Many of these were detrimental to TIE and required to be re-negotiated with each bidder, as I discuss above; and[186]

11.129.2 in each case where contractual responsibilities lie. It offers no analysis or evaluation at this point in time – nor could it as the work of a legal adviser – on whether an event might occur and what consequences it could have.

11.130 Project risk analysis is the job of the Project Director and his commercial, financial and technical teams, often supported by external consultants with wide experience on modelling risk based upon industry practice: such as TSS or Turner Townsend, both under contract to TIE. DLA Piper was not involved in TIE's internal processes on risk assessment / QRA process, as I discuss above.[187]

11.131 Furthermore to re-inforce this, I include below the text from an instructive DLA Piper email (from Phil Hecht) on 14th December 2007 to TIE (Geoff Gilbert and risk manager Mark Hamill) recommending that TIE record risk balance changes in its own risk register and reporting to CEC. This was two days before Wiesbaden. I do not recall any response from TIE on this. (CEC01443991). The email draws a clear distinction between the uses of contractual and commercial risk matrices.

CEC01443991 should be CEC01430991

[186] See paras 7.84 *et seq*
[187] See paragraphs 7.311, 10.67 and 11.95

Further to my conversation today with Mark, please find attached a clean version of the latest draft contractual risk allocation matrix together with a comparison of the difference between this version and the September version. Hopefully the comparison will allow tie's exercise in marking up its risk allocation matrix more manageable.

We plan to release this contractual risk allocation matrix to CEC today, and appreciate that you will be doing the same with tie's version once you have marked it up. I think it would be sensible, not least from a cosmetic point of view, to highlight to CEC material shifts in risk transfer rather than uncontroversial changes to detail, something that I am aware that Mark has been doing this week. Much of the differences stem from more detailed negotiation and refinement on the contractual terms during the past few months, rather than a major shift in risk allocation.

I hope this is useful for your purposes and feel free to get in touch if you require anything further on this.

11.132 DLA Piper's letter of 12 May 2008 attaches a document headed, "contractual allocation of risks". This is the final version of the DLA Piper contractual risk matrix issued prior to Close.,

11.133 Pages 22 to 23 of the 12 May 2008 Risk Matrix show a series of risks attributed to the public sector under the heading "*risk: relief events (time) and compensation events (time and/or costs)*". These cover many points including: "*pricing assumption does not hold good*"; "*refusal of third party to permit Infraco to exercise occupation rights*"; and "*execution of utilities works or MUDFA works*". Page 25 deals with Clause 80 and mandatory TIE changes and Notified Departures, all show distinctly as public sector risks. These public sector risks relate directly to the risks which TIE accepted in the Wiesbaden and SP4 negotiations.

11.134 I also draw the Inquiry's attention to two contemporary 2007 CEC internal documents available on CEC electronic archives which concern something called CEC Strategic Work Programme[188]. This is not a concept that DLA Piper were ever aware of or involved in.

11.135 The first document (dated Dec 06/January 07) allocates responsibility for the Project reporting and monitoring within CEC to three CEC staff officers (Andy Conway, Lex Harrison and Max Thomson). The Project is given a title and designation: SWOP5. There is an incomplete and anodyne description of the Project without explanation of CEC's substantial involvement and responsibility in SDS design approval. The SDS contract is not in fact mentioned. However, this report remarks that: design is on-going and Traffic Regulation Orders will be promoted in March 2007, MUDFA works will commence in April 2007 and Infraco works will begin in December 20 and be complete by 31 December 2009.

11.136 The second document is the CEC SWOP two monthly update report for July 2007, in fact dated and issued by CEC on 2nd October 2007. The SWOP5 section relating to the Project records that:

11.136.1 the Project completion date is now 31/10/2011 - a 22 month programme slippage;

11.136.2 MUDFA will complete in November 2008 – so: the report states that the major advance works contract now sits with a one year overlap with Infraco Works;

11.136.3 two 'prior approval' design packages have been approved and a further sixty will be submitted for approval in the nine months following i.e. during the period October 2007 to July 2008, well after BAFO and well after Infraco contract award;

[188] See paras. 11.135 *et seq*

11.136.4 TIE has confirmed that the Infraco bids received are: "consistent with the expectation of the draft final business case"; and

11.136.5 the Project funding position has changed "dramatically" because CEC will bear cost overrun in its entirety.

11.137 The SWOP report is signed by Jim Inch, CEC Director of Corporate Services. Interestingly, the Report concludes that the Project, SWOP5, is "on target" and that the matters reported do not have direct financial consequences for CEC.

11.138 **The Close Report (Supplementary Questions 10 – 13)**

11.139 I am asked in Supplementary Question 10 to give a full account of my involvement in a TIE document called 'Close Report'. TIE had begun preparing drafts of this formal report - for reasons not discussed with me - in January 2008. My first contact with the process for a TIE Close Report came in mid-January 2008 when I was copied on Graeme Bissett's email CEC01429681. This was a guide for TIE staff involved in this exercise; neither I nor anyone else at DLA Piper was at that time instructed by TIE to do anything about this.

11.140 Graeme Bissett's email contained the following direction about the Close Report:

> **The purpose of the Report is to provide a comprehensive view of all important aspects of the work done to support Financial Close. The recipients will be the Tram Project Board, TEL Board, tie Board and CEC officials (for use, as they wish, to support their own internal reporting). The drafting can assume prior knowledge of the subject matter to a reasonable degree – as a benchmark consider what would be known to members of the Boards who have regularly attended Board meetings over the last year or so. The underlying principles, objectives and history do not need to be spelled out in great detail. Brevity is our friend and guide here.**

11.141 At that time, January 2008, there were, in my opinion then and now, far too many open positions to begin writing anything other than a framework for this kind of synopsis. As an example: 3 days after Graeme Bissett's email of 15th January 2008, SDS Provider informed TIE's Commercial Director that they had serious issues with novation and would not agree to warranting their design because of the TIE ERs revision.[189] I have to ask: how would this have been described in a Close Report for 28th January 2008? And in addition, TIE's Project Directorate was exchanging emails with BB on the actual drafting of PA1 in SP4 which had only recently been disclosed by BBS.[190]

11.142 My best recollection is that it was not until early March 2008 that I began to receive requests to review discrete parts of the Close Report, that is those parts that discussed three areas: (i) the scheme of the contracts, (ii) contractual mechanics and structure and (iii) procurement risk (possible challenge by the reserve bidder or a third party based upon how and/or the terms on which TIE had awarded the Infraco Contract).

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[189] Paras 7.413 *et seq*
[190] Paras 7.214 *et seq*

11.143 Beyond the specific input noted above, DLA Piper was not asked and did not take any responsibility for the Close Report and no one at TIE involved then or subsequently ever indicated to me a view that DLA Piper had responsibility for the Close Report. It was a task – and in fact contractual function - directly connected to TIE's role under its Operating Agreement with CEC (see CEC01351476). If I gave other observations in doing so, beyond the areas noted above, it was on the basis of support for TIE with objective comment or logic check, not advice or opinion on what TIE wanted to say or ought to be saying.

11.144 Graeme Bissett sent me the TIE Close Report v.6 (CEC01450478) on the 9th March 2008 and instructed me to review the section entitled Infraco Contract Suite. The section contained the following preface: "...USING EXISTING MATERIAL AS APPROPRIATE. PLEASE NOTE THAT THE HEADINGS/FORMAT MUST SURVIVE AS IT HAS BEEN PRE-AGREED WITH CEC SO THAT ALL THEIR QUESTIONS ARE COVERED". I provided comment, paying attention to these instructions and I also observed that I was concerned about reporting on matters that clearly remained open between TIE and BBS.

11.145 I am referred to an e-mail dated 19th April 2008 (CEC01282113) from TIE's Director of Strategic Planning, Graeme Bissett, to his colleagues (copied to me). What can be taken definitively from this email is that the Close Report is TIE's document and TIE is responsible for its content and accuracy. Interestingly, special attention is again instructed in that e-mail for TIE's reviewing personnel as to the Close Report sections on Risk (section 8) and design management (Appendix 2).

11.146 Within the most urgent time frame the parties had set, any idea that some wholesale review and commentary on this document was either instructed or in fact possible for DLA Piper to provide at this point was not realistic. It was TIE's report and TIE confirmed this ownership. CEC had indicated to TIE alone what they had wanted covered in this report.

11.147 I understood that Graeme Bissett was charged by Willie Gallagher with this task - in the same way as he was responsible for producing TIE's approach and documentation on Project governance. In my experience, it would be normal for the Project Director and the Commercial Director to be the lead authors of a close report such as this, not a senior figure remote from the Project procurement and the commercial, financial and technical decisions TIE had made and was still making as the Close report was being prepared and discussed with CEC.

11.148 Graeme Bissett was very able, but held neither of those key Project decision-maker positions. He was, I believe, TIE's Director of Strategic Planning during Q1 and Q2 2008, but may not have been holding a full time post. As a consequence, he stood apart from the quotidian tasks of commercial, financial and technical negotiations and decisions and, from memory, was absent from the Project for periods of time. First-hand knowledge of how Project issues evolved - and why and how solutions were achieved - was an important ingredient, in my opinion, in being able to summarise positions reached and also to best understand what was impossible to report because commercial and/or technical positions had not reached a landing.

11.149 Graeme Bissett's original email to TIE staff on 15 January 2008 (CEC01429681) notes that material changes since 20th December 2007 should be reported in the Close Report and I am asked in Supplementary Question 11 whether I consider that they were. Ownership, responsibility and full knowledge of what material changes needed to be progressively highlighted in the draft document and why these changes had occurred sat with TIE's corporate management and Project Directorate. And likewise, all decisions as to what was or was not 'material' - and judgment about how much knowledge CEC and other governance bodies and the Tram Monitoring Officer had or needed - belonged to TIE. Neither I nor DLA Piper had any role in that activity and DLA Piper were not retained or paid by TIE to police TIE's decisions on such matters.

11.150 I am also asked whether adequate information about SP4 was given in the Close Report. I have discussed the evolution of SP4 above.[191] Having negotiated every component and related provisions in SP4 themselves, TIE management described the document, its purpose, mechanics and its financial, commercial and technical effect as they wished to in the Close Report. That was not DLA Piper's role and, in my view, never would be for a legal adviser. I had provided DLA Piper's legal advice on SP4 to those TIE senior managers at the appropriate times.[192] I could also see that TIE and various CEC personnel were discussing this document as it developed.

11.151 Under the heading 'Price Certainty Achieved', the Close Report (CEC01282116) describes the Infraco price as having £228.3m of 'firm' costs. I am asked in Supplementary Question 12 whether that description was appropriate standing the terms of SP4. The BBS construction price was "firm" to the extent of the price given for the scope of the Project identified by BDDI and the Infraco Proposals. That is what I reported to CEC Legal on the 18th March 2008 as having been informed by TIE (CEC01351480). Beyond that, it was very obviously not firm because of the clear and extensive express qualifications and BBS's attitude towards the state of the SDS design, the related position on CEC Planning's and Roads Authority consenting process and MUDFA. In my opinion, it fell short of an arm's length and objective analysis. But it was TIE's report to its parent and it represented TIE's views on the programming, technical, commercial and financial aspects of the Infraco contract, not mine and not those of DLA Piper. And the report was written allowing for express assumptions about what its CEC readership already knew and were interested in.

11.152 As I discuss above, I had no knowledge of the methodology TIE was using to assess, model and budget for the contractual positions on automatic change orders in BSC's favour (the principles and detail of which TIE had settled and agreed itself).[193] Nor did I know how TIE was reporting these issues to CEC.

11.153 Jim McEwan sent me an email on 10th March 2008 (CEC01550626) after TIE had updated the Close Report text on price movement post preferred bidder selection. He instructed me to review what he described as the 'sensitive area' - that is how these price movements appeared under procurement law. I am asked in Supplementary Question 13 whether I did so. I responded immediately to review TIE's comments regarding procurement challenge due to significant price

[191] See paras 7.214 *et seq*
[192] See paras 7.283 *et seq*
[193] See paragraphs 7.311 et seq, 10.67 and 11.95

increases and other concessions in BSC's favour which TIE had introduced post-preferred bidder. This is one of the three areas noted above where DLA Piper was asked to review the Close Report. I have discussed this issue in depth elsewhere[194]. That DLA Piper advice sat squarely at section 10 in the DLA Piper letter to CEC Legal of 12th March 2008, issued two days later and again in DLA Piper's letter of 18th March 2008 to CEC Legal. I had already given a preview of that advice in my email (DLA00006378) to Graeme Bissett (copied to all TIE's senior managers) on Sunday, 9th March 2008 timed at just after 11.03pm (CEC Legal had raised the issue of procurement challenge that evening):

> In relation to Gill's e mail at 10.30pm approx., I need to be clear that DLAP will not be in a position to advise definitively that there is no procurement risk, following the negotiations which have been conducted since preferred bidder - not least because we played no role in evaluating the bids other the contractual evaluation.. Price and technical advantage were the factor s which were stated by tie to have created differential. There have been several price moves since November and we have no knowledge of the final price offered by Tramlines or of how the technical offering from BBS has change since its Preferred Bidder offering..
>
> The materiality of that risk depends upon the losing preferred bidder's appetite to make a challenge (...sed on (i) their perception of why it has taken four month to reach award (ii) their assessment of the cost benefit equation. It should not be forgotten that a challenge may be made not just by a losing participant, but by any person.
>
> The main mitigant (in terms of the contractual position) will be that both preferred bidders qualified their final submissions heavily (commercially and contractually).

11.154 This advice addressed the legal aspect of what I understood Jim McEwan required in his email of 10th March 2008: procurement risk arising from agreed pricing increases and contractual protections accorded to BSC post preferred bidder appointment. But, as I say, DLA Piper was not competent to, nor had we been appointed to, report to CEC Legal on the time and cost implications of what TIE management had decided to agree to technically, financially and commercially in order to close the Infraco Contract. I did not receive any comment on the email to indicate TIE wanted something different.

11.155 **Report on the Infraco Contract Suite (Supplementary Question 14-19)**

11.156 I am asked in Supplementary Question 14 why changes were made to the title of a draft document called TIE Limited Report on the Infraco Suite (CEC01486859). An email from Graeme Bissett on 10th March 2008 (CEC01393819) confirms that this report was produced by TIE but included as an appendix to the DLA Report in order to ensure FOISA protection. This may explain the significance of the changes in its title, if any. I do not recall making changes to the title nor being instructed to do so. I did not direct anyone at DLA Piper to be involved in this.

11.157 I believe I may have been instructed verbally by TIE to comment on outline topics for a TIE report on the Infraco Contract Suite that Graeme Bissett was managing and editing. I believe that this was in late February 2008. This work was then prepared by TIE. I was not involved in that distinct process and I did not see any related work product until, at the earliest 8th March 2008.

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[194] See paras 11.139 *et seq*

11.158 The report document was ultimately sent to CEC as an Appendix under direct cover of the DLA Piper letter of 12th March 2008 because of FOISA concerns. That document was titled, "Report by TIE Limited on Infraco Contract Suite and Council Guarantee". I emailed this report to Gill Lindsay along with the DLA Piper letter. This confirms that the report which I am asked about was TIE's but was issued to CEC by DLA Piper due to FOISA concerns. For discussion of FOISA concerns on the Project in another context please see paragraph 8.63.

11.159 For completeness, I can say with confidence that CEC01486859 is not a document originally generated on the DLA Piper document management system, If it were, it would automatically carry the DLA specific TIE client reference: 310299/15 and a unique document locator number. It has neither.

11.160 As the question put to me posits: The Report on the Infraco Suite document may well have been hived out of a draft of the Close Report. DLA Piper was not involved in that exercise. But what was hived out by TIE had not been drafted by DLA Piper in the first place, but rather by TIE, and the draft Close Report (v6) that I saw received very limited comment from DLA Piper on 9th March 2008. I do not believe that I had seen the Close Report before this. There was no reason for me to have seen it since DLA Piper had no role in its assembly or authoring. No-one claimed or held out that the Close Report was DLA Piper's work.

11.161 I am referred in Supplementary Question 19 to an email from me to Susan Clark of CEC on 8 March 2008 which notes the report will point out unusual features/risk allocation in the contract suite. The question put to me supposes that the report referred to in this email is the Report on Infraco Close, but that I believe, is incorrect. The email is referring to DLA Piper's letter and its attachments. My reference and choice of language is therefore generally referring to what DLA Piper would be providing to CEC and to TIE, on TIE's instruction. I discuss this email (CEC01516428) above in the context of DLA Piper's letters.[195]

11.162 I am also asked in Supplementary Question 19 whether I consider that the report pointed out unusual features/contractual risk allocation. I consider that the DLA Piper package did do so - in the manner and to the level specifically requested by CEC Legal.

11.163 I am asked in Supplementary Question 15 about a version of the Infraco Contract Suite report as at 10th March 2008 (CEC01428734) and language in the first paragraph on page two of this document. As discussed above this was TIE's report. I agree that the generic language regarding principal pillars would have been improved by adjacent qualification – qualification that in fact comes from its overall terms, the known factual background and in the DLA Piper letter and in the DLA Piper contractual risk matrices. The CEC01428734 wording was not language I or DLA Piper had chosen.

11.164 I am referred to the content which stated that certain 'principal pillars' of the contract had not changed materially since October 2007 and asked whether I consider this to be accurate.

[195] Paragraph 11.61 *et seq*

Certainly, the Infraco Contract contained the 'pillars' identified. Taking each one as at October 2007 compared to March 2008:

11.164.1 Scope: the scope of the Project remained more or less the same, less Leith Walk and plus Piccardy Place gyratory.

11.164.2 Cost: there was no overall intelligible cost for civils construction works or systems installation work for the Project as at October 2007 because BAFOs had not been received. Cost is represented as a function of the negotiations, using the permitted budget as some kind of a guide. Reporting no 'material' change as a general comment was in fact meaningless and the Close Report itself showed this.

11.164.3 Programme: there was, if any, only an indicative BBS construction programme as at October 2007 BAFO so that, in my opinion, the notion of 'material' change was not apt. By mid-March 2008, BBS had produced a construction programme (based upon their view of the current status of SDS Design and MUDFA progress) with significa qualifications and contingencies in it.

11.164.4 Risk transfer: As at 10th March 2008 (and as an example) negotiations were continuing on SP4 between TIE and BBS. It is obvious from CEC01428734 that TIE itself was unable to report exactly where the SDS Design had reached. I have given my views earlier in detail on what TIE had available to assess this situation – both in terms of its own knowledge and its resources.

11.165 In my opinion, the section on SDS Novation may not be elegantly worded, but it provides a clear commentary on how the Project procurement strategy had been compromised and what concessions had been made to BBS in order to achieve some transfer of responsibility.

11.166 I note that by 19th April 2008 (CEC01282115) TIE had decided to remove the comment on the pillars of programme and cost from its Infraco Contract Suite Report.

CEC01282115 should be CEC01282116

11.167 I am asked also what commercial compromise' was obtained by TIE in response to the development during January to late March 2008 of the terms of SP4. This is a question for TIE. My understanding at the time about the inclusion of this language was that TIE regarded the following as "suitable commercial compromises" on BSC's part: (i) the BSC construction programme and its PSCD; (ii) the element of fixed price that the Wiesbaden Agreement had secured; and (iii) Value Engineering.

11.168 I am asked in Supplementary Question 16 if I agree that the terms of a draft TIE report on the Infraco Contract Suite report dated 19th April 2008 attached to an email from Graeme Bissett (CEC01282113) "*play down the possible effect of Schedule Part 4 which was apparent in your advice in it at an earlier stage*". My response is that this was TIE's document. I recommended the insertion of the text on assumptions and Notified Departure. Whether this was given prominence or not was TIE's decision. There appears to be a presumption in the question put to me that the report on the Infraco Contract Suite should have given special prominence to SP4. That was a

matter for TIE who authored the report and a choice for TIE as regards explaining its function, content and mechanics. That is why the authorship of the Close Report is important in my view (see also paragraphs 11.147 and 11.148).

11.169 I would also observe that the document under discussion (CEC01282115) contains the following clear reservation on page 1:

> "This report is not a substitute for reading the Contract itself. It summarises those provisions in which DLAP understands CEC has expressed particular interest and has directed tie should be included in our review. It should be understood that the Infraco Contract has undergone a lengthy and difficult negotiation and close out phase. BBS has on a number of occasions moved from a previous firm position and this has required detailed re-examination and recasting of contractual provisions."

11.170 Bearing in mind that this was TIE's document, not DLA Piper's, I recommended to TIE the insertion of this language. I wished to make it clear that the report going out - in name - as a DLA Piper document (for FOISA exemption purposes) was aimed to cover what CEC had asked TIE about.

11.171 I am referred in Supplementary Questions 17 and 18 to two draft versions of the Report on Infraco Contract Suite issued approximately a week apart on 28 April 2008 (CEC01312358 and CEC01312364) and 8 May 2008 (CEC01351475).

11.172 I am asked, in relation to both these versions of TIE's draft report, to explain the basis of statements on the Infraco Suite to the effect that the exposure caused by BBS seeking an immediate Notified Departure has "*been assessed in detail by TIE and confirmed as acceptably within the risk contingency*". This was a matter for TIE. I refer to my discussion above regarding (i) DLA Piper's advice to TIE regarding the immediate Notified Departure referred to here and (ii) TIE's risk assessment on commercial, technical and financial matters.[196]

12 NATIONAL GOVERNANCE

12.1 As far as I was aware, Transport Scotland was TIE's reporting point for the Tram Business Case. TIE required Transport Scotland to approve the Business Case in order for the grant funding release to CEC. DLA Piper played no role in this part of the Project's procurement (aside from briefly being asked to review the grant funding document, which I was informed by Stewart McGarrity was essentially non-negotiable). I attended no meetings with Transport Scotland about this aspect of the Project. Nor would I have expected a legal adviser to be involved in such matters. I did draw Stewart McGarrity's attention to the fact that the grant funding document contained draconian provisions regarding the government's right to claw back disbursed funding. I understood that it had been looked at by D&W for Transport Scotland - which puzzled me, given D&W's roles for TIE and for CEC in the Project.

[196] For further details see paras 10.75 and 7.283 *et seq*

12.2 Aside from two or perhaps three meetings in 2005, I had no general interaction with Transport Scotland on the Project (unlike EARL) nor would I have expected to. What I would say on this subject is that had commercial funders been involved, I would have immediately expected a far more visible level of due diligence and related disciplines imposed on the Project by funder appointed legal, technical and financial advisers, in particular the programming, financial modelling and risk analysis of the execution phase.

13 PROJECT COST

13.1 I have commented in detail regarding my involvement in various TIE-BBS commercial meetings in early 2008 at which clear and significant price increases were discussed and agreed by TIE. I have also given my view on the BBS construction price as it was presented by TIE to CEC at paragraphs 7.202 *et seq* above. But, as legal adviser, DLA Piper had neither visibility into, nor any advisory responsibility for :

13.1.1 how TIE had evaluated BBS's technical, financial and commercial BAFO bid a(extracted a construction price comparison from this for the competitive evaluation with the Tramlines BAFO bid;

13.1.2 why TIE appears to have made an agreement with BBS during the pre BAFO Phase regarding payment for Phase 1b costings in the event that this part of the Project did not proceed (see 13.2 below);

13.1.3 why TIE agreed at some point in the ITN phase that BBS would receive an unsecured advance payment of £42milion;

13.1.4 why after Wiesbaden, TIE was continuing to adjust the Project out-turn cost upwards to take account of BBS's consistent and successful efforts to increase its construction and systems supply price post preferred bidder appointment and maintain its major qualifications;

13.1.5 why and how TIE chose to present its decisions to CEC on direct price increases and TIE's own assessment on further cost increase risks and uncertainties post contract award as covered within contingencies under the available overall funding budget; or

13.1.6 how TIE assessed and provided for the cost and time impact of MUDFA delay and SDS design and design approval delays, design production and development post BDDI and the impacts of the 43 SP4 Base Case Assumptions.

13.2 It is put to me in Question 60 that it appears that £3.2m was moved from the Infraco price of Phase 1a to Phase 1b (CEC01704016 – Minutes of Evaluation Meeting August 07 and TIE00679381) and that it appears from TIE00088497 and CEC01482234 that this was done deliberately in collusion with Siemens. DLA Piper played no part whatsoever in these events as we were not retained by TIE at that point. I did not attend the evaluation meeting documented in CEC01704016 and was not copied into any of the correspondence referred to.

13.3 Clause 85.was originally a mechanic by which a decision by CEC (as Authorised Undertaker) and TIE to implement Phase 1b would have been legitimately sheltered from the requirement to run a fresh procurement: I.e. it had been within the contemplation of the parties at time of award, not an afterthought. But Clause 85.1 was adjusted in the Infraco Contract (by Schedule 37) under TIE's express instruction (as I describe at para 7.508) to provide for a payment of £3.2million to BBS, if Phase 1b was not implemented. This had been agreed by TIE at that August 2007 Bid Evaluation meeting. I am aware that TIE made that payment to BBS in mid-2009.

13.4 I assume this had been conceived by Geoff Gilbert and Matthew Crosse of TIE in discussion with BBS in order to remove this amount from the Infraco construction price reported to CEC as "firm" in early 2008, in exchange for agreeing to pay after contract award to BSC. It was well known at BAFO and certainly by December 2007 and at Infraco Contract award that Phase1b (the Roseburn to Granton loop) was unlikely to be implemented as part of the scheme.

13.5 The Inquiry may find it instructive that neither TIE's CEO Willie Gallagher nor its Project Director, Steven Bell, appear to have either known about or understood the effect of this financial and commercial arrangement, as is apparent from them needing on 6th May 2008 to ask Geoff Gilbert (eight days before Infraco Contract Close) what TIE's agreement in fact had been (see TIE00679381 and train). Willie Gallagher had been corresponding with BB Wiesbaden about the point in anticipation of BB Wiesbaden senior management's 9th May 2008 visit to demand more money.

13.6 **Inquiry Question 66**

13.7 The record of a meeting (DLA00006406) which I attended on 25 January 2011 is put to me in Question 66: I do recall this meeting and I have re-read the note which I prepared as a summary of what I said and what Richard Jeffrey said in his introductory remarks.

25 January 2011 should be 24 January 2011

13.8 Richard Jeffrey said in the meeting that Richard Walker of BSC had told CEC of his view that CEC had been misled by TIE at contract award in May 2008. What Richard Jeffrey sought was my comment about what grounds Richard Walker had for making that comment. I was not at the meeting when Richard Walker made his comments to CEC. In my opinion, the right party to ask this question was TIE's Project Directorate in 2007 and 2008.

13.9 What I said in that January 2011 meeting was that:

13.9.1 the TIE management members who had been to Wiesbaden and had engaged with BB on the document that emerged from that meeting knew perfectly well that the BBS construction price was not "95% fixed" and that Richard Jeffrey already knew this himself from the inquiries that TIE had carried out with Tony Rush and with McGrigors throughout late 2009 and 2010;

13.9.2 subsequent to Wiesbaden, BBS had used their position as preferred bidder to exploit TIE's obvious and strident desire to reach close and to extract more money, more

concessions and more protection from TIE against SDS design shortcomings and absence and MUDFA delay; and

13.9.3 as TIE's various proposed Infraco Close dates came and went, BBS simply took the opportunity to harden their positions.

13.10 In a one hour meeting, I could not conceivably have given - and did not give - an explanation "in detail" about the period of time from early October 2007 to mid-May 2008. Furthermore, it was not the place or the time - at a meeting called by Richard Jeffrey to essentially end DLA Piper's mandate for TIE after over eight years - to give my views about what Richard Walker had meant at a meeting I had not attended, other than in a very brief summary. I refer to my detailed comments throughout this statement regarding the Infraco Contract negotiations.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 363 pages and the four appendices attached to this statement: i) where they are within my direct knowledge are true, ii) where they are based on information provided or shown to me by others are true to the best of my knowledge, information and belief and iii) where they are based on information provided to me and a request to provide an opinion, comment, explanation or interpretation represent my honest and best endeavours to do so.

Witness signature. [redacted]

Date of signing..... 14th July 2017

APPENDIX 1 – CV

ANDREW SUTHERLAND FITCHIE

[redacted]
tel [redacted]
email [redacted]

PROFESSIONAL EXPERIENCE

DLA Piper Scotland LLP part of **DLA Piper**, a Global business law firm with offices in over 30 countries

Partner, Head of Finance & Projects Scotland Aug 2001 – June 2011

Joined DLA Piper UK LLP (London) as partner in August 2001 and transferred to Edinburgh in January 2003. Managed a combined unit of 12 lawyers and support staff with overall responsibility for: client relationships, service standard and work product delivery; team resourcing, unit financial out turn, recruitment, promotion and performance reviews; business development and market strategy. Unit budget of £3 million. Member of Scottish Partnership Committee; responsible for setting Scottish business plan for 23 partners, 120 lawyers and 250 staff with annual turnover *ca* £20 million.

Practice areas under management: transportation infrastructure, light and heavy rail schemes and asset financing, climate change, energy and renewable energy sector, project and structured finance, asset-backed finance. Key clients: Confidential.

Significant mandates

Advising in relation to the US$11 billion gas transporter pipeline being constructed from Turkey to Austria. In particular, providing detailed procurement advice on structuring all aspects of the company's invitation to tender for pipeline manufacture and delivery, along with all major ancillary equipment, so as to retain maximum flexibility as regards selection of competitively priced bidders, supported by committed ECA financing. Advising in relation to shareholder and inter- governmental relationships.

Advising Scottish client on all agreements with developers taking berths to test wave and tidal energy generation prototypes. First facility of its kind in Europe, being replicated by a project in Cornwall, England.

Advised funders' club on the £320 million M80 Stepps to Haggs Roads DBFO in Scotland under EU competitive dialogue procurement; successfully closed in January 2009. Representing finance group on negotiation with Scottish government. Prepared full due diligence report; negotiated project and financing documentation, including separate intercreditor arrangements; particular focus on protections from contractor insolvency.

Advising TIE Limited on competitive procurement, contracting strategy for £545 million Edinburgh Tram Network. Infrastructure and tram supply contracts closed with Bilfinger Berger-Siemens-CAF consortium on a DBM basis in May 2008. Advised on major consultancy procurements, innovative separate appointment of potential future network operator (Transdev plc) and owner-controlled master insurance policy. Advice on contracts implementation and State aid and Competition law aspects of the City of Edinburgh's transport integration plan.

Advised TIE Limited (government project delivery arm) on promotion of enabling legislation and choice of procurement models (D&B, DBFM and DBFT) for construction of £600 million Edinburgh Airport Rail Link. Negotiated with railway infrastructure maintainer, Network Rail and airport operator concerning construction of underground airport railway station and sub-runway tunnels and advance protective works. Delivered briefings on project progress and contractual risk mitigation to government officials. Advised on liabilities following scheme curtailment by Scottish National Party administration after 2007 general election.

Advising on aspects of procurement strategy and tender process for £2.8 billion major river crossing project in Scotland.

Advised on the acquisition of 15MW and 30MW windfarm projects in North Cumbria and Wales; negotiation of EPC and maintenance contract, grid connection and financing documentation. Subsequently advised in relation to claims and liquidated damages due to underperformance of assets.

Advised significant US energy corporate in relation to preparation of bid for Scottish and French oil refineries, valued by seller at US$2.1 billion.

WORLD BANK GROUP Washington DC 1994-2001

Senior Counsel, Co financing and Project Finance (IBRD)

Advised client governments and World Bank Board of Directors in relation to new IBRD operations: political risk guarantee programme, co- financing through trust funds and sovereign commercial debt reduction projects. Drafted IBRD and IDA policy papers and new bespoke legal documentation, establishing best practice. Delivered seminars and workshops on IBRD Guarantee Programme to the private sector and to interested governments. Explained and presented legal, commercial and policy issues to member country governments at ministerial level.

Implemented and refined IBRD policy and operational guidelines for initiative to mainstream political risk guarantee and contingent loan instruments and to partner private sector investors and commercial debt providers (international and local) on privatisation and project financing schemes for transportation, telecommunications, power and aerospace sectors. Led transaction teams on all legal issues.

Project specific advisory and negotiating involvement

Negotiated successful IDA grant-funded commercial debt and debt service reduction operations: Senegal, Sierre Leone, Sao Tome, Tanzania, Albania, and Haiti.

Partial credit guarantee of US$50 million convertible bond issue by Jordan Telecommunications Corporation to support phased corporatisation and privatisation.

Partial credit guarantees mobilising syndicated finance for PRC power plants: Zheijang (US$135 million), Yangzhou (US$150 million) and Ertan (JYen5 billion)

Negotiated with Russian government and project company the IBRD guarantee instrument to mobilise US $200 million syndicated loan for Sea Launch commercial satellite project, involving Russian and Ukrainian Space Agencies, Boeing Corporation and Kvaerner A.S. Project achieved work force re-employment and viable redeployment of Russian military know-how and rocket technology for civilian purposes.

Support for SMEs through pre-export and micro financing guarantee facilities in Russian Federation, Moldova, Romania, and Ukraine - facility value ranging from US$150-300 million for export manufacturing, industrial regeneration and agricultural production.

Negotiated IBRD guarantee with Brazilian parastatal to provide rolling coverage on coupon payments to support US$180 million 144A (private placement) bond issue by SPV operator of the Brazil-Bolivia gas transporter pipeline. Tailored guarantee design to optimize credit rating for bonds and to comply with IBRD prudential policies. Settled Project Information Memorandum with Standard and Poors and Merrill Lynch, as lead arranger.

Project finance structure for US$3.5 billion Chad-Cameroon Pipeline Project sponsored by Exxon, Chevron and Petronas. IBRD was lender to two host governments; negotiated and drafted pre-completion guarantees with project company and offshore escrow structure for capture of royalties and oil transport fee. Advised on intercreditor issues between senior commercial lenders and IFC, IBRD and EIB. Settled terms of government contractual indemnity to IBRD.

Led legal advice for IDA's provision of political risk guarantee covering US$90 million commercial debt for construction of the Haripur IPP (Bangladesh) in conjunction with IFC. Settled all contractual documentation with government. The transaction won Project Finance Infrastructure "Deal of the Year Award" 2001.

Supervised external counsel in common law and civil code jurisdictions: e.g. Jamaica, Russian Federation and Dominican Republic.

MASONS (now merged with Pinsents) International commercial law firm
Partner Hong Kong 1989 – 1994
50 Partners, 150 professional staff

Earnings of US$4.5 million for the firm over four years. Managed ICC arbitration involving dispute between Italian company and electricity authority on construction of 132 KV transmission line in Papua New Guinea; successfully defended and reduced claim for US$22 million to US$1.5 million.

Managed team of five lawyers, three expert witnesses and four paralegals throughout hearings conducted in New York, San Francisco, Papua New Guinea and Singapore. Prepared and presented written and oral submissions to an arbitral tribunal and expert assessor. Instructed and worked closely with expert witness to prepare evidence on extensive claims and Italian language project documentation.

Drafted and negotiated joint venture and consortia agreements and EPC contracts for international civil and marine engineering and construction concerns for Far easter and port development scheme core projects: Project values: US$1.2 billion and US$925 million.

Jointly responsible for China practice and development of newly opened Guangzhou office

PHILIPP HOLZMANN AG Engineering and construction group
Corporate Legal Counsel Frankfurt am Main 1985-1989

Reported to Chairman and Director Overseas Division; provided legal advice for international business development strategy and large project acquisition plan. Drafted and negotiated legal documentation for joint ventures, consortia, EPC contracts for build-operate-transfer and turnkey projects. Planned corporate reorganizations to maintain competitive position in Middle East. Managed external counsel on claim relating to Channel Tunnel consortium.

SOGEX INTERNATIONAL s.a.r.l. Construction group
Legal Adviser and Deputy Company Secretary Paris 1984-1985

Drafted and negotiated implementation contracts for industrial plants and infrastructure schemes in Middle East and South America. Handled intra-group mergers, disposals, and formation of offshore vehicles. Prepared and argued ICC arbitration claims of US$40 million relating to desalination plant in Jeddah, Saudi Arabia.

Negotiated with major US bank on corporate insolvency and appointment of an administrative manager by creditors.

ALLEN & OVERY International commercial law firm
Litigation associate London 1978-1984

PROFESSIONAL QUALIFICATIONS
Solicitor: Hong Kong, admitted August 1990
England and Wales, admitted August 1980
Registered as foreign lawyer with Law Society of Scotland

EDUCATION
1997 Finance for Executives, INSEAD, Fontainebleau, France

1988 M.B.A. programme at Boston University, Frankfurt, Germany
Georgetown University, Washington DC, USA

1978 England and Wales Law Society Professional Examinations - all heads

1973-1977 Master of Arts: Modern Languages and Law
St. Catharine's College, Cambridge University, England

1962-1962 Edinburgh Academy, Scotland

LANGUAGES

English (mother tongue), French and German: fluent spoken and written; Italian: fluent spoken

INTERESTS

Scottish and European history, languages, sports, outdoor pursuits;
Cambridge University Soccer Blue in 1975 and 1976.

PAPERS PRESENTED

Procurement Seminars	Scottish Government 2009
"Tramspotting"	Infrastructure Journal 2005
"The World Bank Guarantee Programme"	Euromoney Conference London 1996
"IBRD Partial Risk and Credit Guarantees"	World Bank Group Seminars Washington D.C. 1996-1997
"B.O.T. - The Host Government Role" Bombay November 1993	Anglo Indian Trade Conference
"Design and Build Contracts"	Singapore Contractors Association Singapore March 1993
"Contracting Risks in the Asia Pacific Region"	American Bar Association Washington D.C. November 1992
"B.O.T. and the Privatisation Initiative"	International Institute for Research Kuala Lumpur June 1992
"B.O.T. - The Contractor's Perspective"	International Bar Association Hong Kong October 1991

APPENDIX 2 – INQUIRY'S QUESTIONS AND SUPPLEMENTARY QUESTIONS

Edinburgh Tram Inquiry
edinburghtraminquiry.org

Floor 1, Waverley Gate
2-4 Waterloo Place
Edinburgh EH1 3EG
www.edinburghtraminquiry.org

This note identifies the broad subject areas which we would like to discuss with you during the interview. We have tried to include all documents that may assist you in answering the Inquiry's questions. However, not all documents will be referred to when taking your statement. It would be helpful if in advance of the interview you considered the documents that are provided.

Instructions

1.	When and how were DLA instructed? Was a formal contract or a document containing terms of engagement prepared? An email from Graeme Bisset to you dated 1 July 2008 (**CEC00114232**) refers to the basis on which DLA would provide legal services. Is it accurate? It notes that DLA are also contracted to provide services to CEC. This seems to go beyond the duty of care letter issued separately to CEC (see below). Can you comment?
2.	How was it determined who within DLA would be working on the project and that you would be leading the team?
3.	Can you provide details of the relevant experience that you had? In particular, what experience did you have of public transport projects, light rail projects and engineering contracts?
4.	Who did you deal with in TIE? Personnel changed over time but was there also a change in the titles of the persons that you dealt with? Were there clear channels of communication which ensured that advice that you have was given and received efficiently?
5.	What impression(s) did you for of the people with whom who dealt during the project? This includes not just the personnel at TIE but those at CEC and the contractors, designers and their representatives.
6.	Which other legal firms were engaged to give advice either to TIE on the one hand or CEC on the other? The position of McGrigors is considered in more detail below. It appears, however, that Dundas & Wilson and Shepherd & Wedderburn were also involved. When were these other firms engaged and

	what was the scope of work they undertook?

Secondment

7.	Why was this done? What was the charging arrangement? What was your role/title? What was the basis on which you became a director of TIE? It is apparent that you were given a TIE email address. Who was providing independent legal advice external to TIE? During your secondment what use was made of SF at DLA? How were the interests of the Council protected during this period?
8.	The email dated 17 December 2007 and attachment sent by you to Gill Lindsay (**CEC01500974** and **CEC01500975**) advises on the draft contract suite as at 16 December 2007. It appears strange that you, by then a Director of TIE, were sending a DLA Piper support letter to Gill Lindsay. Can you comment?
9.	The letter dated 12 March 2008 from you to Gill Lindsay (**CEC01347797**) advised that *"an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by the procurement strategy, to BBS"* (para 4). In contrast, the draft letter e-mailed the previous day by Graeme Bissett to Andrew Fitchie stated, *"an advanced draft Novation Agreement is in play for negotiation to close. The terms of the Novation… result in retained SDS performance risk for TIE"* (para 3.4) (**CEC01541243**) Can you explain the change
10.	In an e-mail dated 28 November 2007 (**CEC01544715**) CM advised Sharon Fitzgerald that the recent meeting of the Legal Affairs Committee (**CEC01500853**) had noted that *"DLA would report to the Council independently of Andrew Fitchie, who would be acting in his TIE Contracts Directors role"*.
11.	It appear that there was a period prior to conclusion of the contracts in which advice was not taken from DLA. Did that coincide with your time on secondment?
12.	What was the arrangement in respect of fees? An email from you to Stewart McGarrity dated 28 April 2008 (**CEC00114231**) appears to suggest that there

	was a fixed fee but also that you had been recording time at DLA.
13.	It seems that the bonus payment went straight to you rather than to DLA to be distributed in the normal way (see your email to Colin McLaughlan of 26 June 2008 - **CEC01371747**. This seems inconsistent with the idea that your services were being provided by DLA. Can you comment on and explain the arrangement and how it relates to the basis on which you provided services? Another draft letter, however, suggested that the services *were* to be provided by DLA (**TIE00159296**). The same was true of a proposal sent under cover of an email from you to Colin McLaughlan dated 23 May 2008 (**CEC01304382**),
14.	When and why did the secondment come to an end?

Relationship with people at TIE

15.	In general, how would you describe your working relationship with the TIE personnel? Obviously the Chairman, Chief Executive and Project Director changed over time. Did this present a problem for you? Were some of the persons performing these roles notably better than others?
16.	It is apparent from your email to Richard Jeffrey of 3 December 2009 (**TIE00034122)** that there was strain in your relationship. Can you comment? What was the involvement of Graeme Bradley of DLA? Why did you consider it necessary to consult him? What concerns had been expressed in relation to the arguments as to the strength of the contractual position?
17.	What caused you to send your email of 9 June 2010 to Richard Jeffrey (**CEC00336251**)?
18.	What lay behind your email to Richard Jeffrey of 18 June 2010 (**CEC00337052** – see also email to which it responds, **CEC00440581**)?

The Contracts – General

19.	It is apparent that the contracts for the various works carried out for the project were bespoke contracts rather than standard forms. Why was the

	decision taken not to use standard forms? What benefits were considered to flow from this approach? What advice was given to TIE and or CEC in relation to this issue and when and to whom was it given? There is reference to a paper on the matter in your email to Mark Bourke of 21 October 2005 (**TIE00057545**) and an email from Graham Nicol to you of 24 October 2005 (**CEC01857004**) but there is no version of either email with the attachment. In an email from you to Scott Prentice of TIE on 1 November 2006 (**CEC01780708**) you refer to a contracts choice paper prepared for TIE some time ago. Who was that provided to and when was it sent?
20.	The use of bespoke contracts meant that none of the terms has been tested in court. As the function of many terms of a contract is to determine where various risks lie this means that the use of bespoke contracts has the result that the attempts to allocate risk would not be tested. The fact they are bespoke means that there is a higher level of uncertainty in interpretation and consequently resolution of disputes Do you agree? Why was the decision taken that subcontractors should be engaged on standard forms when the principal contracts were bespoke (see email dated 7 August 2008 copied to you - **CEC00593053**)?
21.	In relation to MUDFA, it appears that at a meeting on 18 February 2005 Tom Blackhall of TIE said that if the contract was not bespoke, he would like to use the NEC or ICE forms (**CEC01853909**). This was discussed again on 25 February 2005 (**CEC01854993**). Do you accept the account given in these notes is correct? What consideration was given to the use of the NEC and ICE forms? When MUDFA works were taken from AMIS/Carillion and relet, it was on the NEC form. Why had there been a change of heart as to the contract to be used?
22.	Were the contracts based on standard forms and, if so, which ones?
23.	Clause 80 is one which came to cause problems later on. In an email from you to Tony Rush and others on 3 March 2010 (**CEC00619254**) you acknowledge that this was produced by DLA but say that it was heavily negotiated. Can you explain the history of the clause and how it got to its final form? Similarly, can you explain how the DRP provisions were agreed? Were

	clause 80 and the DRP provisions taken from another contract form and, if so, which?
24.	In drafting the INFRACO contract, did you have a view as to the extent to which the design would be completed at (a) the date of initial bids (b) the date when BAFO were made and (c) when the contract was awarded? Similarly, did you have a view on the extent to which the MUDFA works would be complete by the time that the INFRACO contract was awarded?

Procurement Strategy

25.	In general, what was your involvement in advising TIE on the procurement strategy for the tram project? What was the role of others in DLA in providing advice on that matter? How was advice provided by you, or others in DLA, in relation to the procurement strategy?
26.	What involvement, if any, did you or others at DLA have in the preparation of the Draft Final Business Case and Final Business case where it narrated the procurement strategy?
27.	On 10 December 2003 you sent an email stating that *"CEC must let go and give TIE the freedom to manage the procurement. Looking over TIE's shoulder and intervening whenever it suits will seriously damage TIE credibility as the DPOF procurement manager and contract partner."* (**CEC01873322**) What was your concern?
28.	By email of 5 May 2005 (**CEC01882678, CEC01882679** and **CEC01882680**) KPMG sent a list of queries they had in relation to the procurement strategy. They had been retained to report to the Scottish Ministers. The fourth question asked what the relevant lessons were from the Holyrood Inquiry and how they had been reflected in the procurement strategy. What answer was given and who gave it? The sixth question asks what would be done to resist the SDS provider refusing to agree to novation. Again, what was the response?

5 May 2005 should be 6 May 2005

CEC01882680 incorrect doc

SDS Contract and Design Performance

29. A document in relation to the OJEU notice for the design contract (**CEC01861755**) proposed for December 2004 provided that the level of detail to which the detailed design is to have been developed by the Integrated Tram Systems Design Services provider (ITSDSP) at the point of novation, is likely to be such that the functionality, layout, appearance and technical specification of the system and its components and specification is unambiguous in the context of configuration, spatial layout, design and appearance and specification. It further noted that consideration was being given to the level of completeness of the design at the point of novation. It was stated that the Instructions to Tenderers for the ITSDS (ITT) will identify those aspects of the design that require to be fixed pre novation, and those which will be passed on as an Infraco responsibility. It was TIE's intention that any residual design risk to be passed onto Infraco, was only that which could be managed effectively by Infraco on TIE's behalf.

a) To what extent were you, or others in DLA, involved in the drafting of the Instructions to Tenderers for the (ITSDSP)?

b) Did the instructions to tenderers/Invitations to negotiate identify the extent to which design required to be completed at the point of novation and which aspects of the design would be completed by or on behalf of the Infraco contractor post novation?

c) What was your understanding of the passage noted above that it was TIE's intention that the only residual design risk that would be passed onto Infraco was that which could be managed effectively by Infraco on TIE's behalf?

30. The SDS contract was entered into in September 2005 (**CEC00839054**).

a) What was the agreed programme, when the SDS contract was entered into, for carrying out the SDS services (perhaps with reference to (i) clause 7 (pp26-28), of the SDS contract, (ii) Schedule 1, Appendix 2, *"Programme Phasing Structure"* (pp100-101) and (iii) Schedule 4, *"Programme"* (p238))?

b) What was the *"Master Project Programme"* referred to in clause 7.1.1 (p26)? Are you aware whether such a Master Project Programme was agreed and in place when the SDS contract was entered into? Are you aware whether such a programme

was maintained, and updated, by TIE as the tram project progressed (together with who, within TIE, was responsible for that)?

c) What procedure was in place for updating or amending the programme, delays and seeking an extension of time (see clauses 7.1.2 (p26), 7.4 (p32) and clause 7.5 (as substituted by Appendix 1, *"Schedule of Amendments to the SDS Agreement"* (pp262-263))?

d) What was the purpose of the *"criticality"* provisions for determining the order in which the SDS services were carried out (see clause 7.2 (p26) and Schedule 1, Appendix 2, *"Programme Phasing Structure"* (pp100-101))?

e) What was the responsibility of the SDS provider for obtaining necessary statutory approvals and consents (perhaps with reference to clause 5 (p25) of the SDS contract and paras 2.6.1.2 and 2.6.2.4 of Schedule 1 (p83))?

f) What were the main provisions in relation to price and payment of fees (perhaps with reference to clause 11 (p37) and Schedule 3, *"Pricing Schedule"* (p105- 108))?

g) What were the main payment milestones?

h) Were there incentives for meeting the milestones early or on time? Were there penalties for not meeting the milestones on time and/or for late delivery of design?

i) Recital E of the SDS contract (p1) stated that *"TIE intends to appoint an infrastructure provider (the 'Infraco') to complete the design, and carry out the construction, installation, commissioning and maintenance planning in respect of the Edinburgh Tram Network"* (p1). What was your understanding of the work that would be undertaken by the Infraco contractor to *"complete the design"* i.e. once the Detailed Design had been completed by SDS, and all necessary approvals and consents had been obtained, what further design work remained?

31. What was your awareness during that period of the delay in progressing design and in obtaining statutory approvals and consents? What was your understanding of the cause or causes of the delay? What was your understanding of the steps taken to try and address these delays and why these steps do not appear to have been successful?

32. Did the delay in completing design and in obtaining statutory approvals and consents cause you, or others in DLA, any concerns in relation to the risks created for the procurement strategy (including, in particular, obtaining a fixed

price for the Infraco contract and transferring design risk to the Infraco contractor)? If so, what did you, or others in DLA, do in relation to any such concerns? Do you, or others in DLA, bring any such concerns to the attention of CEC?

33. It is apparent that as early as 2006 it was considered that the SDS provider was not performing adequately. By email dated 24 January 2006 (**CEC01867255**) from you to IK you mention *"push-back"* from PB and indicate that PB had begun their own collation of evidence on alleged client-side shortcomings. This suggests problems with the SDS contract at a very early stage. What was your awareness, and understanding, of any such problems? In your view was there any merit in the alleged client-side shortcomings? In a letter dated 24 March 2006 DLA gave advice about service of Persistent Breach Notices under the contract (**DLA00000763**).

24 January 2006 should be 24 March 2006

34. In May 2006 (**CEC01881982**) Fenella Mason of DLA noted her view that it would be counter-productive to serve a Persistent Breach Notice on PB at that time because serving a contractual notice in these terms may create an adversarial relationship between TIE and Parsons Brinckerhoff which, as a consequence, may have a detrimental effect on the project as a whole. (**CEC01789432**).

a) What was your awareness of, and views on, these matters

b) As the time for performance of Services was allied to and measured by the Consents Programme and the Design Delivery Programme (**CEC00652331**) was adherence to these schemes essential to compliance with the contract?

c) To what extent were the Consents Programme and the Design Delivery Programme subject to change?

d) If tie did not wish to terminate the contract what other remedies could they have employed?

35. There was a meeting on the 6th of June 2006 (**CEC01628981**) between TIE and DLA at their offices, to understand the background to the SDS contract and what happened during the Requirements Definition Period (RDP), the March 2006 claim preparation, and up to the submission of the Preliminary Design at the end of June 2006. Did you attend this meeting? What was your

	understanding of the background to the SDS contract?
36.	It is apparent from the email from Sharon Fitzgerald dated 22 November 2006 (**DLA00002083**) that consideration was given to whether the SDS contract should be terminated. What was your involvement in these matters? It appears that matters had moved on from the advice given by Fenella Mason six month earlier. What was that? Why was neither of them implemented at that time?
37.	On 16 August 2007 you sent Geoff Gilbert an email with a further draft persistent breach notice for SDS (**CEC01642351** and **CEC01642352**). Can you explain the content of the breach referred to in the Notice? Why was the notice produced? A notice that could lead to the contract being terminated seems at odds with the conclusion that there should be a commercial settlement with PB rather than dispute resolution procedures and that seemed to be the approach at the time. Why the different approach? What was the Notice not implemented?
38.	By mid or late 2007, what was the position with design? What were the apparent causes of delay? What effect was that having on MUDFA and on the negotiations with INFRACO bidders? What was done in those negotiations to address any problems that arose?
39.	(**CEC01629883**) is an email from you to Geoff Gilbert dated 22 August 2007 addressing withholding of payments to SDS. Can you explain what caused this and what was done about it?
40.	In an email you sent to GG on 12 January 2008 (**CEC01544498**), you express the view that, *"The SDS contract already contains the mechanisms to control SDS against programme performance".* Which mechanisms did you have in mind? Were they implemented and, if not, why not? Were they effective in practice to ensure that designs were delivered timeously?
41.	In the letter of advice to CEC of 20 March 2008 (**CEC01544970**) you refer to, *"risk emanating from the Employers' Requirements because of deficiency in precision, clarity and link with the core contract provisions."* You consider that the risk had reduced that it was no longer an obstacle to award of contract.

12 January 2008 should be 21 January 2008

	When and how did you advise CEC of this risk originally and express the view that it had been such an obstacle. What had been done in relation to this that put you in a position to revise your opinion? Was advice taken from a third party as to the adequacy of the information that had been prepared?
42.	In the later advice letter of 28 April 2008 (**CEC01312368**), you record that there are assumptions as to programme and pricing that arose from delays caused by SDS design production. Can you explain how it was that the delays lead to these assumptions? You record that, *"tie are prepared for the BBS request for an immediate contractual variation to accommodate a new construction programme needed as a consequence of the SDS Consents Programme which will eventuate, as well as for the management of contractual Notified Departures when (and if) any of the programme related pricing assumptions fall."* What preparation were you referring to? This comment gives the impression that the requests could be fought off. Was that your opinion?
43.	In your email of 26 August 2010 to Tony Rush (**CEC00131751** – second in string) you give an outline summary of the poor performance of PB and note that the ERs were taken off them. Can you provide more detail of the decision to remove the ERs?
44.	What was your role in relation to the settlement of the claims made by SDS? It seems that GG prepared a note reflecting the basis for settlement and sent it to you for discussion (**CEC01629951** and **CEC01629952**).
45.	On 23 August 2009 you emailed Susan Clark asking about whether there was traceable evidence that SDS performance has caused delay and expense on the INFRACO contract (**CEC00854847**). Did you get a reply? What evidence was there?

MUDFA

46.	Why was having a MUDFA contract considered to be a good idea? What were the advantages it gave and what would it deliver – see (**CEC01858524**)? What potential disadvantages were identified at the outset and what measures were taken to address them? What was the instruction to you as to what it should 'do'?
47.	What were the services to be provided under this contract? How was the design responsibility split between the MUDFA contractor and statutory utility companies? What was meant in the contract by *"critical design"*?
48.	On 7 February 2007 MUDFA AMIS Project Director Andrew Malkin wrote to Susan Clark (**CEC01792998**) noting that the contract documents signed by TIE and AMIS *"still appear to be incomplete and do not represent what was agreed during the last few days of the negotiations"*. That was described as a *"fundamental"* contract issue and a list of the missing documents (comprising various Bills of Quantities) was set out. What was your awareness and understanding of that issue including why there appear to have been *"missing documents"* when the contract was signed, why the contract was nonetheless signed and how agreement could be reached while documents were missing from the contract? Did these matters cause you any concern? a) Whose responsibility was it to produce the Bills of Quantities referred to in the letter? b) How, and when, were these issues resolved? c) Did these issues cause or contribute to any delay in commencing or carrying our any of the MUDFA works?
49.	You were copied into an email from SF dated 23 March 2007 (**CEC01621726**) to which she attached a document on which she had marked up comments on a document entitled *"MUDFA Contract Improvements"*. One of the suggestions is that there need to be more effective penalties / LAD provisions. DLA pointed out that they would be difficult to negotiate in at this stage. Was there a reason why there were not more robust penalties in the original contract?? Can you explain what is said in this document as to why the LAD

provisions were not different?

Third Party Agreements

50. What were the third party agreements that are referred to in this context? TIE/CEC had powers to undertake works in terms of the NRSWA. Why was it felt necessary or desirable to enter into specific agreements? It appears that the Council were reluctant to become parties to the agreements with Scottish Power and Telewest. What was the reason for this?

INFRACO

Terms

51. How was Clause 80 drafted? Is it based on one or more standard forms? What input did the various parties have?

52. DLA sent various letters to CEC advising on the terms of the INFRACO contract, namely (i) letter dated 17 December 2007 (**CEC01500975**); ii) letter dated 10 March 2008 (**CEC01393822**); (iii) letter dated 12 March 2008 (**CEC01347797**); (iv) letter dated 18 March 2008 (**CEC01347796**); (v) 20 March 2008 (**CEC01544970**); and (vi) letter dated 28 April 2008 (**CEC01312368**). Did the need to provide advice repeatedly at short notice create problems Are you satisfied that there was sufficient opportunity afforded to you to provide advice.

Awarding the contract

53. Supplemental Instructions to Tenderers (**CEC01824070**) were issued on 9 January 2007 and provided that between 12 January and 16 April 2007, Tenderers would be provided with further project information relating to *"significant development to the Preliminary Design, including surveys, carrying price or risk implications"* and *"key structures detailed design"*. Given the problems, by that stage, experienced with delays to design, approvals and

	consents, what consideration, if any, was given to delaying the procurement of the Infraco contract until these matters had been resolved?
54.	In your letters of advice on the contract documentation prepared in the contemplation of contract close (eg **CEC01347797**), you stated that the contracts were broadly aligned with the market norm. What information was available to you to assess that norm? You qualify your statement regarding the alignment by saying, *"taking into account the distinct characteristics of the ETN and the attitudes of BBS and SDS to novation."* Can you explain what you meant by the qualification? Also, can you explain what you meant when you said, *"technical ambiguity (and therefore delay / costs risk) may exist in the interplay between design scope and method of execution."*

Allocation of risk

55.	By letter dated 22 October 2007 to GL, you advised on *"Contractual risk allocation – preferred bidder stage"* (**CEC01542790**). What did you mean in stating that the key risks were neither different nor pronounced than those encountered by Promoters on other projects? Can you explain what you mean by the second and third paragraphs?
56.	By e-mail dated 29 August 2007 (**CEC01560935**) you sent Gill Lindsay a Report on the Development of the Contractual Risk Allocation in the Infraco Contract (**CEC01560936**). Had you been made aware that this was the level of information that the Council and TIE expected. Were you aware from this and other communications that risk was something of particular concern to the Council? Was there a discussion about the effect of the decision by Transport Scotland to state expressly that they would not pay a penny more than £500m? This meant that the entire cost of overrun fell on CEC.

Wiesbaden

57.	This was during your secondment period. Was there no awareness that there was to be a meeting between the principals of the company to whom you

	were seconded and the proposed contractors?
58.	You were provided with a copy of the draft agreement on 18 December – after the visit to Wiesbaden but before the agreement had been concluded. You were asked for comment and expressed views on it in an email dated 18 December 2007 to Geoff Gilbert, Matthew Crosse and others (**CEC01430872**). Can you explain the advice that you provided in this email?
59.	When controversy arise later over the agreement and to what extent liability had been accepted by INFRACO, there was an exchange of emails in which Stewart McGarrity gave his views on what had been agreed and how it represented payment for assumption by INFRACO of design risk (email of 10 September 2009 - **CEC00851679**). This appears to be on the basis that the provisional items were only there because of inadequate design information so, when the provisionals were removed and made firm, there was no longer any consequence to the inadequacy of design. Can you comment on what is said there?

Adjustment of process between contracts

60.	It appears that £3.2m was moved from the price of Phase 1a to Phase 1b (see **CEC01704016** – Minutes of Evaluation Meeting August 07 and **TIE00679381**). It appears from (**TIE00088497**) and (**CEC01482234**) that this was done quite deliberately in collusion with Siemens. The result was that there has to be a provision that if Phase 1b did not proceed a payment of that sums was due to BBS.

Likely costs

61.	The rebuttal letter from Brodies to McGrigors says that at a meeting in early December 2007 you were told by Richard Walker that there would be additional costs of £80m or thereabouts. Can you recall more accurately the date and purpose of the meeting? Exactly what did Richard Walker say and in what context did he say it? Was any explanation given of how the additional costs would arise? Did the statement alarm you and create a need for

	particular care as to any part of the contract negotiations? The rebuttal letter says that you relayed this conversation to 'tie management' later the same afternoon. Who did you tell? Was this in a formal or informal setting? Did you make anyone from CEC aware of this conversation?

Conclusion of the contract

62.	In response to an email from Colin Mackenzie at the end of January 2008 regarding how consents would fit with the INFRACO contract you sent email to the TIE team at the end of January 2008 (**CEC01496537**). Could you explain the import of the email from Colin Mackenzie and the one that you sent in response?
63.	Why did you send your email of April 2008 to Geoff Gilbert and others saying that TIE should give nothing further away at all (**CEC01332431**)?
64.	As part of the advice to TIE and CEC regarding the contract, DLA produced a risk allocation matrix (see **TIE00077024** and **CEC01430993**). What was the function of this? As produced, it seems merely to work through the contract clauses and does not provide an overview of risk. It merely considers who will bear the consequences of failing to adhere to particular contract clauses. In essence, it merely identified upon which party obligations are placed by each clause and does not attempt an analysis of risk at all. In particular, it does not provide any assessment of what risk there is of cost overrun and where it applies. It does not give the same degree of assessment as the document sent on 29 August 2007 (see para XXX above). There is no consideration of the risk inherent in the Schedule Part 4. Do you agree? Could this have been drafted in a way that would have provided a more useful analysis of risk?
65.	Stewart McGarrity sent an email dated 17 February 2009 to you and others with his notes of a meeting on 9 February 2009 (**CEC00941819**). Point 8 of this suggests that progress was made under the contract on the basis of a gentleman's agreement he made with Willie Gallagher. What do you know about this alleged gentleman's agreement?
66.	In January 2011 there was some discussion of the basis on which the contract

	has been concluded by TIE and you attended a meeting with Richard Jeffrey, Simona Williamson (McGrigors), S Rae and H Moffat on 25 January 2011. A record of the meeting (**DLA00006406**) notes that you gave an explanation in detail as what had happened although only bullet point headings are given in the record. What was the explanation you gave?
67.	Why were advance costs or mobilisation payments made to BSC? What advice did you give in relation to these? How were these accounted for during the contract and during the Marr Hall negotiations?

Schedule Part 4

68.	Although the Part was based on the agreement reached at Wiesbaden, it is apparent that it also innovated upon it to a material extent? Do you agree?
69.	Although Part 4 does contain matters of engineering detail, the elements of how the price would be fixed and what would give rise to a deemed change is classic territory for the allocation of risk. Do you agree? As such, what was the role of DLA in either negotiating these terms or advising on the effect of the terms that had been negotiated by others? What advice was given as to the effect of the various iterations of Schedule 4 on the allocation of risk?
70.	A draft of Schedule Part 4 was forwarded to DLA on 6 February 2008 (**DLA00006341**). Was that the first time that you had been made aware of it? What did you mean in your email in response of 6 February 3008 (**DLA00006343**)? What did you mean it was a contract within a contract? With whom in TIE did you discuss Part 4?
71.	By email of the same day (6 February 2008) Andy Steele made directors of TIE and you aware of his view that the assumptions stated in Schedule 4 would not be borne out in practice (**CEC01448355** and **CEC01448356**). That being so, it must have been clear at the outset that the effect of Part 4 was to put TIE at risk for all the future design changes. This was recognised expressly in comments made by Bob Dawson in the same draft. Did you give advice in relation to this and the effect that it could have on price? Was this a situation in which it would be relevant to consider whether the state of

	knowledge of CEC was the same as that of TIE?
72.	Throughout the period in which Schedule 4 was negotiated you were copied into emails with drafts etc. In your view, what was the purpose of bringing the drafts to your attention?
73.	It is apparent from your email to Ian Laing of Pinsents of 12 February 2008 (**CEC01540594**) that you clearly were aware that there was a need for discussion of it that involved solicitors. Why did you think that solicitors should be involved in this part? Was there such a discussion? Who attended such discussion(s)? Were any records kept of these meetings – either in the form if note/minutes or email summaries of what was discussed?
74.	Ian Laing replied sent a draft in an email of 22 February 2008 which was sent to GG, BD and you and copied to many others. Why was it sent directly to your clients? Was he concerned breach of normal professional rules? What did you do in response to this email? The BBS draft removed the requirement that any deviation from BDDI had to be material before it would be a Notified Departure and introduced the idea of stating the assumption on which the price is based with a proviso that there will be a change if the assumptions are not correct. Did you discuss this with anyone? Three days later you emailed Steven Bell with a comparison of recent versions by stating that you had not gone over it with GG and had not been involved in development (**CEC01449710** and **CEC01449711**). Why did you say this? Did you draw anyone's attention at that time to the fact that the changes reflected a major shift in the balance of risk?
75.	On 3 March 2008 BD send a further draft to BBS (**CEC01450182** and **CEC01450183**). This refers to normal design development *based on design intent*. What role of any did you have in relation to this draft? He issues a further draft on 6 March 2008 (**CEC01450309** and **CEC01450310** – NB the draft incorrectly states it was issues on 19 February 2008). What was your involvement in this draft? On 10 March 2008 he emailed you and others indicating that on a telephone call he had agreed wording in terms of which any change from Base Case Assumptions would be a Notified Departure and would be deemed to be a Mandatory TIE Change. What did you do in relation

	to this when it was sent to you? Did you discuss it at or before the drafting meeting you attended the following day (**CEC01450544**). The principle from the email appeared in a draft sent out by BD on 12 March 2008 (**CEC00592628** and **CEC00592629**).
76.	A version of the Part 4 is sent internally on 17 March 2008 (**CEC01510266** and **CEC01510267**). The cover page states that it reflects Pinsent Mason's mark up of an earlier version received from Suzanne Moir on 13 March 2008. This is *not* the same as the version noted above as having been sent out on 13/ March. There does not appear to be an email sending it to PM. It is materially different from the version sent out days later on 19 March. Can you explain this version and what was done with it?
77.	On 19 March 2008 PM issued new version for discussion next day (**CEC01451012** and **CEC01451013**). The version sent bears the date 18 March. This version is in the more rigorous form that means there is a Notified Departure if the designs *"in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information"*. The normal design qualification does not apply. How did this change come about? You commented on some of the assumptions (**CEC01489543**) so must have considered the draft. What advice did you give in relation to this further evolution of the position and shift from the Wiesbaden terms? Did you give any such advice at or before the six hour drafting meeting that you attended the following day (**CEC01518014**).
78.	On 19 March 2008 IL of PM issues agreement saying that it is to align content with recent discussions (**CEC01543498** and **CEC01543499**). On the cover page, the agreement says *"NOTE : This mark-up reflects recent agreements reached between tie and BBS in relation to Schedule 4 as amended as a consequence of discussions on 18/3/08"*. What did you do in relation to this? The following day, Philip Hecht of DLA sends and email referring to Schedule Part 4 *"as agreed today on screen"*. Had there been another meeting? Was this only on the TIE side or did it involve BBS? This Version appears to contain the wording with the passages ultimately relied on by BBS. How was this final version produced? What advice did you give in relation to it?

17 March 2008 should be 19 March 2008

79.	An email from IL of PM dated 26 March 2008 (**DLA00006398**) sends out a further version which is said to have been agreed n 25 March. What was your role in relation to that? Who attended the meeting at which it was agreed? Later the same day, you and others received an email from Ian Laing which noted that, because one of the assumptions was that the design programme in Schedule 4 was v26 whereas in fact it had already v28, there would be an immediate Notified Departure (**CEC01451185**). This was sent also sent to various TIE personnel. This was followed up by a 'chaser' email on 31 March (within **CEC01548431**). Normally it would be a breach of professional rules for a solicitor for one party to correspond directly with the client of another solicitor. Why was it happening here? What was your reaction to this? Did you discuss the email with any of the personnel at TIE or contact them by email about it? If you had discussions, when were they, with whom and in what context? Is there any record of those discussions? If you corresponded by email, can you identify the email?
80.	The following day IL sent out a further version said to have been updated following the meeting on the 25th (**CEC01451209** and **CEC01451210**). This is not the same agreement as that sent out the previous day. The covering email explains the changes. Were you involved in discussions with him to produce this further draft?
81.	In response to the chasing email from IL dated 31 March 2008 noted above, Jim McEwan emailed you the same day (**CEC01465878**) accepting what was said by IL but saying that they wanted to avoid *"gaming"* of the position by BBS and it should only be where a change can be shown to materially change the INFRACO programme critical path that there would be a liability to additional payment. Your response was the same day (**CEC01466394**). You recommended that TIE identify key changes that will be required and attempt to agree them and the impact that they will have on cost and programme prior to the contract being concluded. It seems from this that you were aware of the consequences that might follow of this is not done. Did you warn TIE directly of these consequences? You pointed out that the Notified Departure mechanism as it stood was too blunt and would permit BBS to seek relief for everything that would affect them. Did you get any response from TIE in

	relation to this? Did TIE do as you suggested and identify and agree the consequences of key changes? An email to you and others from Geoff Gilbert also sent on 31 March 2008 (**CEC01465933**) appears to accept your advice. Did you respond to this?
82.	On 2 April 2008 IL of PM sends out a further draft that now contains the express wording acknowledging that there will be an immediate Notified Departure (**CEC01423746** and **CEC01423747**). What did you advise in response to this? Including it in the contract in this way seems at odds with the advice you had given and the position that JM said they sought to achieve. Further versions were sent out on 4 April (**CEC01451415**, **CEC01451416**, **CEC01451434** and **CEC01451435**) and on 16 April 2008 Dennis Murray sent out a version with minor changes (**CEC01297352** and **CEC01297353**) but the critical parts were not changed. Was any effort made to change them? There was then a change made to pricing assumption 4 by PM on 21 April (**CEC01293387**) which was agreed (**CEC01293407**).
83.	It appears that on 9 April 2008 you advised senior TIE personnel including Geoff Gilbert, Stewart McGarrity, Dennis Murray and Steven Bell that Schedule 4 already contained numerous *"arguable risk allocation points for BB(S)"* and there was a risk of BB(s) exploiting Schedule 4 (**DLA00006319**). What did you mean by this? What were your particular concerns? In saying that the matter was *"arguable"* it seems that you were of the view that there was ambiguity. Is that correct? Where was the ambiguity and in what did it lie? Had this been raised before? According to this File Note the issue is being raised in the context of discussions that are not actually about the terms of Schedule 4. There are a number of blanks in this File Note. Would a final and complete version have been prepared? The comment SB is noted as having made suggests that although the negotiations on Part 4 were protracted, BBS were not closed to any changes of position. Would you agree? Why, in response to that, did you claim that it was not negotiable? This is referred to in this note and also in the rebuttal letter sent in response to the claim from the Council. In your view what was not negotiable? Would you accept that by this time there have been some significant developments in the wording of Schedule 4? It is apparent that negotiations were carried out on the terms of t Schedule Part 4 up until the end of April. Why did you say it was

	non-negotiable at the meeting? In 2010, you said to TIE personnel that Part 4 had been imposed on the Contract (email from you of 30 August 2010 - **CEC00098063**). Do you remain of the view that that is an accurate way to describe matters?
84.	Part 4 was then sent to Stewart McGarrity and you by Denis Murray for Quality Assurance review (**CEC01374219** and **CEC01374220**). What was your role in QA review? What did you do and what did you report? Schedule 4 was 'signed off' by Stewart McGarrity (**CEC01286695**) on 23 April 2008. Although this refers to matters which have to be addressed prior to signature, they did not concern the core matter of assumptions and the consequences of them not being correct. Was any advice provided to SMcG to enable him to approve the drafting?
85.	The definition of *"normal design development"* produces circularity in the discussion of the first assumption. This was apparent in the draft of 18 March (**CEC02084791**). Did you comment on this at or before the meetings?
86.	The *"Base Date Design Information"* was defined in para 2.3 of Infraco Schedule 4 as meaning *"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H"* and yet Appendix H did not contain any list of drawings and, instead, simply stated *"All of the Drawings available to Infraco up to and including 25th November 2007"*. This appears to have resulted in ambiguity and disputes. Why was the contract drafted in this way?
87.	By letter dated 12 March 2008 DLA advised CEC on the Draft Contract Suite as at 12 March 2008 (**CEC01347797**). Graeme Bissett, TIE, appears to have had an input into the drafting of that letter (see, for example, e-mails from him to you dated 11 March 2008 (**CEC01551064**) and (**CEC01551066**) and e-mail dated 11 March from him to you (**CEC01541242**) enclosing a draft of the proposed letter from DLA to CEC (**CEC01541243**). Was CEC aware at the time that TIE had an input into the drafting of the letter purporting to be from DLA to CEC? Do you consider that to have been appropriate?

Advice on close of the contract

88.	In relation to the advice letters, how much input was therefore people at TIE in general and Graeme Bissett in particular?

Advance payments

89.	Why advance payments made and on what basis was it made (see email form you to Stewart McGarrity of 19 February 2010 - **CEC00111697**). How was the payment treated in the Mar Hall discussions?

Role in relation to CEC

90.	After you had been providing services for a while you were asked to provide a duty of care letter to CEC. The letter you provided was dated 23 June 2005 and addressed to TIE (**DLA00006300** and covering letter **DLA00006301**). It appears that the terms of the letter recognise implicitly that there could be conflict of interest. Although the first paragraph says that DLA were entitled to assume that the *instructions* from TIE took into account CEC's best interests, what steps, if any, were taken to ensure that advice could be given where DLA became aware that a step to be taken was not in CEC's interests. Is the commonality of interests and objectives among the Council, tie and TEL a reasonable assumption? CEC bore the entire risk of overruns whereas TIE and TEL were bodies with the purposes of delivering / championing trams. What was the intention of this letter? It was so limited as to mean that any interests of CE distinct from those of TIE would not be taken into account.
91.	By e-mail dated 16 August 2007 (**CEC01711054**) Andrew Fitchie sent GL a draft letter (**CEC01711055**) he proposed to send to the Council to affirm DLA's duty of care to the Council and that the Council and TIE were joint clients of DLA. Was a final signed letter ever provided by DLA setting out the duties owed by DLA to CEC? (see, in that regard, the e-mail dated 7 December 2007 from your to Colin Mackenzie (**CEC01399575**).
92.	At any stage did you suggest that it might be preferable if CEC had their own

	advice? Whether or not you suggested this at the time, would it have been a good idea
93.	The letter dated 12 March 2008 from DLA to CEC (**CEC01347797**) advised that *"an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by the procurement strategy, to BBS (subject to the above)"* (para 4) c.f. the draft letter e-mailed the previous day by Graeme Bissett to Andrew Fitchie stated, *"an advanced draft Novation Agreement is in play for negotiation to close. The terms of the Novation ... result in retained SDS performance risk for TIE"* (para 3.4) (**CEC01541243**). Can you account for this change?
94.	A file note by you of a telephone discussion he appears to have had with GL on 31 March 1999 recorded, *"GL stated CEC officers (and she) had no concerns about the content and mechanics of the Infraco Contract Suite and that she was entirely satisfied that DLA had reported fully and regularly to CEC at the time TIE was negotiating and closing the Contract. This had permitted CEC to understand the allocation of risk and the commercial positions TIE was agreeing to"* (original emphasis) (**CEC01031217**)? What lead to this call and this matter being discussed?
95.	By December 2007 you were expressing doubts to WG about the abilities of CEC (**CEC01500899**). What had given rise to these concerns? Did they continue to hamper the implementation of the project and, of so, in what ways.
96.	By the time of your email for Nick Smith of 2 September 2010 (**CEC00098268**) it is clear that you are taking a more direct role in relation to CEC? Can you identify when this happened? Was there any formal change of instructions to change CEC from being ancillary to TIE to being a client in their own right with their own needs and giving their wen instructions? Is it related to the email from Richard Jeffrey to you on 11 August 2010 (**CEC00097692**).

Princes Street Dispute

97.	There was significant congestion in Princes Street when the traffic management measures were first introduced (see **CEC01053731**) a) What was the reaction to this? b) Was it the reason that a decision was made to allow buses one way along Princes Street? c) As this was one of the first significant departures from the contract, what consideration was given to issue of the claim that it would generate?
98.	Your email to Gill Lindsay of 2 March 2009 (**CEC01033708**) summarises some of the key facts leading to the dispute. Could you elaborate on what is said there? BSC were of the view that the reason that the agreement was required was that the MUDFA works were incomplete (see letter from Walker, 3 March 2010 - **CEC00548448**). In your view, is this correct? Also, what was your view on the comments in this letter on the effect of Part 4 of the Schedule to INFRACO?
99.	An initial salvo in the dispute is contained in the email chain sent to you on 18 February 2009 (**CEC01032271**). Can you explain / comment on this
100.	What advice did you give as to the merits of the TIE position in this dispute or the risks that they were facing? Why was it decided to enter into a supplementary agreement rather than to press for implement of the contract? What effect did this have on the pater conduct of BSC?
101.	What role did you take in drafting of the supplementary agreement and what advice did you give in relation to it.
102.	Can you explain / comment on the contents of your email to Mike Heath dated 11 March 2009 (**CEC01032481**). Who was Mike Heath and what was his role?
103.	What was the issue with the BSC supply chain? It is referred to in your email of 26 February 2009 (**CEC01010735**) and elsewhere?

Accumulation of INTCs

104.	There was very quickly an accumulation of Infraco Notice of TIE Changes (INTCs). These were, in effect, claims for additional payment. Were you surprised by the volumes that were submitted? Were you involved in processing them or advising upon them?

DRP

105.	It appears that even in the early stages of the contract there were problems with the contract mechanisms and the time restrictions that lead TIE to seeking to get round them (Se email to you from Dennis Murray dated 13 September 2008 - **CEC01292449**). Do you agree? What changes would have been required to the contract procedures to keep matters moving more smoothly?
106.	Can you elaborate on the conversation you had with Richard Walker that is referred to in your email to Graeme Bissett of 21 September 2008 (**CEC01213251**). Can you explain the contents of the email from Stewart McGarrity to you dated 20 February 2009 (**CEC01010525**) regarding the need for BSC to recover the anticipated shortfall on the contract?
107.	When BBS started to claim that there design changes amounting to Notified Departure when did you start to give advice as to the merits of the BBS position or as to the tactics that might be used to respond? At the TPB on 6 May 2009 (the papers are **CEC00633071**) at para 2.8, the Minutes record advice from DLA that they were confident of the TIE position on interpretation of the contracts? What was the basis for this view? The BBS position later on was that TIE should have been able to form a view on what was a ND and what was not. It appears, however, that they were being told by you that the matters being claimed by BBS were *not* NDs.
108.	In late May 2009 TIE instructed Senior Counsel to advise on the interpretation of the INFRACO contract (**CEC00901461**). A consultation with Counsel took place on 1 June following which Counsel issued written advice (**CEC00901460**) and (**CEC00901462**). At this juncture you were still

	supporting TIE. What were the purpose and outcome of the consultation?
109.	I note that on 27 July 2009 DLA provided a note of advice to Stephen Bell summarising the significant pieces of legal advice provided to TIE by DLA up to 24 July 2009 (**CEC00652331**). Why was this provided to him at this stage? Did you discuss and explain the advice.
110.	A further papers concerning Schedule Part 4 was requested in December 2009 and was provided by you under cover of mail of 9 December 2009 (**CEC00651407** and **CEC00651408**). It appears that there was some divergence between McGrigors, DLA and counsel. Can you comment? Was this indicative of a lack of certainty in these issues? How had that lack of certainty come about? Were these issues considered at the time that the agreement was concluded? Some of the concepts – such as *"normal development and completion of designs"* appear quite fundamental. Do you agree?
111.	The attachment to an email from Julie Smith to you and others dated 6 February 2009 (**CEC01213972** and **CEC01213973**) and the attachment to an email from you dated 29 January 2009 (**CEC01119937** and **CEC01119938**) summarise the BDDI to IFC issue. Can you explain this? Do you agree with what is said in this paper?
112.	When the Carrick Knowe and Gogarburn decisions came in, what difference did it make to the strategy for engaging BSC? What about the Dervaird Decision?
113.	There was evident unhappiness with the adjudicators' decisions - particularly those of Mr Hunter. Why were they not challenged (the attachment to the email from you to Tony Rush dated 18 December 2009 may be relevant - **CEC00578620** and **CEC00578621**)? After the Wilson decision it might seem that there was particular merit in this. When, how and by whom was the decision taken not to challenge – there does not appear to be a written record of it. Is that correct? Was there a conscious decision or was it a case that the matter remained under review but no formal decision was taken. In that there was no contractual time bar; did it remain the case that a challenge remained an option all the way to Mar Hall? Why did you send your email of 26

	November 2009 to Gill Lindsay (**CEC00851367**) regarding options for challenging these decisions?
114.	By e-mail dated 20 April 2009 (**CEC01003720**) you sent GL a Summary Paper on DRP Issues (**CEC01003721**). The email notes that work is under way considering the consequences of project scope truncation or termination of the INFRACO contract. Where has this idea come from? The paper attached to the email considers the dispute concerning the change from BDDI to IFC (DRP3). What is meant by the last sentence of the first paragraph under the heading 'Contractual Basis'. It appears that there is implicit recognition that the change has occurred and attempts are being made to mitigate the effect by finding technical ways that that mean that the claim cannot proceed. Can you comment?

Off Street Supplementary Agreement

115.	Once they had obtained the agreement specifically for works on Princes Street, BSC wanted a new agreement to cover all off street works. It appears that to all intents and purposes they did not carry out *any* street works during the project. Initially, it appears that you were attracted by the idea of an Off Street-works Supplementary Agreement (see email to Tony Rush of 10 January 2010 - **CEC00656394**). Can you explain how matter evolved and why it did not ultimately proceed? Was it related to the claim submitted by BSC for works under the PSSA that was much greater than expected?

Involvement of McGrigors

116.	When did they become involved? For whom were they acting? If, as appears to be the case from some documentation, they were acting for CEC, how did that affect the DLA instructions from the Council? Also, if they were acting for the Council, what was the basis on which they conducted the adjudication in relation to the Murrayfield Underpass (the Dervaird Adjudication)?
117.	How was work allocated between you and information shared? Did the presence of two firms hamper the efficient and effective management of the

	disputes that has arisen?

Tony Rush

118.	How did he come to be appointed to assist TIE? What was your role in relation to that? Had you worked with him before?
119.	Once TR had begun his work how did this affect the way that you performed your advisory tasks for the company? It appears that you and TR would email one another directly and include Richard Jeffrey as a 'cc'? Is that a fair representation of how matters proceeded? Who was taking the ultimate decisions as to what should happen?
120.	Who was in charge? It appears from emails such as TR's ones to you of 21 and 22 September 2010 (**CEC00218055** and **CEC00098706**) and that he was the one making decisions as to strategy and tactics. Is that a fair summary of the position?
121.	When Tony Rush had the GMP figures for Project Carlisle, why did he email them to you rather and only copy them to the TIE personnel (**CEC00337645**).
122.	Can you explain the contents of your file Note of 9 June 2010 (**DLA00006390**) in which TR appears to give quite blunt views about the TIE personnel?
123.	When Tony Rush was involved it appear that someone called Torquil Murray was also engaged. Who was he and what was his specialism / skill? Who determined that he should be retained and when? What was he asked to do?

Work in 2010

124.	You appear to have attended many of the meetings in 2010 to determine what further steps should be taken. Do you agree? What was your input into evaluating the various options facing TIE?
125.	How did the intention change / develop during the course of the year? To

	what extent was termination of the contract(s) the principal objective? It appears to emerge from TIE in June (email to you from Richard Jeffrey of 14 June 2010 - **CEC00302039**)
126.	Can you explain the various projects - Phoenix, Pitchfork, Carlisle, and Notice? What were the problems encountered with Carlisle?
127.	Can you comment on / explain the following documents and their attachments a) Email from Anthony Rush to you dated 28 October 2010 (**CEC00213619**). b) Email from Richard Jeffrey to you and others dated 8 October 2010 (**CEC00099403** and **CEC00210648** c) Email from Joanne Glover to you and others dated 24 September 2009 with Carlisle suite of agreements d) Project Pitchfork Level One Meeting Minute for 23 September 2010 e) Your email to Nick Smith of 16 September 2010 (**CEC00034471**) and attachments (**CEC00034472** and **CEC00034473**). Why was this advice being tendered to the Council at this time? Was there a particular concern on their part which lead to it being requested? Why had a decision been taken to elevate the role of TEL? f) Email with a new Project Carlisle Proposal from Martin Foerder to Steve Bell forwarded to you and others on 13 September 2010 (**TIE00667409** and **TIE00667410**) g) Email from Tony Rush to you dated 7 September 2010 (**CEC00098384**) h) Email from Tony Rush to your dated 3 September 2010 (**CEC00207451**). What is the 'clandestine agreement' mentioned there? Is it the same matter considered in the email to you from Tony Rush on 11 August 2010 (**CEC00215951**) and the email string between the two of you from 5 August 2020 (**CEC00337896**)? i) The email from Brandon Nolan attaching Lord Dervaird's adjudication decision on the Murrayfield underpass. j) Instructions to Richard Keen QC with email from you dated 22 June 2010 (**CEC00337188**). k) Your email to Brandon Nolan of 21 February 2010 recording a discussion with Willie Gallagher (**CEC00649800**)

l) The email from Stuart McGarrity to you dated 15 February 2010 (**CEC00605552**). The attachments to this and the attachments to the attachments (**CEC00605553** to 658) provide an overview of Pitchfork and it would be helpful if you could narrate the history of this?

CEC00605553 to 658 should be CEC00605553 to 568

m) In his email to you and others dated 26 January 2010 (**CEC00551040**), Richard Jeffrey suggested an action to clarify the meaning of schedule 4. Why was this not done?

n) A report was obtained from Robin Bois Brooke (see **CEC00579043** and **CEC00579044**). He agreed with the view that design development that could have been foreseen by a contractor would be deemed to be included in the Contract Price bot concluded that the changes made to the Bankhead Drive retaining wall and some of the changes in respect of track drainage went further than this so were Mandatory TIE changes. Despite this view, it appears that TIE ultimately paid BSC on the basis that *all* changes would have to be paid for. Why was this? What effect did RBB's comments on the two specific matters he was asked about have on the TIE position?

128. What lay behind the switch to mediation in November / December 2010?

129. What was your role in relation to Remediable Termination Notices? Did you advise on this part of the strategy generally? There was advice from counsel later to the effect that it would not be safe to proceed on the basis of these notices. Why was that? What effect did it have on the TIE strategy?

Reports on design liability

130. The report prepared by Torquil Murray in 2010 (**CEC00548227**) noted that the wording of the novated design contract was such that *any* change in design documents would generate a Mandatory TIE Change and that, because the design at novation was poor, INFRACO were free to claim for all actions to remediate this? Can you comment both on his view taken of the contract and the state of design at novation? Can you comment on the other aspects of the report and in particular the view that recovery would be possible wherever there was a change from the BDDI? This is at odds with the basis on which the DRP had been conducted over the preceding two years. At paragraphs

	4.17 and 4.19 TM notes that the issue of whether the Deliverables comply with INFRACO Proposals and Employer's Requirements and the design delivery programme are things that only INFRACO could have checked out. That being so, why was Part 4 drafted in such a way that it was an assumption that meant that INFRACO would get more money if it was not the case?
131.	The terms of the report from TM are very different from the one you prepared and revised for 28 September 2009 (**CEC00801438** and **CEC00801439**). Can you comment?
132.	Another report related to this issue but with a different focus was issued by DLA on 24 July 2009 (**CEC00810434**). What was the context in which this advice was sought? Did you agree with the view expressed in the report that a term could be implied that would require provision of a certain amount of information by INFRACO if they claimed that there was a Notified Departure. This Note also considers the question of whether late provision of design information can be a Notified Departure where, after novation, the obligation to provide information rests with INFRACO. It seems odd that failures on the part of SDS were to be treated as Notified Departures in this situation. Can you comment? Was this point considered when the contract was being drafted – it was known at that stage that the design contract would be notated to INFRACO? Although a Notified Departure does not arise if due to a breach of INFRACO obligations, it is difficult to reconcile that with the inclusion of design failings when that contract was to be novated. Again, can you comment?
133.	Can you explain the DLA Note of Advice on INFRACO Design Responsibility dated 9 February 2009 (**CEC01033533**)?

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SUPPLEMENTARY NOTE TO WITNESS

The documents other than the DLA letter in their final form are attached to an email from Graeme Bissett dated 12 May 2008 (**CEC01338846** to **CEC01338854**).

The DLA Advice Letters

1.	It appears that the advice was made up of three letters; one letter is dated 12 March (**CEC01351479**), one is dated 18 March 2008 (**CEC01351480**) and the third is dated 28 April 2008 (**CEC01351481**) – these are all attachments to an email from Graeme Bissett dated 8 May 2006. Is this correct or are there additional and/or alternative letters? These reports were intended to update a letter provided for the Council on 16 December 2007 (**CEC01448715**) in relation to the decision that was taken then.
2.	The letters are pieces of work clearly for the benefit of CEC rather than TIE. This seems to be a deviation from the position that governed most of the work where in terms of the duty of care letter it was made clear that the instructions were from TIE. Can you comment?
3.	Towards the end of the letter of 12 March, there is a comment that DLA have been asked to state the position in relation to procurement risk and this suggests that they had been informed of the matters that the letter had to cover. Was there a specific request for it and, if so, did it determine the scope of advice to be given? An email from GL to GB copied to you dated 9 March 2008 (**CEC01489942**) refers to the contents of the DLA letter and states that it is to include a statement that the terms of the contract reflect the commercial position agreed, that the terms are consistent with market terms and closing diligence caveats. Were there any other such stipulations as to contents?
4.	A draft dated 10 March of the letter sent on 12 March can be found at **CEC01393822**. The following differences are apparent:

(a) It does not have the text at the end of the first paragraph noting that all instructions come from TIE and that the instructions are consistent with the Council's instructions and interests. Why did you add this between 10 and 12 March?

(b) The draft does not contain the statement of DLA's role under the heading 'Programme' why was this added?

(c) On 10 March the draft said that there were no significant legal issues outstanding whereas the final version two days letter said that there are only 'limited' legal issues outstanding. What caused the change? Which issues were outstanding and why did you consider them limited?

(d) The draft letter noted that the Novation agreement results in retained SDS performance risk for TIE but this was deleted. Why was this done?

5. By email of 11 March 2008 to you, Graeme Bissett suggested changes to the draft letter of 10 March (**CEC01541242**, **CEC01541243** and **CEC01541244**). This was part of a pattern in which Mr Bissett took a very significant role in relation to these documents Did it surprise you to have one client dictating what you should say in a report to another client? The letter suggests that Stewart McGarrity might wish to make further comment in relation to risk. Did he? The 10 May version of the letter was emailed to various Council personnel on 10 Match by Graeme Bissett (**CEC01393819** to **CEC01393823**). Why was this done and why was it him doing it rather than you?

6. Your reference was on earlier drafts (eg **CEC01544147**) but was removed for the final version. Why was this done?

7. In the various drafts, the risk is presented in similar form and proceeds on the basis that

> *"Our view on the contractual allocation of risk and responsibility between tie Limited and the competitively selected private sector providers remains that the Infraco Contract and the Tram Supply and Maintenance Agreements* ***broadly aligned*** *with the* ***market norm*** *for UK urban light rail projects,* ***taking into account****: the* ***distinct characteristics of the Edinburgh Tram Network and the***

	attitudes of BBS and SDS to novation. *(emphasis added)"* Can you comment on this and, in particular the matters in bold? What information did you have available to you as to the norm for allocation of risk in UK urban light rail projects? How were the provisions of Part 4 of the Schedule reconciled with this? What were the characteristics of the Edinburgh Tram Network which you felt had to be taken into account? How did the approaches to novation affect allocation of risk?
8.	There was a further letter of 18 March 2008 (**CEC01229872**). This reflected negotiations that had taken place on some key elements but the changes to the letter are not material.
9.	In the version dated 28 April 2008 (**CEC01351481**) sent out under cover of an email from Graeme Bissett dated 8 May 2008 (**CEC01351475**) the section on risk refers to the fact that there will be a BBS request for an immediate contract variation to accommodate the new programme. The blame for this is attributed to SDS and CEC. Can you explain this? The note says that TIE are 'prepared for' the request but does not say what this means. Can you comment? Was it accepted that it was valid or was it planned to resist it? Had there been any discussions in relation to this matter?. The letter also states that Part 4 has been *"extensively discussed"* (para 11.3) over the preceding six weeks and was settled as to assumption, VE, provisional sums and fixed prices. Can you elaborate on those discussions? It said that TIE has assessed the likely financial impact of the assumptions not holding true and triggering changes. What was the basis for this latter statement? Were you party to the assessment or were you provided with details of it? What was the likely financial impact? No notice is given to CEC as to this impact. As it was a key risk, would it not have been appropriate to do so?

The Close Report

10.	It appears that you had significant involvement in revising drafts of this report although formally it ran in the name of TIE. Can you give a full account of your involvement?

11.	An email dated 15 January 2008 from GB copied to you (**CEC01429681**) which noted that the Close Report must report material changes from position reached at 20 December. The word 'material' is underlined. Do you consider that the material changes were reported? In particular, do you consider that adequate information was given about Schedule Part 4 and its effects?
12.	In the Close report (**CEC01282116**) under the heading 'Price Certainty Achieved' the INFRACO price is described as 'firm'. Standing the terms of the Schedule Part 4, do you consider that this was this a description which would convey to its intended reader(s) the full scope of uncertainty in the price?
13.	In an email from Jim McEwan to GB and others dated 10 March 2008, he suggested that you should review the sensitive area of the comments on the Report on price movement post preferred bidder selection (**CEC01550626** and **CEC01550627**). Did you do so?

Report on INFRACO Contract Suite

14.	The early drafts of this are title "DLA Report .... etc". Later, the heading is "TIE Report .... etc" (see CEC01486859 where, although the file is called 'DLA Report etc', the document bears the title 'TIE Report .... etc'). Later still, it just says "Report ..... etc". Why was this change made? It seems clear that the Report was drafted by you/DLA and that is was hived out of the Close Report.
15.	An early copy can be found attached to email from Graeme Bissett to you and others dated 11 March 2008 (**CEC01428730** and **CEC01428734**). This said that the principal pillars of the contract in terms of programme, cost, scope and risk transfer have not changed materially since October 2007. This statement remains in the subsequent drafts. Do you consider that it is accurate? There was undoubtedly a transfer of risk in the drafting of Part 4 of the Schedule. The report recognises that risk allocation has been altered but states that this has been adequately recognised in *"suitable commercial compromises"*. What commercial compromise was obtained in response to the development during 2008 of the terms of Part 4 of the Schedule?
16.	A new version of 19 April 2008 is attached to an email from Graeme Bissett

	(**CEC01282113**). There is a reference to the assumptions and the possibility of Notified Departures on page 4. This has little prominence. There is mention of the fact that BBS will seek a ND following signature but does not say that the contract stated expressly that there *will* be a NB as soon as it is signed. Do you agree that the terms of the report play down the possible effect of Part 4 which was apparent in your advice in it at an earlier stage?
17.	New Versions were attached to email of 28 April from Graeme Bissett (**CEC01312358**). The version of The DLA Report on INFRACO Contract Suite (**CEC01312364**) is relevant. In relation to the programme the statement as to BBS seeking an immediate Notified Departure on signature has been further qualified. It states that there is an obligation on BBS and SDS to mitigate and that the risk has been assessed in detail by TIE and *"confirmed as acceptably within the risk contingency"*. What was the basis for this statement? What assessment had you seen which confirmed this?
18.	The next version supplied under cover of the email from Graeme Bissett dated 8 May 2008 (**CEC01351475**). Under the heading programme it still notes that BBS will seek a Notified Departure in relation to the programme due to SDS delay in design production. It says that the *"The exposure has been assessed in detail by tie and confirmed as acceptably within the risk contingency."* What was the basis for this? Did you see the assessment? By whom was it undertaken? What was the outcome?
19.	An email from you to Susan Clark dated 8 March 2008 (**CEC01516428**) notes that the Report will point out unusual features / risk allocation of the contract suite. In this context 'Report' appears to mean this report rather than the DLA letter. Were you given any other requirements as to content? Do you consider that the Report as it developed did point out unusual features and risk allocation?

Delay in concluding contracts

20.	In a letter to CEC of 16 December, it was indicated that the preferred date for closing the contract was 28 January 2008. In fact it was not concluded until May In your view, was the original estimate a realistic one? What caused the

delays from January until May?

APPENDIX 3 – TABLE SHOWING WHERE INQUIRY'S QUESTIONS ANSWERED

Note: This table identifies where the Inquiry's Questions and Supplementary Questions have been addressed in the statement. However, the statement should be read as a whole.

Inquiry Question	Paragraphs in statement
1)	3.12 – 3.17; 4.7-4.10; 4.43-4.45
2)	1.3; 4.12-4.15
3)	1.1-1.4; Appendix 1 (Mr Fitchie's CV)
4)	4.17-4.20; 10.1-10.26; 7.54
5)	10.28-10.41; 11.4-11.5; 7.36-7.38
6)	3.12-3.22; 8.94
7)	7.48 – 7.71
8)	7.66
9)	11.78-11.85
10)	7.58-7.63
11)	7.41-7.46
12)	7.68-7.71
13)	7.72
14)	7.73
15)	10.1-10.10; 10.20-10.29
16)	10.43-10.44
17)	10.47-10.49
18)	10.50-10.51
19)	4.112-4.122; 4.124-4.128
20)	4.112-4.122; 4.130-4.141
21)	4.137-4.141
22)	4.112-4.122
23)	7.518-7.536; 7.558-7.561
24)	4.148-4.152
25)	4.12-4.20; 4.65-4.77
26)	4.154
27)	4.143-4.146
28)	4.156-4.163
29)	a) 5.1 b) 5.5-5.6 c) 5.7-5.14
30)	Generally – 5.16 – 5.70 a) 5.26 – 5.31 b) 5.33-5.37 c) 5.39 d) 5.41-5.46 e) 5.48-5.54 f) 5.56-5.57 g) 5.59-5.64 h) 5.66-5.68 i) 5.70
31)	5.79 – 5.80; 5.89-5.99
32)	5.124-5.126
33)	5.101-5.107; 5.177-5.203
34)	a) – c) 5.109-5.113 d) 5.121-5.122
35)	5.115
36)	5.117-5.119
37)	5.160-5.170
38)	5.85-5.87; 5.89-5.99; 5.134; 5.136-5.158
39)	5.171-5.175
40)	5.72-5.77
41)	7.427-7.432
42)	11.89-11.97
43)	7.405-7.426

44)	5.188-5.203
45)	5.220-5.225
46)	6.18-6.32
47)	6.41-6.45
48)	6.47-6.53
49)	6.55-6.69
50)	6.34-6.39
51)	7.518-7.536
52)	11.105-11.108
53)	7.27-7.32
54)	11.109-11.113
55)	11.49-11.52
56)	11.32-11.35; 4.54
57)	7.180-7.184
58)	7.184-7.199
59)	7.396-7.403
60)	13.2-13.5; 7.508
61)	7.123-7.132
62)	5.128-5.132
63)	7.488-7.491
64)	11.100-11.101; 11.116-11.133
65)	7.256; 8.49-8.52
66)	13.7-13.10
67)	7.563-7.574
68)	7.234-7.235; 7.240-7.244; 7.249-7.251
69)	7.240-7.252; 7.343
70)	7.237-7.241
71)	7.263-7.270; 7.275-7.278; 7.283 *et seq*
72)	7.245
73)	7.246-7.249; 7.258
74)	7.337-7.342
75)	7.344-7.349
76)	7.350-7.351
77)	7.234; 7.248 *et seq;* 7.283 *et seq;* 7.352-7.357
78)	7.352-7.357 (documents referred to are identical to those referenced in Question 77)
79)	7.360-7.363
80)	7.364-7.365
81)	7.297-7.310
82)	7.366-7.368
83)	7.319-7.323; 7.369-7.374
84)	7.376-7.381
85)	7.234-7.323
86)	7.325-7.329
87)	11.66-11.71
88)	11.66-11.71
89)	8.105
90)	4.54-4.58; 4.34 – 4.36
91)	4.37-4.42
92)	4.50-4.52
93)	11.78-11.85
94)	11.24-11.26
95)	11.14-11.18; 5.96 *et seq;*
96)	4.60-4.63
97)	8.113-8.114
98)	8.134-8.137
99)	8.115-8.122
100)	8.114-8.131
101)	8.132-8.133
102)	8.138-8.141
103)	7.133; 8.58; 4.134-4.135

104)	8.16-8.26
105)	8.13 *et seq*; 7.535
106)	7.255; 8.53-8.57
107)	8.33-8.34
108)	8.35-8.37
109)	5.218
110)	8.98-8.99
111)	8.47-8.48
112)	8.65-8.67
113)	8.100-8.103
114)	8.59-8.63
115)	8.162-8.167
116)	8.82-8.92; 8.67
117)	8.93; 8.95-8.96
118)	8.73-8.75
119)	8.75-8.80; 8.177
120)	8.177; 8.73 *et seq*
121)	8.173-8.175
122)	10.46
123)	8.202
124)	8.143-8.144
125)	8.146 *et seq*; 8.169-8.171
126)	8.69-8.71; 8.146-8.160
127)	Generally 8.179 *et seq* a) 8.180 b) 8.181 c) 8.182 d) 8.183 e) 8.184 f) 8.185 g) 8.186 h) 8.187 i) 8.188 j) 8.189 k) 8.190 l) 8.191 m) 8.192 n) 8.192.3
128)	8.104
129)	8.148; 8.117-8.124; 11.22
130)	8.194-8.210
131)	8.211
132)	8.213-8.220
133)	8.221

Inquiry Supplementary Questions	Paragraphs in statement
1)	11.53
2)	11.54-11.55
3)	11.56-11.65; 11.76; (also 11.49-11.50 regarding earlier versions of the letter)
4)	11.77
5)	11.66 – 11.74
6)	11.75
7)	11.109 - 11.112
8)	11.86 – 11.88
9)	11.89 – 11.101; 11.172; 10.75; 7.285; 7.307-7.318
10)	11.139-11.148
11)	11.149-11.150

12)	11.151-11.152
13)	11.153-11.154
14)	11.156-11.160
15)	11.163-11.167
16)	11.168-11.170
17)	11.171-11.172
18)	11.171-11.172
19)	11.161-11.162
20)	7.576-7.582

APPENDIX 4

LIST OF ABBREVIATIONS

BAFO = Best and Final Offer
BB = Bilfinger Berger
BBS = the Bilfinger Berger – Siemens consortium (pre-addition of CAF)
BDDI = Base Date Design Information
BOOT = Build-Own-Operate-Transfer
BOT = Build-Operate-Transfer
BSC = the Bilfinger Berger – Siemens – CAF consortium (post-addition of CAF)
CEC = the City of Edinburgh Council
D&W = Dundas & Wilson
DBFM = Design Build Finance Maintain
DBM = Design-Build-Maintain
DBOM = Design-Build-Operate-Maintain
DLA Piper = DLA Piper (Scotland) LLP (except where context denotes other bodies within the DLA Piper group)
DPOFA = Development Partnering Operating Franchise Agreement
DRP = Dispute Resolution Procedure
EARL = Edinburgh Airport Rail Link
EPC = Engineering and Procurement Contract
ERs = Employers Requirements
FOISA = Freedom of Information (Scotland) Act
IFC = Issued For Construction
Infraco = Infrastructure contract
the Inquiry = The Edinburgh Tram Inquiry
ITN = Invitation to Negotiate
LAC = Legal Affairs Committee
LB = Lothian Buses
MUDFA = Multi Utilities Diversion Framework Agreement
PA1 = Pricing Assumption 1, within Schedule Part 4 of the Infraco contract
PB = Parsons Brinkerhoff (also referred to as SDS interchangeably)
PCG = Parent Company Guarantee
the Project = The Edinburgh tram project
PSCD = Planned Service Commencement Date
PSSA = Princes Street Supplemental Agreement
PUK = Partnerships UK
PWC = Price Waterhouse Coopers
QRA = Quantitative Risk Analysis
RTN = Remediable Termination Notice
SDS = Scheme Design Services
SP4 = Schedule Part 4 of the Infraco contract
TEL = Transport Edinburgh Limited
TIE = Transport Initiatives Edinburgh Limited
TSS = Technical Support Services
Tramco = Tram vehicle supply and maintenance contract

APPENDIX 4 TO STATEMENT OF ANDREW FITCHIE – TABLE SHOWING ADDITIONAL DOCUMENT REFERENCES AND CORRECTIONS OF MINOR ERRORS

Note: Where 'Additional Documents' are referred to these have been provided to the Inquiry but do not yet appear on Haymarket.

PARAGRAPH	CHANGE
2.21	3rd sentence: Insert: '(CEC01711054)' after 'to her' Final sentence: Replace: 'October' with 'December' Insert: (CEC01506475) at end.
2.133	Replace: 'the basis for' with 'at the heart of the'
2.142	Insert: (CEC02084855) at end
2.143	Insert: ' , I believe, ' before 'at £2.7 million'
2.164	Replace 'unless' with 'until'
2.168	Insert: (CEC00145837) after '13 March 2009'
2.211	Insert: (CEC01312360) after '12 March 2008'
2.214	Insert: (CEC01347796) after' 18 March 2008'
2.223	Insert: (CEC01033532) after 'letter to CEC'
3.23	Replace: 'came into' with 'became'
4.4	Replace "Beattie' with 'Beatty'
4.31	Insert (CEC01351476) after '29 versions'
4.39	Replace: 'October' with 'December' Insert: (CEC01711054) after 'So I did'
4.54	Insert: (BFB00097935; final version) after 'under the Infraco Contract'
4.67	Insert: (Additional Document 1) after 'commercial bank financing'
4.92	Insert: 'and MUDFA' after 'design for the Infraco' Replace: 'procurement' with 'procurements'
4.103	Insert '(Additional Document 2)' after 'retaining us'
4.105.3	Insert: (CEC01015023 pp.111-112) after 'Public Realm works'
4.117	Insert 'and' before 'were familiar with'
4.159	Footnote 15 – Insert '-CEC01880646' after '4.107'
4.163	2nd sentence - Replace: 'Issue' with 'The SDS bidders were issued at ITN with'

5.5	5th sentence - Replace: 'contract' with 'contractor'
5.37	Replace: 'CEC01712262' with 'CEC01712262'
5.73	Insert: footnote 23 after '2007 on the SDS Contract' to read: 'See paragraphs **Error! Reference source not found.** and **Error! Reference source not found.**'. Re-number all subsequent footnotes accordingly. Insert: '(CEC00810434)' after 'report on the SDS contract'
5.76	Replace: 'it's' with 'its' after 'CEC would direct'
5.99	Insert: 'and' after 'design production delay'
5.128	Replace: 'with' with 'through' before 'me at this stage'
5.132	Delete: 'had' before 'evaluated BAFOs'
5.157	Insert: 'Engineering Director and then' before 'Project Director'
5.158	Insert: (CEC01338853) after 'TIE's Close Report'
5.164	Replace: CEC0164232 with CEC01642352
5.166	Replace: £2.856,724 with £2,856,724
5.172	Insert: (CEC01629809) after 'Gilbert'
5.178	Insert: (CEC02085580 & PBH00026254) after '£2.86m' Insert space after '5.193'
5.184	Insert: (CEC01629809) after 'August 2007'
5.198	Insert: (CEC01488889) after ''TIE on the SDS claims'
6.19	Replace last sentence with: 'I do not now recall the exact date of the TSS appointment but they had not been a party to TIE's consideration of its procurement strategy in 2004/5.'
6.35	Insert: '(Additional Document 3)' after 'important agreements'
6.56	Insert: (CEC01621726) after '*Contract Improvements*"'
7.30	Insert: (CEC01560936) at end.
7.58	Replace: 'October' with 'December' Insert: (CEC01506475) after 'December 2007'
7.78	Replace: 'I was present at the straight financial discussions' with 'DLA Piper was not present at the straight financial discussions between TIE and its two bidders during the pre BAFO negotiations'
7.103	Delete: '(discussed at paras. 0)'
7.129	Replace: 'Jeffrey' with 'Walker'
7.132	Replace: '8.51' with '**Error! Reference source not found.** (penultimate bullet point)'

7.133.2	Revise 3rd sentence to: 'I advised TIE that if BB was unable to provide its intended subcontractors with SDS scheme designs matching TIE's ERs, for use in building up basic Bills of Quantity, then BB UK would only provide TIE with indicative prices.'
7.134	Insert: (CEC02085660) after 'December 2007'
7.137	Insert: 'DLA00002790, DLA00002791, DLA00002792, DLA00002793, DLA0002795, CEC00547731, CEC00547740, CEC00547740' before 'see below at paragraph 7.191'
7.174	Insert: (CEC01546423 attaching CEC01546424) after 'I believe'
7.178	Replace: 'reports, though' with 'reports. Though'
7.182	Insert: (see for example DLA00002789) after 'clarity'
7.184	Revise final sentence to: 'And so; on the 18th December, it was Alastair Richards, not Mathew Crosse or Geoff Gilbert or Willie Gallagher, who provided me with an unsigned and incomplete version of what seemed to have been discussed (See CEC00605720 for my response).'
7.187	Insert: '(CEC00605720).' after 'that afternoon'
7.188	Insert (DLA00002789) after 'review of Wiesbaden' Replace: 'under 6th February 2010' with 'until 6th February 2008'
7.191	Insert: (CEC00547740) after 'wrote to Geoff Gilbert'
7.199	Delete additional ':' at end
7.199.2	Insert: '(' before '"BDDI")'
7.203	Insert: (CEC00547780) after 'confirms this'
7.206	Insert: (CEC01363703, at p.5) after '19th December 2007'
7.208	Insert: 'Project' after 'The TIE'
7.212	Insert: (CEC01400299) after 'contract acceptance'
7.214.6	Insert: (CEC02084855) after 'Square Agreement'
7.227	Insert: (CEC01422803) after 'February 2008'
7.239	Replace: DLA00006341 with DLA00006343
7.242	Insert: 'in SP4' after 'involvement'
7.243	Revise 1st sentence to: 'I recall going to two initial meetings on SP4 (5th and 6th February) when I anticipated risk allocation principles were going to be discussed and another on 11th March 2008'
7.258	Replace: '6th and 7th February' with '5th and 6th February 2008'
7.262.1	Insert: (CEC00592619) after 'closed'
7.262.4	Replace: CEC014478862 with CEC01448862

7.262.5	Insert: (CEC01450182) after 'that day'
7.263	Replace: 'CEC01448355 /356' with 'CEC01514107; CEC01448355; CEC01448356'
7.297	Insert: (CEC01466394) after '31st March 2008'
7.298	Insert: (CEC01465878) after '31st March 2008'
7.300	Insert: (CEC01466394) after 'some detail'
7.313	Insert: (CEC01015023) after '23rd January 2008' Insert: (CEC01015023 at pp.23-34) after 'Dec. 2007' Insert '.' at end
7.329	Replace: CEC01213521 with CEC01213251
7.337	Replace: CEC00149876 with CEC01449876
7.342	Insert: (CEC01449710) after '25th February'
7.343.2	Replace: (CEC0060555 and/60) with (CEC00605557 and /CEC00605560)
7.344	Replace: 'CEC01450182/183 and CEC01450309/10' with 'CEC01450182/CEC01450183 and CEC01450309/CEC01450310'
7.345	Replace: CEC0059268 with CEC00592628
7.347	Insert '– CEC02084776' after 'Geoff Gilbert's notes'
7.353	Change reference to: CEC01543499
7.358	Insert: (CEC00327764) after 'up to that point'
7.368	Insert: 'meeting and what I have described as my and DLA Piper's involvement' at end.
7.374	Insert: '(Additional Document 4)' after 'May 2008'
7.376	Insert: 'CEC0137' before '4220'
7.384	Insert: ', post Wiesbaden' after 'PA1'
7.395	Insert: '?' at end.
7.414	Insert: 'I believe' at start
7.435	Insert: (CEC02084855) after 'Agreement'
7.442	1st sentence Insert: 'the draft pricing schedule,' after 'this was why'
7.467	Insert '.' after 'negotiation rules'
7.470	Insert: '(see TIE00678587)' after 'negotiations at Citypoint' Insert (See Additional Document 5) after 'Citypoint offices'
7.478	Insert: ' – ' after 'bonding'

7.480	Insert: '(Additional Document 6) after ' January 2008'
7.493	Insert: (WED00000023) at end.
7.496	Insert: (CEC01338846 attaching CEC01338847) at end
7.500	Insert: '(see para **Error! Reference source not found.** *et seq*) after 'already showed'
7.506	Insert: (WED00000023) after 'at the meeting'
7.508	Insert: (TIE00679381) at end
7.512	Insert: (Additional Document 4) at end
7.514	Insert: (CEC01338847) after 'May 2008'
7.519	Replace: 'legal function' with 'contractual provision'
7.527	Insert 'is' before 'supportive'
7.541	Replace: 'They had' with 'I recall they had'
7.543.2	Replace: 'part of this' with 'part of the reason'
7.544	Insert: (CEC01374219) after 'SP4'
7.548	Insert: 'million' after '£13.8'
7.552	Insert: (Additional Document 7) after 'approvals risk'
7.559	Replace 'Clause 2.6' with 'Appendix Clause 2.6 (CEC02084855)'
7.560	Replace: 're-application or the application' with 'disapplication'
7.563	Insert: 'under the Infraco contract' after 'made to BBS'
7.576	Insert: (CEC01500975) after '17th December 2007'
8.13	Insert: '.' After 'years later'
8.36	Replace references at start with: CEC00901460 and CEC00901462
8.45	Replace: 'early 2010' with 'mid 2010'
8.52	Insert: 'to' after 'In order'
8.53	Delete: '/002'
8.54	Insert ((part of CEC01010525 chain) after '19 February 2009'
8.78	Replace: 'remedial' with 'remediable'
8.80	Replace: 'challenge' with 'Carlisle'
8.90	Insert: ', Notice' after 'Carlisle
8.131	Insert: (CEC00145837) after 'Agreement confirms'
8.136	Insert: (CEC00145837) after 'Supplemental Agreement'

8.143.1	Replace 'where' with 'that' after 'arguable case' Delete: 'and continuing'
8.182.1	Insert: (CEC00129799) after '24th September 2010'
8.183.1	Insert: (CEC00220060) after 'located this'
8.187.5	Insert: (CEC00337893) after 'Reynolds'
8.191.5	Insert: (CEC00605553) after '2010 email'
8.191.5; 8.191.6; 8.191.7; 8.191.8; 8.191.9.10;	Insert additional '5' as 9th digit of references
8.191.9.11	Insert '0' as 7th digit of references
8.214	Insert: (CEC00145837) after 'agreement'
8.218	Insert: '.' after '7.316'
8.223	Insert: '.' at end
10.9.6	Insert: '.' After 'engineering role'
10.9.7	Insert: 'had ceased' at end
10.16	Replace: 'possibly early February 2008' with 'probably autumn 2007'
10.17	Replace: 'transport' with 'Transport' Replace: 'managing' with 'supporting TIE's management of'
10.42	Replace: 'sometime' with 'sometimes'
10.44	Replace: 'perception at' with 'perception about'
10.60	Insert: '(eventually, I believe, settled at £2.7 million)' after '£3.2million'
10.75	Insert: 'at Tie' after 'Hamill' Replace: 'DLA piper' with 'DLA Piper' Delete additional '.' at end of 5th sentence
11.17	Replace: ', or whoever was in charge of making this decision to sign the operating agreement' with 'to a close on this'
11.22	Insert (CEC00337189) after 'Dean of Faculty'
11.24	Insert: (CEC00145837) after 'Supplemental Agreement'

11.26	Replace: CEC00097639.0001 with CEC00098050 Delete: (CEC00097693.0002)
11.31	Insert: (on which see CEC01651033 and CEC01651034) after '30th August 2007'
11.39	Replace: '11.141' with '11.135' Replace: 'sign' with 'signed'
11.40	Insert: (both at Additional Document 8)
11.46.5	Replace: '17th' with '7th' Insert: (CEC01526422 at 3.8) after '2007'
11.49	Insert: '2007 (CEC01709800)' after '9th October'
11.53	Replace: 'CEC01351479' with 'CEC01312360' Insert: (CEC01033532) at end
11.56	Insert: (CEC01351479) after '2008 was issued'
11.56.1	Insert (CEC01489942) after 'Graeme Bissett'
11.56.4	Insert: (CEC01516428) after 'Clark that day'
11.65	Insert: (Additional Document 9) after '12th May 2008'
11.77	Insert: (see CEC01544148) after 'the final wording'
11.95	Insert: 'project' after 'assessment, planning and' Insert: 'tasks' before 'that were the 'bread and butter' Insert: 'that' after 'I therefore believed' Insert: 'these activities' after 'TIE was undertaking'
11.96	Insert: (see para **Error! Reference source not found.** et seq) after 'seat as regards Notified Deopartures'
11.102	Insert: (CEC01033532) after ' 12 May 2008'
11.123	Insert: (see CEC01650759, CEC01651033 and CEC01651034) after 'August 2007 workshop'
11.127	Insert: (CEC01560935) after '29 August 2007'
11.131	Correct reference to: CEC01443991
11.132	Insert: (CEC01347795) after 'allocation of risks"' Delete: ',' at end
11.135	Insert: ' – Additional Document 10' after 'dated Dec 06/January 07'
11.136	Insert: (Additional Document 11) after '2nd October 2007'

11.141	Replace: '3 days' with 'the day'
11.153	Replace: DLA00006378 with CEC01463884
11.158	Insert: (see Additional Document 12 with attachments) after 'FOISA concerns' Insert: (CEC01338851) after 'Council Guarantee"'
11.161	Insert: (CEC01516428) after '8 March 2008'