Edinburgh Tram Inquiry Office Use Only
Witness Name: Richard Walker
Dated: 30/6/17

The Edinburgh Tram Inquiry
Witness Statement of Richard Walker

Statement taken by Adam Hoy on 17th August 2016. Solicitor, Louise Forster also in attendance.

My full name is Richard Walker. I am aged 59. My contact details are known to the Inquiry.

I have now retired from employment. My last role prior to retirement was as Project Director for the Mersey Gateway Civil Contractors Joint Venture contracted by Merseylink, a construction consortium which was appointed in March 2014 as the project company to design, build, finance and operate the Mersey Gateway Project. I commenced employment on this project in October 2014. My role in the tram project was as Managing Director at Bilfinger between May 2006 and September 2011.

This statement should be read in conjunction with the statement that I prepared with the assistance of Pinsent Masons LLP, signed on 12 February 2016 and sent to the Edinburgh Tram Inquiry on 2 September 2016. A copy of that statement is attached to this statement as Appendix 1.

Statement:

Introduction

1. Prior to Merseylink I was employed as the Director for Rail, Air and Water Projects for Balfour Beatty Major Civil Engineering and before that I was employed as the Managing Director for Bilfinger Construction UK Ltd (previously known as Bilfinger Berger UK Limited and Bilfinger Berger Civil UK Limited). I have honours degree in Civil and Structural Engineering from the University of Bradford, graduating in 1979. At the end of my university degree, I started working with Sir Robert McAlpine, who I had

worked with during my site experience at university. I worked with Sir Robert McAlpine between 1979 and 1983. I became a chartered member of the Institute for Civil Engineers in May 1983. I left Sir Robert McAlpine in 1983 due to starting a family and began working for John Mowlem Regional Civil Engineering (now part of Carillion plc). I worked for John Mowlem until 2006. During my employment with John Mowlem I was promoted from site engineer through the ranks and joined the Board of Civil Engineering in 2001. In 2003, I was appointed as the Director for Highways and Major Projects across the UK. In 2005 and 2006 while working with Mowlem, I began to work closely with Bilfinger in relation to a potential joint venture project between John Mowlem and Bilfinger Scotland (Kincardine Bridge). This opportunity did not materialise. Shortly afterwards I was approached by Bilfinger Berger AG Civil Engineering and was asked to take the lead in establishing the presence of Bilfinger's civil engineering business in the UK. Prior to 2006 Bilfinger had only completed three projects in the UK, all of which had been completed with Bilfinger acting as the minor partner in a joint venture with another contractor, although they had experience with two other tram projects in Montpellier, France in 2002 and a Tram System in Turkey between 2005 and 2006. The Bilfinger construction business had been established in the UK for many years, but the civil engineering business, which was internationally successful, was not well established in the UK. Bilfinger saw the UK market as a market which was continuing to develop, and they wanted to establish themselves as a 'Top Ten' contractor. Bilfinger had a great deal of technical expertise which needed to be adapted and applied to the UK market I have extensive experience in the UK market, knowledge of the types of contract used in the UK, legal frameworks, knowledge of the supply chain and knowledge of the safety and quality systems which are operated. Bilfinger appointed me as Managing Director of the civil engineering business on 1 May 2006. There were approximately forty five personnel in Bilfinger in 2007, and one hundred and thirty in the years 2008 to 2011, which is when I left the company. I have no knowledge of company numbers after this and cannot recall what staff were located where, as this was so long ago. I would also not be privy to any information regarding staffing numbers or organograms in relation to Seimens. The working relationship between Bilfinger UK and

Bilfinger Germany, I could only describe as very very close. The Chief Executive of Civil Engineering, Germany visited the UK once a month and I would visit Germany once a month, and sometimes in between. All business decisions in relation to Bilfinger UK were taken in the UK and reported once a month in Germany, in person, by myself and my Commercial Director, Gary Dalton, who is now deceased.

The Tendering phase of the Infraco contract (2005 to October 2007)

2. I am aware that a Prior Information Notice was issued on 6 October 2005, document reference **(CEC01792891)**, and that a Contract Notice was published on 31 January 2006, document reference **(CEC00208568).** A Memorandum of Information and Pre-Qualification Questionnaire was produced by TIE on 6 March 2006, document reference **(CEC01781572)**. The contract documents were due to be issued on 25 May 2006. In March 2006 Bilfinger Berger pre-qualified as a civil works contractor and was asked to pre-qualify again, this time as part of a joint venture with Siemens plc. Bilfinger Berger and Siemens duly formed an alliance or consortium (BSC) and pre-qualified as partners in July 2006. A record of a meeting on 7 June 2006 between TIE and BSC, document reference **(CEC01800968)**, noted that TIE's intention was to issue the tender documents in late August/early September, with tender return by the end of December 2006, with a view to contract award by July 2007 and operational trams by the end of 2010. My understanding and recollection of these matters is that Bilfinger were pushed by TIE to work with Seimens. At this time Bilfinger wanted to work with Bombardier, but Laing O'Rourke had already approached Bombardier and TIE wanted someone different. This was to be a 'build only' contract, fully designed by TIE's designer, but I only joined Bilfinger on 1 May 2006, so I only have peripheral knowledge of the Pre-Qualification Procurement Strategy. The works that would need to be carried out by Bilfinger in relation to the Infraco contract was, no design whatsoever, basically build the civil works from Edinburgh Airport to Leith, and that design would be complete before Infraco contract award. At this time it was also my understanding that the majority of utility diversion works would be complete with the remainder being complete approximately six months in advance of scheduled

construction, but TIE's programme was slipping and delayed. This programme was totally unrealistic as it was already delayed by four months and the end date had stayed the same. Between 2005 and 2007 everything just got delayed. The Chief Executive, Michael Howells and a guy called Ian Kendal left. These two had sense. With Michael Howell and Ian Kendal leaving and the design being delayed, the procurement programme changed.

3. In a letter dated 3 October 2006, document reference **(CEC01794929)**, Andie Harper, Tram Project Director, TIE, issued the Invitation to Negotiate (ITN). The date for submission of tenders was 9 January 2007. My first view of the invitation was that the deadline was tight, because the start date had slipped by a number of months and the finish date had stayed near enough the same. However, if the design was complete it is my belief that it would have been just about achievable. In Mr Harper's letter he noted that *"We are currently checking the Employers Requirements against the Contract Terms and Conditions and volume 1 of the ITN for consistency of terminology. Consequently we expect to re-issue an updated version before the end of October ..."*? This caused me to suspect that they were not really ready to issue the documents, and they were working to an unrealistic timetable. They issued them in a panic to achieve a set date.

4. In a letter dated 13 October 2006, document reference **(CEC01795260)** I advised TIE that BSC had a number of significant issues with the ITN, as listed in my subsequent letter dated 16 October, document reference, **(CEC01795314)** which precluded BSC from submitting a compliant tender and requested a three month extension to the period for submitting a tender return. It was my considered opinion that the tender was of such complexity and magnitude that the tender deliverables in the ITN were such that we would be unable to work up any meaningful affordable prices by the required return date. I therefore requested that consideration be given to extending the tender by three months. I thought the first ITN was a bastardised Private Public Partnership contract and totally unsuitable for working in an urban environment. I thought DLA Piper had done it in a way so that they had to re-write it, so that they got paid twice – totally

unsuitable. No contractor would accept it. A fixed price (with full risk transfer) contract was wholly unsuitable for the purposes of this project given the uncertainty surrounding some of the key aspects of the project, such as, design and obvious delays in utility diversion. I could not understand the motivation to attempt to let a project of that nature on such an inappropriate form of contract. After thirty years of experience of working in an urban environment I knew that it was extremely difficult and needed a flexible approach.

5. On 23 October 2006 I was sent an Email, document reference **(CEC01796267)** from Bob Dawson, TIE, which had a draft "letter of comfort" attached from CEC, document reference **(CEC01796268)** based on a similar letter adopted for the MUDFA contract. I requested this letter as the ITN and the Conditions of Contract did not appear to contemplate the insolvency of TIE. For our consortium to contract with TIE we required an undertaking from the funders to facilitate all monies becoming due under the terms and conditions of the contract in the event of any insolvency, winding up, or TIE default. I was concerned that if TIE had no financial backing and were just a shell company, we would be left in difficulty if they became insolvent (especially after the failing of E.A.R.L.). I was content after receiving the letter.

6. On 23 October 2006 I received an Email from Geoff Gilbert, document reference **(CEC01796317)** which had a list of proposed design priorities attached, document reference **(CEC01796318)**. I believe this was to try and indicate what needed to be done first to price the job, but the design was in complete disarray as the list contained virtually everything. The list was quite full, I did not think there were any main items not on the list.

7. On 25 October 2006 I was CC'd in an Email to Bob Dawson, TIE, document reference **(CEC01795913)** where BSC returned a 'mark up' of the Infraco Contract and Schedules and a document, document reference **(CEC01795948)** highlighting the key issues for BSC arising from the ITN documents. The purpose of this document was to show what was unacceptable to BSC and what would be acceptable. After this Email, I

believe that BSC were invited by TIE to a series of meetings, but I cannot recall if they took place and have no record if they did.

8. In an Email dated 25 October 2006, document reference **(CEC01823109)** Scott McFadzen, BSC, attached a document, document reference **(CEC01823110)** listing inconsistencies between the hard copy set of drawings, the electronic CD set, the drawing list attached with the documents and the Employer's Requirements. The administration of the data was in disarray. None of the information was consistent, and was impossible to price. Appendix H, Schedule Part 4, Base Date Design Information was an attempt to resolve the issue, but failed as the Appendix did not list anything. The dispute ended up being resolved by adjudication, but TIE did not accept the adjudication. The design process at this stage was woefully behind and TIE did not understand what the impact of that would be.

9. Meetings took place between TIE and BSC on 8 November 2006, document reference **(CEC01794528)** and 22 November 2006, document reference **(TIE00078323).** These meetings were in relation to the design not being in a fit state to be priced, the documentation not being in a fit state to be understood, and the conditions of the contract being unresolved.

2007

10. In January 2007 TIE issued a Supplemental Instructions to Tenderers document, document reference **(CEC01824070)**. The intention was to receive Proposals on 12 January 2007, after which further dialogue and negotiation would take place with a view to the submission of final Consolidated Proposals on 16 April 2007. During the period between 12 January and 16 April 2007 it was intended that Tenderers would be provided with further information including updated Employer's Requirements, significant development to the Preliminary Design (including surveys) carrying price or risk implications, updated traffic modelling, current programme for the MUDFA works and detailed design for key structures (with a view to Tenderers incorporating their responses

to the further information provided in their Consolidated Proposals). After submission of the Consolidated Proposals it was proposed that a number of activities would take place, including the selection of a Preferred Bidder, the release of detailed design from SDS (after nomination of the Preferred Bidder), due diligence by the proposed Preferred Bidder on price and risk critical items in the SDS design and final negotiations to settle the agreed Infraco Contract package, including firm price and scope for Phase 1a. It was anticipated that Infraco contract award would take place in October 2007. I think I was provided with approximately 10 to 15 % of the above information, but I cannot recall any detail. The term "firm price and scope", I believe, refers to a price and scope that was not going to move, and was to give certainty to Edinburgh City Council. This would only have been agreed if there was a complete design, the contract wording had been agreed and all the utilities had been moved. Due to these matters not being resolved, the anticipated date for the Infraco contract award was October 2007. When I first received the Supplemental Instructions to Tenderers document in January 2007, I knew then that it would still drift and there was not a hope in hell of it working.

11. On 26 January 2007 I was CC'd in to an Email, document reference **(CEC01789801)**. Geoff Gilbert sought Scott McFadzen's views on whether there were opportunities for significant savings, the areas that should be looked at with a view to achieving savings and whether a 10% reduction was an achievable target. This is when TIE realised that their budget was under pressure. TIE was already trying to clutch at straws financially, and they knew at that stage that it was financially unviable. Anyone asking for a 10% discount or reduction does not know what they are doing.

12. In an Email exchange dated 26 June 2007, document reference **(CEC01625845)**, between Geoff Gilbert and I, Geoff Gilbert noted that I had some concerns over the standard of drawing information provided. This was an issue due to the information being lacking and incomplete, and the scope continually altering. These matters were never fully resolved. The design around that time was abysmal. I thought the designer, Parsons Brinkerhoff ('PB') were treating the whole thing as a

training exercise for graduates, not as a project which would actually be constructed. By this I mean that I suspected that the SDS thought that the requisite funding would never be made available and therefore that their design would never have to be used.

13. In May 2007 BSC submitted its Tender, document reference **(CEC01656123)** and submitted updated proposals in August 2007 with a Schedule of Clarifications, document reference **(CEC01604676 and CEC01491869)**. I cannot recall the specific dates of the various tender returns, but if the information was incomplete, the price was qualified.

14. The utility diversion works under the MUDFA contract commenced in July 2007 with a planned duration of 70 weeks (i.e. until the end of 2008) (I note document reference **CEC01891483)**. In terms of duration, BSC did not comment on duration, but I expected work to be complete 6 months before we started engineering works. This was TIE's responsibility and was clarified in document reference, **(CEC01491869** (Para 1.6)**)**, *'Our programme and price assumes that Services; overhead, over ground and underground, will all be diverted or protected by MUDFA/others to enable us to start works as indicated on our programme'.*

15. In a letter dated 19 July 2007, document reference **(CEC01627004)** Geoff Gilbert set out the Activities to Deliver Contract Award Recommendation. It was noted: The strategy for the delivery of the tram project included *"The de-risking of the price for the works by getting sufficient design done in advance of Infraco recommendation so that risk pricing by bidders for scope and performance is minimised"* (Para 2.1). The programme had been delayed by *"Delays to the design programme resulting in the outputs required for pricing due to their difficulty in obtaining decisions from Project stakeholders. TIE have intervened now to bring about clear decision making"* (Para 2.3). TIE intended to conclude tender evaluation and negotiations by 28 August 2007, to enable TIE to make a conditional contract award recommendation to its board by 25 September (with proposed contract award in October), which recommendation would be conditional on negotiations and design due diligence (Para 2.4). To enable that timescale to be met, TIE required bids that met certain

requirements, including that bids *"Don't contain significant pricing uncertainty and risk allowances"* and "*Have a clear and agreed basis for adjustments in respect of: significant areas of design uncertainty e.g. roads, paving's and drainage; and significant quantity changes arising from completion of detailed design"* (Para 3.1). Bidders were required to update their bids for *"The further design information to be provided as the attached schedule"* (Para 3.2, 3rd bullet point). TIE required *"Details of the items bidders believe are required to enable them to deliver design due diligence for the price and performance risk critical issues"* (Para 3.3). The purpose of this letter was to articulate TIE's intended process. My view at that time was I did not think the design would be ready, but they had articulated a clear and agreed basis for adjustments. I felt that this de-risked the contract. At that time I do not actually think that the design was delayed, I think the tender process was started too early in relation to the design progress. We had caveated our submissions on the basis that the design would be complete in sufficient time for us to have been able to give firm prices. In relation to further design, we were told that TIE had intervened to bring about clear decision-making in terms of progressing the design, so we were given some confidence that the design would be ready in adequate time for us to price. It would be reasonable to say this was to be provided two months before the return date for the bid, but it was not provided within that timescale. It was my understanding that due diligence would be undertaken when it was concurrent with receipt of the design. BSC did not provide details to TIE in relation design due diligence as Geoff Gilbert, TIE, sent a list of proposed detailed design priorities, document reference **(CEC01796318)**, so I don't think BSC needed to enhance that in any meaningful way. It was envisaged and anticipated that all the design would be complete in sufficient time for us to price. I felt – and I think I voiced this concern at the time - that the tender should be delayed approximately a year to get the design completed, so the procurement timescale was totally unrealistic and not achievable.

16. In an Email dated 30 August 2007, document reference **(CEC01642812)** Geoff Gilbert sent a spread sheet, document reference **(CEC01642813)**, noting that *"Taking things in the round it doesn't look like there has been much movement"* and that *"Heads up from the contract session this*

morning is that it has not gone at all well. We need [to] settle this this afternoon". I believe the purpose of this Email and spread sheet was to put pressure on the bidder to reduce the price. I actually felt that it was designed to pressurise us to reduce the price by putting us in direct knowledge of the competition because they introduced this "normalised bid". It was basically the start of the pressure TIE applied to get the cost down and an attempt to get us to agree to things that we did not want to agree to.

17. On 20 September 2007 PB gave a presentation to both Infraco bidders, namely Scoop (i.e. the Tramlines consortium) and Roley (i.e. BBS), document reference, **(CEC00199336)**. I can recall this presentation was given by Steve Reynolds in, I think, the Kingdom Room and my recollection is that we were dismayed that the evident progress of the design was even further behind than we had been given to believe. Around that time is when I voiced my view that the tendering process should be put on hold for a year to allow the design and the MUDFA contract to be progressed to a suitable condition at the time of the Infraco bidders due diligence and at the time of contract close.

18. In an Email dated 21 September 2007, document reference (**CEC01602752**), Scott McFadzen noted that TIE had stated that it was their intention to deliver a price that was within the £219 million budget for the Infraco works. Mr McFadzen further noted that appendix 6.4 (mechanisms for adjustment of price) of the draft deal referred to three categories of provisional quantities which were subject to adjustment, whereas, 'Our understanding is that quantities in general will be re-calculated for the design current at the time of contract agreement in accordance with your paragraph "Omissions and additions to the price"'. In his reply, in the same chain, Mr Gilbert stated, 'I think that to make the price adjustable for designs at time of contract agreement as being too wide', and enclosed an updated version of appendix 6.4 (**CEC01602753**) (the reference in Appendix 6.4 to a table 'Draft deal for Infraco – areas to be finalised post preferred bidder' appears to be a reference to **CEC01631027)**. I had no idea why they had a figure of £219m. I have an issue with TIE stating it was its intention to deliver a price that was within

the £219 million budget for the Infraco works. I thought, as a tenderer, we were delivering the price, not being told the price we had to do it for. So I have got no idea where they had got it. I had no idea how they had arrived at that sum. The need for and purpose of Appendix 6.4 was to put a price on something that was not much more than a guess or a judgement at the time, it was inevitably going to need amending either up or down when the detail was arrived at, so we needed a clear mechanism that was agreed to adjust that. I don't think BBS agreed to Appendix 6.4, as the contract ended up being different. Any agreementthat the parties reached in relation to the prices being adjusted based on the design available at contract award was embodied in Schedule Part 4. In relation to BBS's due diligence, around September 2007 we were told that detailed design would be complete and all approvals and consents obtained, but in case this didn't happen, this was why we had got a price adjustment mechanism that started as appendix 6.4 and got modified into Schedule Part 4.

19. In an Email dated 2 October 2007, document reference **(CEC01604127)** Geoff Gilbert sent BBS an Index to the Draft Deal, document reference **(CEC01604128)** and the draft Preferred Bidder's Agreement, document reference **(CEC01604129)**. The purpose of these documents was to give information on what we were signing up to. There were provisional sums in the price and there was a mechanism for adjusting the price when the design came in. I cannot recall what BBS's response was in relation to these documents.

Appointment of BBS as Preferred Bidder to contract close (October 2007 to May 2008)

20. On 22 October 2007 TIE and BBS entered into an agreement relating to the Selection for Appointment as Preferred Bidder, document reference **(CEC01497399).** The purpose of this agreement was to try and articulate the areas that needed adjustment after award of preferred bidder where the design was not finalised. The main terms of this agreement was a payment mechanism and adjustment of prices for provisional and undesigned work. The relevance of the £218.5m sum noted in clause

4.3.1, I felt, was a financial gateway that I had been told to get to, or had to offer to get to. The reality appeared to be that TIE had a top price, which I understood as a "gateway" and was referred to as the "business case", which the price had to be under in order to be approved by the Council. TIE was trying to manipulate the numbers to get the price through this "gateway". TIE did not disclose to BBS what this figure was. We were simply aware that they were under pressure to get the number below a set figure in order for this "business case" to be approved by the Council. This was apparent both at tender stage and during the subsequent contractual negotiations. TIE would tell us how much we needed to take off the price to put us back in poll position to be awarded the contract. I assume that they were doing the same with the other tenderer to get the lowest possible price. At the end of this process, we still had not priced the risks in the "risk basket". These risks subsequently became embodied in Schedule Part 4. The purpose of clause 7, Due Diligence was basically to ensure that we had an opportunity to review the progress of the design such that we were making the correct assumptions. My understanding of clause 3.1, "TIE and the bidder acknowledge and agree that there are a number of matters contained in the draft deal, the Infraco contract, the SDS contract and the Tramco contract, which must be resolved before TIE seeks CEC approval to enter into the Infraco contract with PB". This was called the 'PB finalisation issues'. The PB finalisation issues were more particularly set out in appendix 7.1 to this agreement, which states, "The bidder agrees to conduct the due diligence in respect of the following: the deliverables provided under the SDS contract as defined herein in order to (a) confirm acceptance of the system performance requirements set out in employer's(?) requirements and (b) confirm the acceptability and terms of quality of the SDS deliverables produced". What this is basically saying is, the price is that number, but we will need to go and check all of this and we agree to go and look at it all and try and get a more firm price for SDS for the design issues. The time allowed for bidder due diligence of design was adequate to assess the status of the design. The bidder finalisation programme was probably not achievable because the status of the design was not as we were led to believe.

21. Discussions took place after BBS had been appointed preferred bidder. Where the design was incomplete, the progress of the MUDFA contractor was not in line with our construction programme or the agreement of the points of contract was, well, non-agreement of points of contract, then we put all those items into a schedule of items which contained risk. The main individuals (from both BBS and TIE) involved in these discussions were me and Gary Dalton from BBS, Mathew Crosse, and Geoff Gilbert; with our respective lawyers, who were Andrew Fitchie (forTIE) and Suzanne Moir of Pinsent Masons (for BBS). Following the submission of the Tender we were invited on a regular basis (maybe twice a week) for further negotiations in the run up to Preferred Bidder where we were continually and repeatedly asked by TIE to further reduce our price and accept more risk. We received confirmation that BBS had been appointed as Preferred Bidder in late 2007. I signed the Preferred Bidder Agreement on 22 October 2007. I have reviewed this Agreement again recently, and it is very clear from the words of the Agreement that there was much left to be done in October 2007 before the contract could be finalised. Appendix 1 of the Preferred Bidder Agreement contains a table which demonstrates how uncertain the Project was at that stage. This Appendix contains a huge list of major issues which needed to be finalised. The key issues in October 2007 (and prior to and after that date) were: (a) The final design was not complete; (b) The multi utility diversionary framework agreement ("MUDFA") works were not complete; (c) The status of the Third Party Agreements was unclear; and (d) The pricing was not complete. Following the award of Preferred Bidder status we then commenced a seven month process of final contract negotiations. During the negotiations, BBS were based in our office at Edinburgh Park, and I spent a lot of time between our office, TIE's office and DLA Piper (TIE's solicitor's) office. During this negotiation process we had to price the works so far as we were able and distribute the risk in the Project to the party best placed to be the owner of that risk. Where risk could be identified and quantified, BBS, as a contractor, were prepared to accept the risk and price for it accordingly. Where the risk could not be quantified or even identified in some instances, we negotiated the contract to ensure that that risk sat with TIE, as the majority of the risk items were their responsibility such as MUDFA, Design and Third Party Agreements.

These uncertainties continued throughout the contractual negotiations as none of the issues were capable of being resolved during that period. By this I mean that the MUDFA works were still on-going, the Design continued to be developed and the Third Party Agreements had still not been finalised. The exact risk and costs associated with these uncertainties could not be calculated. At no point in the negotiations were we allowed access to the Designer. As a result, the concept of a "risk basket" was developed by Pinsent Masons, where everything which we did not know, or could not quantify would be put in the "risk basket" to be dealt with later. This "risk basket" later became Schedule Part 4 of the Infraco Contract. Those things which were known were properly priced and the risk was passed to BBS. Everything else went into the "risk basket". BBS were not willing to take on the risks of the unknown. The design, and in some places, the concept were still entirely unknown in 2007, so BBS could not, and should not, take the risk for that. The design was also constantly changing, which meant that prices and the tender quickly became incorrect following the design changes. In order to have a base line design which we could price, the concept of the Base Date Design Information ("BDDI") was developed. This is referenced in Schedule Part 4 of the Infraco Contract, and is defined as the design as at 25 November 2007. This was purely for the purpose of having a base line to price for the Project. Changes from BDDI to Issued For Construction (the final design which we were to build to), were to be treated as Notified Departures entitling us to additional time and money. We were subsequently given design information on 5 discs which we understood to represent the BDDI (although TIE subsequently disputed this in one of the adjudications which we had in relation to Tower Place Bridge). BBS carried out a due diligence exercise on the design and produced a report on 18 February 2008. I have reviewed this again recently, and the main issues are perfectly summarised: *"Contrary to tie's original intention for this project stage, the design is incomplete and will require significant further development. Several sections are currently under re-design and the final concepts are unknown to us. According to the SDS document tracker more than 40% of the detailed design information has not been issued to BBS at the abovementioned cut-off date. ... For many areas the 3rd party approval status is not clear. Formal TIE / CEC design approvals*

are generally outstanding. Not a single design element has received approval and has been issued for construction. ... In accordance with tie's original procurement concept a complete and issued for construction design would have been novated to the Infraco. The current design is far from meeting these requirements and, as consequence, a novation is considered to present significant and unforeseeable risks to the project." This summarises the main risk associated with the design - which it was incomplete and therefore could not be subject to a fixed price. With respect to the MUDFA uncertainties, in 2007, all I knew about the MUDFA works was that they were very late and that there were a significant number of services diversions which had not been completed, or which had been classified as "too difficult" by the MUDFA contractor. TIE ultimately accepted that we could not price for this situation and that both the design and MUDFA issues were their responsibility (among other items) and therefore the risk had to sit with them under the Contract. After the Infraco Contract was signed, TIE changed their position on this and only really accepted that this was their issue again after the mediation in 2011.

22. In late November 2007 BBS were provided with various discs containing the design as at that time. The design was changing so rapidly that we insisted on drawing a line in the sand that we could price against. The date for that line, I think, was 25 November 2007 and the means by which it was identified were five CD's which comprised the fixity of the design at that point in time. This is what our price was based upon. The design was approximately 40% complete at this time, and there was no index provided for the design. I am not aware of the date that BBS commence due diligence of the design, but I can recall that it was led by Scott McFadzen.

23. I note in an Email dated 26 November 2007 from Geoff Gilbert, document reference **(CEC01493250)**, set out the 'big issues' for TIE at that time. My impression at that time was that TIE was trying to pressure us to commit to pricing where elements of the design were not complete. They had to get a business case to CEC in December with confidence that it was achievable, but at that stage hey had not got any updated pricing information from us. They were just trying to pressurise us. The big issue

for BBS is that we had only got 40% or 50% of the design. The MUDFA contract was not progressing well. There were many contractual issues still to be resolved. These issues were resolved by the creation of the "risk basket". My personal opinion is that TIE were a group of freelance contractors who were motivated by delivering something they had been told to deliver.

24. In an Email dated 4 December 2007, document reference (**CEC01466900**) Matthew Crosse advised that TIE had failed to achieve their value engineering targets in structures. He noted that since August the designs had been developed to a greater level of detail, which reduced BBS's level of pricing risk in relation to structures and stated, *"If we are to achieve our budget target for the project of £498 million, we need you to revisit your entire pricing strategy and offer a reduction to your rates and/or your risk allocations within the price. Please review your pricing and advise the saving arising from this reduction in risk."* The internal response from BBS was, "Pigs can fly". We would look at it and see if there was an area where we could sensibly tweak it, but we were not there to contribute. We were there to build something and do it to make money. That is why construction firms are in business.

25. In an Email dated 4 December 2007, document reference **(CEC01493840)** Suzanne Moir, Pinsent Masons, circulated a mark-up of the proposed change mechanism, document reference **(CEC01493841)**. I think the purpose of this change mechanism, is that it clearly shows that everybody - TIE and BBS - understood that change would inevitably occur because the design was not complete and the MUDFA contractor was unlikely to be completed sufficiently far enough in advance to give us undisrupted access. The purpose was to regulate the way that the changes were dealt with; the changes also being in terms of TIE's additions. Both TIE and BBS acknowledged there was going to be change as the design got developed internally. Everybody knew that whenever these changes happened, it was obviously going to incur more costs. The scale of that might not have been fully understood by either party at that stage, but inevitably it was going to be a significant number of millions. Everybody knew and in actual fact that change mechanism remained pretty much

unaltered into contract apart from the clause number, which went from 80.12 to 80.13, within the actual contract. "Subject to clause 80.10.1, for the avoidance of doubt, the Infraco shall not commence work until instructed through receipt of a TIE change order." Both TIE and BBS signed the contract, so everyone knew where they stood. The scale of what that change would be commercially I do not think anybody particularly anticipated because, again, TIE was getting promised by SDS that the design would be completed. TIE were telling us that the MUDFA works would be completed and neither actually happened. But TIE failed to recognise, probably because of a lack of experience in their staff, what was actually going on and failed to recognise the scale of the delays to both the design procurement and the MUDFA works.

26. The minutes of a meeting on 6 December 2007 between TIE and BBS, document reference **(CEC01494651)**, note a number of outstanding issues including in relation to pricing. The main issues at that time was MUDFA still had not finished, incomplete design, lack of access, which all had a bearing on price. They all just ran on and on and on and they were still there at contract award and they continued for years. They continued right up to completion of the whole job.

27. In an email dated 10 December 2007, document reference **(CEC01494139)**, Scott McFadzen advised Geoff Gilbert of difficulties BBS had in firming up prices for a number of items (i.e. highways and drainage, overhead line equipment, selected structures and alignment earthworks). In his reply on the same date, document reference **(CEC01494152)**, Mr Gilbert noted that *"Based on our discussions over the last two weeks we made a presentation to our Board on Friday setting out the timetable for firming up prices. This aligned with achieving the 20th December. Unless I have radically misunderstood we will not be able to achieve any of this and will get nothing of any significance tonight or in the near future"*. By letter dated 11 December 2007, document reference **(CEC01481843)** Willie Gallagher wrote to me advising that "*Your news today that BSC are unable to achieve the pricing objectives we set you is extremely disappointing"*. The letter noted TIE's *"critical milestone"* on 20 December where the full Council finally accept the project business case and the

Infraco and Tramco deals, which would pave the way to achieve financial close on 28 January 2008. Mr Gallagher advised that unless the following matters could be agreed by the end of a proposed meeting in Germany on Thursday 14 December, then TIE would not attend and would require revisiting the entire preferred bidder programme. The matters in respect of which agreement was required were: *1. Price confidence: we ask you to consider fixing your price, save for a very few notable exceptions where for example the design itself is absent. 2. Price level: we ask that ... your price level and VE savings are confirmed at a level that enables our project business case target to be met. 3. Programme confidence: ... we ask that you confirm that you can achieve the programme opening dates i.e. revenue service commencing 11 February 2011 for Line 1a. 4. Contracts closure: ... your team appear to have become entrenched in respect of finalising the positions on a number of important legal/commercial issues ... We need your definitive responses on each and conclusion of these issues tomorrow. 5. Employer's Requirements: we need your team's provisional agreement on the compliance matrix and confirmation of alignment with your proposal".* I replied to Mr Gallagher by letter dated 12 December 2007, document reference **(CEC00547788)**. In my letter I advised, in relation to Price Confidence, *"We have considered fixing our price on the information provided and believe that we are able to do this in all areas where the design is available. See attached schedule*". The schedule attached to my letter listed certain items that had been marked "Provisional" in BBS's August submission (and in respect of which the price could be fixed by adding specified further sums totalling £8.2m). The schedule also stated certain assumptions that had been made by BBS including that, in relation to Design: 1. *"In those locations where the design is absent, we are not able to fix our price. Typically these include: Picardy Place, St. Andrews Square, London Road, York Place, Forth Ports Area etc." 2. "In areas where design is partial, we have made reasonable assumptions based upon our experience and the existing design information provided. Notwithstanding material design changes we have a high level of confidence in our pricing e.g. Track Slab, Roads and Pavements, Drainage connections, all as identified in our initial main submission". 3. " ... Design must be delivered by SDS in line with our construction delivery programme previously submitted".* Mr Gallagher

responded by letter dated 13 December 2007, document reference **(CEC00547779)**. These items of correspondence indicate what we saw as pressure and bullying of BBS by TIE. It was pressure and bullying under threat of withdrawal from preferred bidder status to agree to something which was completely unrealistic. Quite clearly, for the SDS design to be a firm price it needed to be in line with the construction delivery programme as previously submitted, and it was not. It was easily recognisable that would not be achieved. The extent to which BBS were and were not able to provide a fixed price, was dependent upon the extent to which the design was or was not complete, e.g 50% of the design complete would equal 50% of the price being fixed which was roughly the position with the design at this time.

28. In an email dated 12 December 2007 from Michael Flynn, Siemens, document reference **(CEC00547750)**, referred to "the transfer of money from 1A price to 1B price." This was TIE's attempt to reduce the price of phase 1A by moving monies for phase 1A into phase 1B because phase 1B did not seem to be under the commercial scrutiny that phase 1A was, and it was an attempt to mislead City of Edinburgh Council. There cannot have been any other reason for it.

29. In an email dated 12 December 2007 from Scott McFadzen, document reference **(CEC00547761)** attached a Structures – Pricing Reliability Analysis, document reference **(CEC00547762)**. The purpose of this document was to identify to TIE the level of price uncertainty and itemise where it was; locate where it was. So all the while BBS were saying, "You cannot deliver this for this price; you have got uncertainty here, uncertainty there"; in some cases, miles out.

30. I note that in an internal TIE email dated 14 December 2007 Geoff Gilbert sent an updated spread sheet, Infraco Negotiation Summary Position, document reference **(CEC00547760)**. This Email seems to be saying 95% of the £212m is firm, but there is a whole extra £60-odd million expected to fall on the contractor. TIE was attempting to manipulate us. Willie Gallagher was trying to tell us what to do, "Fix your price on this; fix

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your price on that. Confirm you can achieve the programme opening dates".

31. I am aware that a meeting betweenBBS and TIE took place at BB's headquarters at Wiesbaden, Germany, between Monday 17 and Thursday 20 December 2007, following which an agreement ('the Wiesbaden agreement'), document reference **(CEC01502881)** was signed. There were various e-mail exchanges during that period. An Agreement was signed following this meeting (which became known as the Wiesbaden Agreement). This meeting was attended on behalf of Bilfinger by me and Joachim Enenkel, Axel Metzger, Christian Korf and Rob Sheehan of Bilfinger, and Willie Gallagher and Geoff Gilbert of TIE. I cannot recall exactly who else was at this meeting. Iain Laing of Pinsent Masons, our lawyers, were also present at this meeting. The purpose of this meeting seemed to be to create an assumed fixed price reduction against a "wish list" of value engineered items. These price reductions (which were incorporated into the tender) were caveated such that if they were not achieved the money would flow back into the contract. Again, in my eyes this Agreement was purely about trying to get the base price down and through TIE's "gateway". This was against the ongoing threats we received from TIE that they would withdraw the preferred bidder status if we did not agree to their demands.

32. In an email dated 18 December 2007, document reference **(CEC00054721)** I advised Geoff Gilbert that BBS's programme confidence was only valid:"...*if SDS deliver their design as scheduled in our programme submitted prior to our preferred bidder award. The programme submitted post Preferred Bidder on 12/12/2007 only allows for completion between the airport and Haymarket and we had not included for any overrun or prelims. We cannot allow known delay by SDS prior to novation to become the cause of our programme slippage or cost overrun."* This Email was highlighting that we were getting tied into the designer that was going to be novated to us. The programme for the city sections, so from Haymarket down to Leith Walk, was behind and our price did not include, and our programme did not include, for taking on board the consequences of that delay. Essentially TIE were asking us to

CEC00054721 should be CEC00547721

fix our price, fix our programme, knowing that the design could not keep up with it. I was attempting to point out that this could not happen. I cannot identify the programmes referred to in the Email.

33. I am aware of an internal TIE Email dated 18 December 2007 (10.45 am) by Geoff Gilbert, document reference **(CEC00547723)** which attached the latest position on the draft deal. The attachment is a draft of the Wiesbaden agreement dated 14 December 2007, document reference **(CEC00547724)**, which states that it *"sets out the agreement reached between BBS and tie on 14 December 2007 in respect of the price for the delivery of Phase 1A"*. It is clearly evident, reading the draft agreements, that there were a significant number of conditions and caveats, all of which are just going to lead to extended time and the price going up; quite clearly evident to anybody who knows anything about this industry. An agreement in relation to the price of that which could be priced, subject to the caveats in the agreement; was agreed. Everything had been discussed numerous times before Wiesbaden and most of the points had been agreed prior to TIE's visit. The main point that was not agreed was Value Engineering.

34. I note a further version of the draft Wiesbaden agreement was produced on 18 December 2007, document reference **(CEC00547729)**. The main change between the two drafts is that the price has gone up by £1m. I cannot recall who requested the change or why it had been made.

35. I am shown an internal TIE Email dated 18 December 2007 at 11.22 am, document reference **(CEC00547800)** in which Stewart McGarrity raised a number of matters including the question, *"What level design development risk they are actually taking off our hands"?* Steward McGarrity is their commercial director, and he is asking his operational team, with a copy to the Chief Executive, about what level of risk they are taking. He is beginning to be concerned about the amount of risk that is left with TIE. It is my view that he is concerned, at that stage, that there is a lot of risk being left with TIE.

36. In an Email dated 19 December 2007, document reference **(CEC00547732)** I note that *"our firm price including the additional 8 million to fix the variable sums noted in our tender is based on all the additional information which we received from SDS via the four CDs, the last of which was delivered to us on 25 November 2007. We therefore insist that our contract be related to this".* In the same email chain Geoff Gilbert replied that he did not understand the point I was making and would call to discuss. The point I was making was that our price is based on those CDs. I talked with Geoff Gilbert every day. Whenever I met with Geoff Gilbert he always had Andrew Fitchie with him and I always had Suzanne Moir with me. We ended up with Schedule Part 4 and this concept of Base Date Design Information (which was referred to as being included at Appendix H although there was a problem in that Appendix H did not actually list anything).

37. In an Email dated 19 December 2007, document reference **(CEC00547735)** I advised Mr Gilbert that, *"I have concerns that this amount was the amount envisaged when we thought SDS design would be complete at novation. Obviously this is not now the case and I believe the £"m will need to be increased in the Infraco contract. I presume you have the budget for this elsewhere and that this will be made available".* The point I was making in that Email was, our price was based on the premise that the SDS design would be complete at the point of novation; and they were not. I was informing them that this was going to cost them millions more, and asking if they had the budget for it. I discussed this with Willie Gallagher. One of the outcomes of discussions I had with Willie Gallagher was that he stated that everybody knew that the price was going to increase after award. It was written into the contract that the price was not the price, and it was going to go up. The people who were best placed to know how much it was going to go up by, were TIE, because they had the contract with MUDFA. They knew the status of the design at that stage and were in contract with the designer. So they were the ones that should have been able to make that assessment more than we could.

38. In an Email dated 19 December 2007, document reference **(CEC00547756)** Mr Gilbert sent a copy of the draft agreement, document

reference **(CEC00547757)** as further revised to take account of a discussion with me. I cannot recall the discussion with Mr Gilbert, but the purpose of this Email was, TIE were attempting to get BBS to take on risk, and we were attempting to put the risk back to the client. If we could have measured the risk and quantified it, we would have been quite happy to set a price for it. But because the risk was unknown, we did not think we were best placed to take it, and we said, "No, you take it".

39. In an Email dated 19 December 2007, document reference **(CEC00547738)** Mr Gilbert stated, *"We went through this [i.e. the proposed agreement] at the Board today and generally everyone was ok with it. However, to get CEC's buy we need to make a few changes … I don't think there is anything controversial in this but call me if you wish to discuss"* (the revised agreement appears to be dated 19 December, document reference **CEC00547739)**. I cannot recollect what changes were required, my views on any changes and what BBS's response was.

CEC00547738 should be CEC00547740

40. In an Email dated 20 December 2007, document reference **(CEC00547740)** I advised Mr Gilbert that *"We still have issues with 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 provisional which we have now fixed by way of the 8 million we cannot accept more drain development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution"*. The point I was trying to make to Mr Gilbert was that BBS did not want to take part in any design work. What we needed to hear was, "We want a tram system to run from here to there. We design it and you build it". "This is how we want it built, this is the size of track, this is the building we want the thing attached to, this is what the ground is, and this is the size of the particular foundation for that. Just go and build it". We priced it the, 'Just go and build it', way and they were trying to put design on to us, which was not in our remit and was not in our price. The phrase "drain development" was a typo, it should have been design development .

41. On Thursday 20 December 2007 there was a meeting, following which an agreement ('the Wiesbaden Agreement'), document reference **(CEC01502881)** was signed the same day. The agreement noted a construction price of £218,262,426, subject to certain exclusions, provisional sums, assumptions and conditions. I cannot recall the meeting in detail, but I know that the agreement was signed that day. Geoff Gilbert and Matthew Crosse and Willie Gallagher fully understood that the price of £218,262,426 was subject to exclusions, provisional sums, assumptions and conditions. I had already identified to them previously that there would be changes which were going to be in the millions. I suspect they did not want to pass that information to CEC, because the contract would have been cancelled. My understanding of clause 3.3 of the agreement was that it was not fixed price. The last paragraph of clause 3.3 states, "For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction ... and excludes ... changes of design principle, shape and form and outline specification." TIE knew there were going to be changes to the design, therefore, the price was going to change. The due diligence exercise had not been complete before the Wiesbaden Agreement, but the agreement was not at all contingent on BBS completing the due diligence exercise. TIE was fully aware of these matters. The final version of clause 3.3, in my view, was made clearer by putting the "avoidance of doubt" statement in there, which was put in in conjunction with a discussion with Geoff Gilbert. The suggestion that in the signed agreement, BBS, take on greater risk for design development is really silly. Our point was proven at the Gogarburn and Carrick Knowe adjudications. I refer more fully in my original statement provided to the inquiry.

42. I am aware that an Infraco mobilisation and advance works contract was entered into in late December 2007. When you are starting a construction project, you need to establish a temporary office base. That needs IT connections, it needs telephone lines putting in and that all takes time. It costs money. You have to have an address before the services will connect. Before you get water, before you get sewage, before you get electricity, before you can get telecoms, you need an address. So you have to have the right sort of piece of land to do that. That then needs

fencing because it is going to get live services in it and it needs protecting. If there is vegetation, trees, that needs clearing, you are only allowed to do that work in certain periods of the year. There are excluded periods from doing that because of bird nesting. Typically from March through to August you cannot go and cut trees and hedges and bushes down, because of nesting birds that are protected. Areas need fencing off to stop members of the public coming so that when you start hazardous operations or excavations, you can keep kids away from it and you can keep the general public away. So the advance works and mobilisation was to get those things up and running in a timely fashion so that when the contract was awarded we could actually start our construction.

January to May 2008

43. An issue arose in late 2007 and early 2008 in relation to a misalignment between the design that had been produced by PB, the Employer's Requirements in the Infraco contract and BBS's offer. BBS managed to do a comparison of what the designers were producing, what the employer's requirements told us in the Infraco contract and what our offer said, and they did not add up. They were not all equal; they were asking for different things. There was misalignment. The issue was incorporated into Schedule Part 4, which are basically mechanisms to resolve issues, where there were two things misaligned, to bring them into alignment. This would have been done around the contract signing date in May.

44. Discussions regarding novation of the SDS contract to BBStook place in late 2007 and early 2008. It is through these discussions about the novation that this misalignment was identified. The main concern of TIE, in my view, was to prevent either the designer or the contractor putting their price up because of this misalignment. That must have been their main concern, and probably their concern about further delays to the procurement process. I do not think they were concerned about delays to the project, but delays to their own procurement process. PB's concerns were that they were going to get asked to do rework for no money. BBS was concerned that TIE were attempting to force us to take on risk for

things which were obviously inconsistent. These concerns were addressed during the period of January to May 2008 by being incorporated in to Schedule Part 4.

45. Various price increases were sought by BBS and agreed in the first half of 2008. I cannot recall specific details around this, but I would say that the items of misalignment identified, where we could align and could fix it, led to a price increase. This went on for five years (that is, misalignments continued to be identified and priced up following contract award). When solutions were found or design clarified, prices could be submitted for agreement.

46. Discussions in relation to the draft Infraco contract continued during January 2008. Matthew Crosse, Geoff Gilbert, our respective lawyers, Axel Metzger and I were involved in these discussions. We discussed the same issues over and over again, "the design is not finished, your programme is late, your utility diversions are late, and we cannot fix the price". Where BBS could not fix a price, we put these items in the risk basket. I put all these unknowns into a document which allowed both parties to fully understand a mechanism for adjusting the price, basically, a mechanism for compensation for when these things turned out to be different from that which was known at the time.

47. In an Email dated 14 January 2008, document reference **(CEC01432272)** Matthew Crosse noted, *"We have as you know briefed CEC before Christmas on the expected risk balance positions at the close of contracts, consistent with the approved strategy. CEC approval has been given on this basis. This position we will need to confirm as remaining the case in order to achieve an award".* I have no understanding of TIE's views in relation to this matter as I do not know the risk position that TIE had briefed the council on.

48. In a letter dated 18 January 2008, document reference **(CEC01432556)** Michael Flynn, Siemens, and I, listed a number of outstanding issues that required resolution. The most important outstanding issues at the time were the resolution of issues on the Infraco contract conditions and the

status and completion of design. On 18 January 2008 Scott McFadzen, Mr Flynn and I had a discussion with Willie Gallagher. This discussion consisted of everybody agreeing and giving verbal assurance that we all were aware that the price was going to go up. That is why TIE moved money from Phase 1(a) to 1(b), it is why there was a bonus agreed. It was taking money out, calling it a bonus and actually it was part of the price. Shifting money around to, essentially, keep the price as low as possible. I have dealt with this at paragraph 32 of my original witness statement.

49. In an Email dated 21 January 2008, document reference **(CEC01488908)** Geoff Gilbert advised Scott McFadzen that *"clearly from a commercial perspective we need to maintain the price"*. I understand this to mean that he had to maintain the price that he was reporting up to the council. I cannot recall what BBS's response was.

50. In a letter dated 28 January 2008, document reference **(CEC01511117)** Willie Gallagher sent me a revised programme for Infraco financial close. BBS did not agree to this programme. BBS's view is that the programme was unrealistic and unachievable, and would take six weeks rather than four weeks. At meetings I would sit across the table with TIE's lawyer and my lawyer, and I thought we had reached an agreement. TIE would submit revised wording for what we had agreed and it was totally different, it was like we had been at different meetings. This was the main reason why there was a delay in reaching financial close.

51. Discussions continued during February 2008 between Matthew Crosse, Andrew Fitchie, Suzanne Moir, Michael Gallagher on behalf of Siemens, and I. These discussions included incomplete design, MUDFA risk, and misalignment of conditions and employers' requirements with our proposals.

52. In an Email dated 1 February 2008, document reference **(CEC01489538)** I advised Geoff Gilbert that: *"Bilfinger Berger's business model does not permit the liability for risks that do not belong in our Industry or risks which are unable to be assessed and quantified. The pricing assumptions have been based on the information given that tie would deliver the Design in*

accordance with their Procurement Strategy i.e. complete at Novation. TIE have not delivered the Issued for Construction Detailed Design in accordance with the Procurement Strategy and therefore the Risk Profile has changed for BSC, Tramco and SDS. It is this which is giving rise to the current difficulties and apparent shifting of position". Bilfinger's business model and any construction company's business model is that they will only accept risk which can be identified and quantified. The purpose and content of Willie Gallagher's presentation on 15 November 2007 was to lay out a procurement strategy, where all the design would be completed at the point of novation and all the utilities would be out of the way. It was a build-only contract. There was no risk because we could identify everything and put a price to it. Willie Gallagher was trying to reassure BBS that TIE knew what they were doing. It was quite clear that they did not. The only record of that presentation is document reference **(TIE0087334)**. I cannot recall TIE's response to the Email.

TIE0087334 should be TIE00087334

53. In an Email dated 4 February 2008 Scott McFadzen sent TIE a schedule 4 pricing assumptions document, document reference **(CEC02084854)**. The need for, and purpose and effect of, the Schedule 4 Pricing Assumptions was due to the design not being complete in advance of construction. The utilities were not complete in advance of construction and it was a document that was more specific and identified the areas where the price could not be fixed. This was to identify to TIE the level and extent of items which were not able to have a fixed price.

54. Parties entered into the Rutland Square Agreement on 7 February 2008, document reference **(CEC01284179).** The agreement noted a construction price of £222,062,426, subject to certain exclusions, provisional sums, assumptions and conditions. The figure was something that TIE needed to try to put in front of CEC to convince them to proceed to the next stage. On the basis that we had recently received the due diligence report on the design, which indicated that we had not received 40 per cent of the design yet, my feeling was that the price was probably only fixed to the extent of a maximum 50 per cent because even in the design that we had received there was a lot of assumptions, and exclusions, and provisional sums. So at a maximum that figure was fixed

to the extent of only 50 per cent. As I have already said, between the Wiesbaden and Rutland Agreements, negotiations were on-going. These particular Agreements provided 'snapshots' of the agreements which were reached, but the months in between each of these Agreements involved long discussions and negotiations over the Infraco Contract. The purpose of the Rutland Agreement was all about price. I have re-read this agreement and note that the price had increased to £222,062,426 since the Wiesbaden Agreement. I also note that this is the first time that the "risk basket", which becomes Schedule Part 4 of the Infraco Contract, appears in the formal documentation as an appendix to this Agreement. It is abundantly clear that whilst, as stated in this Agreement, the price will not be increased prior to entering into the Infraco Contract, the price will increase immediately post contract. Schedule 4 to this Agreement contains significant caveats to the price which are detailed in the main body of this Agreement. As I have already explained, this is as a result of the inability to price all of the unknown and uncertain elements accurately. Therefore these elements and issues remained in the "risk basket" which by February 2008 had become Schedule Part 4. In reference to clause 2, this was the price that TIE was going to put forward to the client to get it through this gateway. The need for and purpose of the schedule to this agreement was to ensure that all areas were covered where the price was not fixed. The documents attached to this Email formed part of this agreement. The need for the base case assumptions was to identify those assumptions which had been made upon which the price was based. We fix the price on that basis. If then, or at any time, the facts or circumstances differed in any way from the base case assumptions, the Infraco would, if it became aware of the same, notify TIE of such differences (a notified departure). The Base Case Assumption (a)(ii) i.e. *"that the Design prepared by the SDS Provider will ... not in terms of design principle, shape, form and/or specification, be amended from the Base Date Design Information"*. In relation to the document attached to the agreement 'SDS Novation – RODs', the purpose of that agreement was to define the risk share between TIE and BBS of the design. Design growth clarifies that if the design information changes then the responsibility lies with TIE, for time and money.

55. In an Email dated 11 February 2008, document reference **(CEC01508965)** Geoff Gilbert attached a copy of a potential SDS incentivisation agreement, document reference **(CEC01508966 and CEC01508967)**. The need for, and purpose of this agreement was that the procurement strategy was to have the design 100 per cent complete at the time of novation. It clearly was not. They were trying to find a way to incentivise SDS to deliver it at least in line with the construction programme so as not to delay us. If you do not have the design you cannot build. So the only way to secure the delivery programme is to get the design done to time, and it was just an incentive. This was required because the design was woefully behind schedule. BBS were in favour of this agreement. If the contract is delayed it costs lots of money as we have a large organisation. If it is delayed or stopped it costs a fortune because all the men are there, all your equipment is there. You are occupying the land. Your offices are there. Your telephones, your administration. Everything is there costing money even if you are not doing any work. It was probably a small price to pay to make sure the design came, so it did not delay us. I cannot recall exactly what was agreed.

56. On 18 February 2008 BBS produced a Design Due Diligence Summary Report, based on design information received by BBS by 14 December 2007, document reference **(DLA00006338).** That document raised various concerns about design, including that 'more than 40 per cent of the detailed design information' had not been issued to BBS. BBS carried out due diligence between 14 December 2007 and 18 February 2008. The design information provided to BBS was, combination works; road structures; construction details; drainage; designer's risk assessment; drawings; geotechnical/earthworks; highway and road sides; landscape drawings; lighting; overhead line equipment; reports, partly considered only; register, partly considered only; and retaining walls; supervisory control and communication; schedules, only partly considered; site clearance; specifications; tram stop substation; track alignment layout; traffic management drawings; track vertical alignment; track substation. BBS was given access to this information on 14 December 2007. My views on the matters and consequences of the Executive Summary of the report were that it was in a worse condition than we had been led to

believe in terms of completeness. The consequences of this were that we had various exclusions, caveats, conditions and mechanisms for adjusting the price when things change. So providing they were carried through into the main contract, TIE retained the risk and we had already agreed the mechanisms to deal with this. I am not aware of TIE's response to the report.

57. In an email dated 21 February 2008, document reference **(CEC01449336)** I was forwarded a message from Willie Gallagher which noted his disappointment at progress, in particular, in respect of SDS novation, and stated that unless there was substantial progress over the next 2-3 days, he would return early from his holiday in South Africa to advise CEC that TIE should deselect the current preferred bidders and pursue a different route. I note that a further email was sent on behalf of Mr Gallagher on 27 February 2008, document reference **(CEC01463219)** expressing similar concerns. The main problems at this time were that we had not been issued with 40% of the design. TIE were asking us to agree a full and final, firm, fixed price, but we only had 60% of the information. I was of the opinion that Mr Gallagher's messages were threatening and bullying. I cannot recall what BBS's response was to those meetings.

58. In an Email dated 21 February 2008, document reference **(CEC01490710)** Geoff Gilbert forwarded two draft documents, namely, SDS Novation Agreement Terms, document reference **(CEC01490711)** and SDS Novation - Alignment of SDS Designs with Infraco Proposals, Plan for Delivering Alignment, document reference **(CEC01490712).** At this stage there was still significant design to be undertaken. There was misalignment of design that had been undertaken (by SDS) with our proposals. And in terms of the employer's requirements, it was recognised that TIE did not have the time to fix these issues before award of contract. We agreed to a mechanism for delivering that alignment, post award of contract. BBS was happy that it had got this plan for delivering the alignment.

59. I note that an internal PB Weekly Report by Steve Reynolds dated 29 February 2008, document reference **(PBH00035854, p3)**, *"in separate*

discussions with Richard Walker he has mused that if TIE understood the likely true cost of building the scheme then it would be cancelled. This is not idle chat – it is Richard's view of the strategy he has adopted to retain as much flexibility pre-contract with a view to securing substantial variations post-contract. On a related note, Richard has also informed me that he and his manager (from Wiesbaden) have seriously discussed withdrawing from the bid." I believe that Steve Reynolds has misunderstood what I said. I think what I meant was if TIE had told CEC the likely true cost of building the scheme, then it may have caused them a lot of concern. TIE, in my view, clearly understood that the price was going to increase by many tens of millions, but I do not think they were passing that information on to CEC. I discussed this with Steve Reynolds, saying, *"Your design is not finished. It is supposed to be. The utilities are not complete and they are supposed to be. The cost of this is going up. Everybody is aware. Everybody is talking about the cost going up, but is anybody telling the Council?"* Our strategy around that time in relation to the Infraco Contract was to make sure that we had clear, concise wording and mechanisms in the contract to make sure that we, the contractor, were not going to be the fall guy for all this uncertainty and price increase. I am absolutely convinced that senior people in TIE - including the Chief Executive, the Commercial Director and the Project Director - were aware of our strategy and that there were going to be significant price increases and delays. I am not sure about the word "strategy" though. Every other comment is about "subject to exclusions, conditions, provisional sums, changes in design not being included". So unless they cannot read or they are totally stupid then they must have been aware of it. Whether they perceived it as an actual strategy, I do not know. From an organisational prospective BB did discuss withdrawing from the bid as it was in such disarray. I am not aware of why BB decided to stay in the bid, it was not my decision. This was my manager, Mr Enenkel's decision.

60. In a letter dated 1 March 2010 from Martin Foerder to TIE, document reference (CEC00578330) noted that prior to contract award it was agreed between the parties that Infraco would incorporate the SDS Design Delivery Programme v31 into the Schedule Part 15 - Programme and the result would be the first TIE change. The discussions on this matter were

about the design programme being delayed. We were on version 31, but the contract was priced on version 26. This was going to affect us the second we started. So agreement was reached and the words incorporated in the contract, "It is accepted by the parties" (clause 3.2.1 of Schedule Part 4), with pricing assumption no. 4 stating that 'the Design Delivery Programme as defined in the SDS Agreement is the same as the programme set out in Schedule Part 15 (programme), which we all knew was not actually the case. It took until December 2008 however, to get agreement on this Notified Departure – the agreement being that Infraco was entitled to an extension of time of over 7 weeks.

61. Discussions continued during March 2008. These discussions were always the same. 'The design is not finished. The utilities are not finished. There is a misalignment in the works and they are just trying to put fixes in place'. The main individuals were the same all the way through. I spent seven months of my life in negotiation. Schedule Part 4 is where these negotiations ended up. Rather than having it only as a Schedule to the Main Contract (which might imply that it is of lesser importance) we insisted on there being reference to it in the Main Contract. Clause 4.3 (within the priority of contract documents provisions) states: "Nothing in this agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to schedule part 4 pricing." So that elevates that right up to the contract level. It is not just a schedule or an annex that has no relevance.

62. I note that an email dated 6 March 2008 from Tom Murray, Bilfinger, document reference **(CEC01450286)** discussed the issue of mobilisation payments. Mobilisation payments are essential as you need an address to enable you to mobilise telecoms, electricity, and water and drainage services. You need to put cabins up. You need to fence them. You need a car park for your staff to go to. You need all your IT developed. You need sections of the site where you are going to work fenced off to prevent third parties trespassing. You need to do clearance of vegetation and trees out with the bird nesting season, which runs roughly March to August. So you have really got to get going prior to award of contract with these things because otherwise when you get your contract in May you

cannot do anything because of bird nesting for one and you cannot do anything because you have no IT, you have no accommodation, you have no car parking, you have no toilets, you have no electricity, no heat and light and so on. So there were direct costs/ amounts that relates to this but it was also an upfront payment of part of the contract price. I cannot recall in detail when mobilisation payments were made.

63. In an internal TIE Email dated 10 March 208 from Steven Bell, document reference **(CEC01463888)** noted that an agreement had been reached on 7 March (between me, Michael Flynn, Steven Bell and Jim McEwan) that the contract price would be increased by £8.6m to cover certain matters. I cannot recall specifically what items were covered in this price increase apart from specialised tapered poles that carry the overhead wiring.

64. In an Email dated 19 March 2008, document reference **(CEC01464731)** Willie Gallagher advised that TIE had issued the PIN the previous day advising that BBS had been selected to build the Edinburgh Tram System and that a contract required to be concluded by 28 March to facilitate the drawdown of funding from Transport Scotland before 31 March. The actual date for contract conclusion was 14/15 May 2008 as we failed to conclude the finalisation of terms. The cause of this was we would sit round a table, get an agreement, DLA Piper would go away and draft up that agreement and when it was presented it did not represent the agreement that was made in our view. We kept going round in circles.

65. In an internal TIE Email dated 26 March 2008 from Stewart McGarrity, document reference **(CEC01422917)** attached tables giving a breakdown of the Infraco contract price, document reference **(CEC01422918 and CEC01422919)**. My only view on this documentation is that TIE has no allowances made for risk.

66. On 26 March 2008, Ian Laing of Pinsent Masons sent an e-mail to Stephen Bell and Jim McEwen of TIE, document reference (CEC01465878). In that e-mail Mr Laing stated: *"As we discussed earlier today, the Design Delivery Programme that will be v28. The Pricing Assumption in Schedule 4 of the Infraco Contract assumes that the Design*

Delivery Programme will not change from v26. It follows that there is the possibility that there will be an immediate Notified Departure on contract execution. Given the unusual position that we are in, please can you confirm that this is understood and agreed by tie". The first thing to note is by the time we actually got into contract it was up at version 31, so this was written some time before that. The unusual position is that all the way through we are being told that the design will be complete at the point of award of contract and it was not. It is very unusual to have a contract that says, "Here is the price but it is not really the price". The purpose of sending this directly to TIE was to ensure that TIE actually understood it, as it was our suspicion that DLA were just rolling things around to get paid on an hourly basis at quite a significant cost. We told TIE it was an unusual position and we needed to confirm that it was understood and agreed by TIE so they would not turn around and say, "We did not understand that and that is not what we meant". The final version was agreed on 14 or 15 May 2008.

67. On 27 March 2008 PB produced a document that commented on BBS's Civils Proposals, document reference **(CEC01377842)**. I note that this document recognises what was not done, and it did not give us any dates by when it would be done.

68. Discussions continued during April 2008. These discussions were always the same and with the same people, "Your design is not finished, it is supposed to be. The utilities are not complete and they are supposed to be. The cost of this is going up."

69. In an email dated 10 April 2008 by Christopher Horsley at DLA, document reference **(CEC01448911)** circulated a note, document reference **(CEC01448912)** setting out the "deal" agreed yesterday. The main points being discussed at that stage are outlined in document **(CEC01448912)**.

70. In his internal PB Weekly Report dated 18 April 2008, document reference **(PBH00018333 at Para 1.3)**, Steve Reynolds noted: *"Richard Walker indicated to me on Friday that he has concerns over the presentation of the Infraco Contract deal to Council. Some weeks ago I had expressed*

my concerns that the price on the table from BSC did not align with the programme contained in the offer. For example, the price assumes that value engineering savings will be made whereas the programme has no allowance for the design and approvals time which would be required. I had suggested that tie would have to be careful in the form of presentation so as not to mislead CEC. Richard is now expressing (to me) similar concerns and has suggested that he will take this up with tie separately. To a large extent the current position is one of BSC's making where the offer is dependent upon a set of pricing assumptions which can be interpreted by the informed reader as a basis for price increase and programme prolongation. It may be that Richard is belatedly expressing worries which have more to do with his concern over working with tie as a client or may even be due to friction between Bilfinger Berger and Siemens. Whatever the reason I detect an air of uncertainty and last minute concern over whether BSC should be taking the job". I was concerned, as Steve Reynolds was, that the Infraco contract deal would not be presented correctly or was not being presented correctly to the council because certainly if I had been the council and I had been presented with this lot correctly I would be saying, "Well, what is it going to cost me?" because it is clearly not what the contract price is. The value engineering savings you can see that if you read the value engineering schedule they are all caveated with the fact that they need to be able to be designed in time to implement. So, again, we had said, "Yes, you could say this but you need to design it in time. You need to instruct your designers." I had concerns. I had talked to TIE, but not with CEC as I had no relationship with them. I raised these concerns with Mathew Crosse, Willie Gallagher and presumably Geoff Gilbert as well and probably Bob Dawson. Possibly even someone called Susan Clark. In paragraph 2.1.1, the second bullet point of Mr Reynolds' weekly report it refers to the need for a detailed design workshop to be held, "To define the scope to the level of detail required prior to construction". This would be held post novation and post contract close. This needed to be held because of the standard and extent of design was insufficient to actually build. The consequences of it being held post novation/post contract close meant that you could finally get a contract in place but that there were inevitably going to be delays and extra costs associated with it.

71. In an Email dated 21 April 2008, document reference (DLA00006417) Suzanne Moir, Pinsent Masons, advised, in relation to the draft schedule 4, that *"To correctly capture the commercial intent of pricing assumption 4 we require it to be amended to read: 'That the Design Delivery Programme in the SDS Agreement is the same as the programme set out in Schedule Part 10 (Programme)'"*. My view and understanding of this is that the price was fixed on the SDS programme version 26 and at the time the contract was signed it was version 31. The only thing that changed was that pricing assumption 4 changed to schedule part 15 programme, so it was just a change in the number in the contract. What I think Suzanne has said here is that 'We need it as an assumption, but it is version 26. We all know it is version 31. As soon as the contract is signed they will have a notified departure.'

72. In an Email dated 30 April 2008, document reference **(CEC01274958)** Willie Gallagher noted that I had advised that Bilfinger required an additional £12m to conclude the deal, despite a deal having been negotiated and agreed by all parties on 14 April. In his internal PB Weekly Report dated 2 May 2008, document reference **(PBH00018873)** Steve Reynolds noted: *"Two observations are that:- tie has sponsored a paper which was materially incorrect at the time when it was presented to CEC. The price increase proposed by BSC would result in an overall price of £520m in comparison with the overall funding limit of £545m. This is without any allowance for costs to cover changes to scope and programme necessary to bring about alignment of the BSC Offer and the SDS Design":* I cannot recall the detail in relation to the further £12m to conclude the deal. In terms of Mr Reynolds comments, I believe it is basically saying that Steve Reynolds had identified that potentially CEC were being misled.

73. Discussions continued during the first half of May 2008. These discussions were always the same and with the same people, "Your design is not finished, it is supposed to be. The utilities are not complete and they are supposed to be. The cost of this is going up."

74. In a letter dated 6 May 2008, document reference **(CEC01284033)** Willie Gallagher wrote to Joachim Enenkel noting his concerns in relation to BBS's last minute demand for an additional £12 million and listed a number of conditions on which BBS would retain its position as preferred bidder. I cannot recall any specific information in relation to this matter, but I believe it was just more pressurisation and bullying from TIE who were out of their depth. What was finally agreed, was the Kingdom Agreement.

75. On 13 May 2008 parties signed the Kingdom agreement, document reference **(WED00000023)**. The purpose of this Agreement was to take some money out of the price in the Infraco Contract and package it partly as an incentivisation bonus and partly compensation for phase 1B of the Project not going ahead. Condition one of the Agreement was an incentivisation bonus of £4.8 million which was to be paid in four £1.2 million instalments. This was not really a bonus it was simply part of the price which was taken out of the Infraco Contract meaning that £1.2m of the Contract Price would be paid to us within 7 days of Sectional Completion of each of the four sections of the Project (irrespective of when that was actually achieved so that it wasn't really an incentivisation to complete early at all). I believe that it was another attempt by TIE to keep the Contract figure low, whilst accepting that this money would be payable to us. I think that we applied for payment of the first instalment of the bonus although ultimately this would have been caught up by the renegotiation of the Contract. Condition Two of the Agreement related to Phase 1 B of the Project. This was the "Roseburn Loop" which was envisaged at the outset of the Project. The Roseburn Loop was a section of the Project which was never built, but was planned to run from Roseburn to Newhaven. The compensation for this part of the Project not going ahead was agreed at £3.2 million in the Kingdom Agreement. Infraco were ultimately paid this sum by TIE. The Kingdom Agreement wasn't really a compensatory or bonus payment, it was simply part of the price which was moved into a separate agreement so that TIE could keep the price for Phase 1a of the Infraco Contract below a certain level.

76. Infraco contract close took place on 14 and 15 May 2008, as part of which a number of contracts were signed, including the inclusion of CAF within the Infraco (so that we were no longer BBS but became BSC or Infraco) and novation of the SDS contract to BSC. The purpose of clause 65 and 80 was to formalise the change mechanism. I also feel that Clause 101, "gagging clause" was important.

77. In relation to Schedule Part 4 of the Infraco contract, document reference **(USB00000032)**. The extent to which the Construction Works Price was fixed and firm was approximately 45 to 50%. In relation to the price with reference to the breakdown provided in Appendix A of Schedule 4, essentially what we were saying is that the construction works price identified in appendix A of Schedule Part 4 is predicated by none of the events identified in schedule part 4 actually occurring. If they did occur, the price was going to alter.

78. In relation to the Value Engineering deductions shown in Appendix A of Schedule Part 4 of the Infraco contract, document reference **(USB00000032)**. My belief is that this was an attempt to lower the reported cost of the job as the works were not going to be achievable because there was no time allowed to start amending and researching different designs to incorporate the Value Engineering, so it was a smoke screen. If the VE savings were not achieved the price would go back up. I did not think any of the VE savings would be achieved, and TIE was aware of my opinion. In the end I think the vast majority of VE savings were not achieved. I cannot categorically say whether none of them were achieved.

79. In relation to Schedule Part 4 of the Infraco contract, document reference **(USB00000032)**, my understanding of the purpose of the various Pricing Assumptions in Schedule Part 4, was to put the risk of uncertainty back to TIE because the design was only 60 per cent issued. Prior to contract close, the main Pricing Assumptions that were likely to change and result in Notified Departures were primarily identified through Clause 3.2.1, in addition the 3.3 specified exclusions among the main Pricing Assumptions, in 3.4 and that was that the design was insufficiently developed, insufficiently undertaken and therefore in terms of design

principle, shape, form, specification, they were likely to be amended from base date design information. It is my belief that several hundred changes were likely to arise prior to contract completion. Although I did not consider the likely total value of the Notified Departures at the time, I think the end total ended up being tens of millions. This was discussed with TIE on numerous occasions prior to contract close. Willie Gallagher even stated, "We all know the price is going to go up once the contract has been awarded".

80. Pricing Assumption 3.4 of Schedule 4 dealt with design development. The meaning of this Pricing Assumption was that if we required further information on to a design to enable us to actually build it, then if the further information was of a particular kind (a change of design principle, shape, form or outline specification), then it would be a Notified Departure. What was allowed for within the price was 'normal design development' - it was not about changing the fundamental principles of how a particular structure works or stands up, and so it was minor changes, minor tweaking if you like, and not major changes, e.g if you say 150 kg or steel reinforcement was required per metre cubed of concrete, you might say that you make that allowance, plus or minus 5%. If the amount of reinforcement doubles, that is not design development. One example of this was the Russell Road Retaining Wall. This was originally an L shaped concrete reinforcement. Due to network rail requirement for an access track, this pushed the retaining wall much further out, and resulted in a requirement for an18 metre deep driven pile. So this was a completely different design from that envisaged and could not have been considered as included within the 'normal development and completion of design'.

81. Schedule Part 4 defined the "Base Date Design Information" as *"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4"*. Appendix H of Schedule 4, however, did not list any drawings and, instead, simply stated that the BDDI was *"All of the Drawings available to Infraco up to and including 25th November 2007"*. I think this got overlooked in the whole negotiation process, so we thought we would just be able to transpose a list out of the CDs, but I was not involved in that. This caused

problems at a later stage, where there was constant dispute between TIE and BSC about what formed the BDDI. This was resolved through the adjudication regarding Tower Place Bridge, where the adjudicator found in favour of Infraco's position.

Post Infraco contract close - General

82. After Infraco contract close; in 2008 we commenced works in Leith Walk and there was some other works along the off-street sections; In 2009, we worked in Princes Street, probably started in the depot in 2009, and in 2010/11, we continued in the depot, probably on Princes Street as well. The main difficulties experienced by BSC in carrying out the works, were lack of design, late design, lack of unrestricted access, utilities not being moved and utilities still in the way even after the MUDFA contractor had ostensibly completed their works. The percentage of the total Infraco works completed were approximately as follows; 5% in 2008, 15% in 2009 and 25% in 2010. I am unable to comment on the utility diversion works as I was not involved. I cannot comment on the percentage of total design phases being complete or the percentage of necessary statutory approvals and consents that had been obtained. I do not know off hand what payments were made by TIE to BSC throughout the years 2007, 2008, 2009, 2010.

83. In relation to completion of the design, and obtaining the outstanding prior approvals and consents, the first thing we did after novation of the SDS contract in May 2008 was co-locate the designer in our own offices so the construction team could have dailydiscussions with them. We had a design manager who monitored their progress, we had regular weekly meetings with the designers and we had senior meetings at board level on a monthly basis. The difficulties experienced in completing the design were inexperienced designers, apparent unwillingness by the designer to put sufficient resources on, the design was in such disarray that the designer was almost overwhelmed when trying to complete the design in the time that we required. Because we are coming from not just a standing start but from a backwards position, the design information flow was behind on day one and I think we eventually got an award of seven

weeks and three days for that position (the change from version 26 to 31 of the design programme which I cover at paragraphs 60, 66 and 71 of this statement), so it was 7½ weeks behind on day one and we were just trying to play catch-up all the time. I also think the design process was required to be signed-off by CEC and also required third-party consents and approvals that were managed by CEC. The designs including IFC's were complete sometime in 2014. All outstanding approvals and consents were obtained after mediation at Mar Hall in March 2011, to the best of my knowledge.

84. In relation to the programme for carrying out the Infraco works, I do not have any documentation from the project. I can see from document reference (**CEC00793593**) that it was updated on 9 July, which is some two months after we had started, or after contract award. The green bars are the predicted time and the black bars are theoretically what were in the contract. The primary reason for slippage on the programme was that we did not have access. Clause 18.1.2 of the contract said that: "TIE hereby grants a non-exclusive licence to the Infraco to enter and remain upon the permanent land for the duration of the term and an exclusive licence to the Infraco to enter and remain upon the designated working area for the duration of the time required for completion of the Infraco works." Typically Leith Walk, the designated working area was 50 per cent of Leith Walk, I think Leith Walk was split into two on the programme, so we were supposed to get roughly a 350-metre section of Leith Walk to work on. We were given sections that were 20 to 25 metres long because the utilities were still operating in there, and only half the side of the road was available instead of the full side of the road. It was just complete piecemeal working.

85. In relation to who undertook the Infraco works, it is likely that a subcontractor would undertake 70% of the works. One of the largest subcontractors was Barr. They had a contract to construct the depot. We also had Mackenzie and we had Crummock, they were doing the on-street works.

86. A mobilisation payment of £45.2 million was made by TIE to BSC. This payment was made on the execution of the contract, so on signing the contract. The contractual basis was a negotiation to facilitate the contractor with some working capital. Materials have to be procured and paid for up front, typically the depot materials, a lot of the materials for the tram construction, and the rails and that sort of stuff, all need to be bought up front. I do not know when we received the money, but it would have been due whenever the contract was signed. The final settlement payment between TIE/CEC and BSC was identified in the payment schedule. It is a typical thing you get with a PPP contract, we call it a bullet payment just to give working capital for procurement of long lead-in items. For example, we cannot invoice for rails until they are incorporated into the works, that is, when they are cast into the ground, whereas you have to buy them many, many months in front of that, so it gives you that facility.

87. Following contract close, a major dispute arose between TIE and BSC in respect of the interpretation and application of the Infraco contract and Schedule Part 4. As identified in the contract, it was likely there was going to be a notified departure immediately on signing, primarily because of the programme issue. We raised this Notified Departure and Willie Gallagher said that TIE could not be seen to be increasing the duration and the price of the contract when no work had physically been carried out. I actually said, "*Well it is the middle of May now, we can wait until the holiday season, we will work in good faith over the summer period and we will get some holes in the ground and some structures up and some works visibly seen and we will keep a record of everything and then we will submit it in September so that you can pay us then, when you have some works on the ground to show what is going on*". We shook hands on it and he agreed. We merrily went away coping with all the difficulties, we started work in Leith Walk, working in this piecemeal fashion due to not having unrestricted access. We were also actually working outside the contract in good faith. Clause 80.13 states: "*Subject to 80.15 [which is when something has been referred to dispute, so if it has not been referred to dispute] for the avoidance of doubt, the Infraco shall not commence work in respect of a TIE change until instructed through the receipt of a TIE*

change order made by TIE." So, in good faith, we put that to one side and we carried on working. In September, I then put in all the TIE changes with the estimates and they were rejected and TIE refused to pay for them. I went back to Willie Gallagher and said, "Your guys are not playing ball, we have now put in as agreed the defects and the changes that have occurred during this goodwill working and your guys are rejecting them", and he said, "I will go and sort them out". In October, we again got no money, and I went back to Willie Gallagher with some photographs to show the level of disruption and an indication of what this was going to cost. At that time we had undertaken that the cost of our disruption was around £2.5m. I explained to Willie Gallagher in fairly simple terms what was going on and where we were at and that we would resubmit in our November application and it needs to be paid before year-end for our year-end figures as we were £2.5m down. If this did not happen then the goodwill would disappear and we would have to revert to the contract and not commence works subject to a TIE change. A couple of weeks later, Willie Gallagher resigned to spend more time with his family. The underlying cause for the dispute, was I had made a gentlemen's agreement about how we were to proceed. Close and proper administration of the contract was actually going to be embarrassing to TIE in respect of time and monies becoming due immediately (before we had even started work). Willie Gallagher and TIE refused to keep their end of the deal and we were approximately £2.5m out of pocket.

88. Approximately 738 Infraco Notified Tie Changes (INTC) were intimated by BSC between contract close and the Mar Hall mediation in March 2011. There were also various TIE Change Notices during that period. The main reasons for contract changes during this period were lack of access (due to utilities) and changes to the design (BDDI to IFC). I cannot recall what the main INTCs and TIE Change Notices were in terms of value and importance. Approximately 95% of the INTCs arose as a result of the Pricing Assumptions in Schedule 4, mainly under Pricing Assumption 1. The estimates for these INTCs were arrived at by following the same principles that we had used in compiling the estimate for the works, which had been designed at tender stage, and we could price. So it is normal first principles. Estimates for the total cost of the work covered by each

INTC only being for the "additional" cost of that work would have depended on what in particular it was. Sometimes you could omit the price that was in the tender build-up and put a new price in. Sometimes you would just do the bit on top, depending what it was really. For example, Russell Road retaining wall, was L-shaped. You would omit the price for that and then resubmit the new price for the piled retaining wall, as it is completely different design. If it was an increase in the thickness of something, then you would take the base price and pro rata it, so add on a little bit. It is probable that some INTCs resulted in a reduction in price, but I cannot provide you with any examples of that now. There were 738 of them and I was not administering the actual day-to-day commercial aspects of the contract. We were always striving to find cheaper materials if we could, particularly in track slab and ballast, type of rails, equipment for poles, we were always trying to find cheaper manufacturers.

89. During the dispute, TIE made a number of criticisms of BSC. One of the reasons that we could not mobilise quickly was, in respect of the depot, the utility works had not been completed. The utility works there had actually failed and they had to do it completely again. There was a 24-inch high pressure water main that needed to be diverted and it was not actually diverted. It was completed (by others) approximately a year late. We could not get unrestricted access down Leith Walk. We started to do piecemeal bits. Then the expectation of TIE seemed to be that we would be able to start work on day one but we needed to draw up statements and health and safety risk assessments. We needed to develop our quality management plan; we needed to develop a health and safety management plan. We need to establish our offices, get our people in place. So I think the rate at which TIE expected us to mobilise was probably wrong in the first place and they took no account of the fact that the programme for design was some seven weeks late. It was also alleged that BSC refused to commence works involving a variation until a price had been agreed for the works as varied. This is false. To start with, we had this gentlemen's agreement with Willie Gallagher where we would commence the works. It was not until we had got ourselves £2.5m in debt and TIE refused to compensate us and refused to acknowledge the Notified Departures, that we started working strictly in accordance with our

obligations under the Contract. After Willie Gallagher resigned, David Mackay then stepped in. He made public announcements in the press that we would get not a penny more for the job. We did not initially refuse to commence the works involving a variation (Notified Departure), we started working in accordance with my gentleman's agreement with Willie Gallagher but all the goodwill had left when he did. The contract actually forbade us to commence work until a price was agreed. In actual fact, I should have crossed the i's and dotted the t's and applied the word of the contract from day one (Clause 80.13). It was alleged that BSC carried out very little on-street works on the Infraco contract with very few exceptions. An example was Princes Street in respect of which a supplementary agreement on new terms had been agreed. The contract granted us exclusive access to the designated working area. The contract also prevented us from commencing work in respect of a TIE change until instructed through receipt of a TIE Change Order. Those two combined prevented us working. The reason we needed TIE Change Orders was due to the utilities being in the way. The utilities had not been diverted. It may be the time to note that even after MUDFA had gone through an area and completed their works, there was still a significant amount of utilities that were in the way. Typically, on Shandwick Place, which is a stretch about 700 metres long, after MUDFA had completed their work in Shandwick Place, there was still 302 utilities within our designated working area that had not been moved. We did not have the access the contract stated we would. If we found a utility, we notified TIE that there was a utility in the way. They came back and asked us to write an estimate for pricing it and we provided the estimate. We then waited for the TIE Change Order before we could commence work. More often than not, we did not get one, so we could not commence work. This was only after we had withdrawn our goodwill, when David Mackay said, "You are not getting a penny for any of this work". This culminated in negotiating a supplementary agreement for Princes Street. On the basis that we were not going to get agreement on Notified Departures, that was a realistic way of TIE paying what TIE was due to pay. We then reinstated an element of goodwill. I totally refute the claims that BSC failed in its duty to take all reasonable steps to mitigate delay to the Infraco works and failed to properly manage and progress the design process after SDS novation

(design being incomplete and necessary approvals and consents being outstanding years after contract close). What I will say is that TIE failed to properly manage and progress the design process before novation because the design was supposed to be 100% complete and issued for construction drawings available at the point of novation and they were not. I accept that BSC were delayed in providing estimates for each INTC. The estimates have basically two parts. They are the direct cost of doing the work and they are the cost of time or extended time to do those works and also the management of that time. Because TIE refused to acknowledge the first notification of change, which was the delay caused to the construction programme by the late design and the slippage between version 26 and version 31 of the design programme at the point of tender (paragraphs 60, 66 and 71), we could not assess how much time every INTC would cause. Without that initial revised programme, you cannot plug the logic of the programme into any kind of system to find out what delay each subsequent event (INTC) would cause. As an example, if we had a two-week delay and it occurred in March, then that delay is two weeks. If that two-week delay actually occurred in the last week of July, then there was a moratorium on works in the city centre due to the Edinburgh Festival for four weeks, so if you have a two-week delay commencing in the last week of July, that would actually take you to the the first week in September. There would be a six-week delay to the following activities but until we knew the starting point, which was INTC number 1, we could not calculate the effect of individual INTCs on time. The result was that we could not give TIE the time consequences on each estimate. We did not delay in providing the cost of the direct works. We only delayed in respect of the additional cost of the extended preliminaries because we did not know what they were. This continued to be a problem because TIE failed to acknowledge any delay as they were obliged to under the contract. I acknowledge that we were late on occasion and that was really brought about by the fact we had not got an organisation that was geared up for 738 changes. The volume overwhelmed us at times. I would refute the allegation that when estimates were provided, they were lacking in specification. Providing we had design information the estimates were adequate. If we did not have the design information, quite possibly, because we did not know what the designer wanted, then we could not

give adequate costs. We would issue an Infraco notice of TIE change possibly due to a utility in the way that had not been moved or design changes, and then you kick into a set timescale of responses between the parties. If the design is not there, you cannot comply with it. It is alleged that BSC's estimates were excessive, for example, the Russell Road retaining wall. The Russell Road retaining wall was changed from an L-shaped retaining wall to a retaining wall that is sat on 1.50 metre diameter piles 18 metres into the ground. It was a totally different design principle in scope, shape and form. The consequence of installing that meant we had to move a significant amount of contaminated material. This is at the back of the network rail maintenance yard. The cost of dealing with that contaminated material was £2.5 million. It was originally put in with the estimate for that structural change as a consequence of it. It was agreed between me and Richard Jeffrey, TIE, who was the CEO at the time that they were quite happy to pay for the contamination. They would take that out of the estimate and pay that separately, which they did (eventually). Our estimate then came down to £2m for the actual cost of the works. This was sent to adjudication and from memory, we got awarded the full amount less around £180,000. TIE lied to the press by saying that the change was circa £5m and we were only awarded £1.8m so it was a 'win' for them. This was a total fabrication because £2.5m was paid in respect of the contamination (that is, this amount was not disputed by TIE so was not sent to adjudication). It was a manipulation of the facts by TIE to put the contractor in a bad light. Richard Jeffrey had acknowledged responsibility for the contaminated materials rested with TIE. They were trying to spin it as a "we had to knock the contractor down" story but it was not factually correct. Infraco was gagged due to Clause 101, from speaking to the press. We could not put forward our side of the story. We asked time and again to be able to speak to the press and put our side of the story. In accordance with the contract, we would submit to TIE the questions we wanted the press to ask us or the answers to the questions the press had asked us. We had to seek their permission to give those responses. Every single time we were refused. The gagging clause should work both ways but it was continually abused by TIE because they went to the press all the time, ever since David Mackay's arrival. I have 40 years in this industry and I have never met such a group of disparate,

lying, conniving, arrogant individuals in my life. To call themselves public servants is an absolute disgrace.

Events between May and December 2008

90. In the weeks and months after Infraco contract close I had discussions with TIE. This was essentially what I talked about with Willie Gallagher before, where he was fairly vociferous in his feelings that he dare not go back to CEC before any work had commenced and asked for further time and monies for the contractor. I offered to work over June/July and September on a goodwill basis and then to try and sort things out at the end of September. We arrived at a gentlemen's agreement upon which we shook hands.

91. In May, June and early July 2008, BSC issued a number of technical queries to SDS, document reference **(CEC00793596)**. Essentially, this is a standard process with any construction project. Designers often do not have construction experience and when a contractor reviews the design in detail he will have questions. We clarify these discrepancies or require further detail to enable us to construct. We do this through a technical query ('TQ') which we submit to the designer. What it should do is focus the designer on the additional information that we require to actually build something. This is a totally standard way of doing it. The outcome was, they would respond to our technical queries because they had a bow wave in front of them; sometimes they took too long or longer than would normally be the case. You would normally expect a response within seven days. It is primarily the expertise of the people who are actually trying to convert this two-dimensional information into three-dimensional structures in the ground. It takes an awful lot of looking at to establish whether the full information is available. You would not do this until you had a contract. It takes many, many hours and has a huge cost. It is usual for there to be TQs of that sort after a contract had been awarded.

92. In May, June and early July 2008, BSC intimated approximately 50 INTC's. The main matters that these related to were; the Hilton car park when we needed an instruction from TIE to expend that money for the

accommodation works, the structural changes on Russell Road right from the beginning and Gogarburn right from the beginning. I cannot recall which were the main INTC's in terms of value and importance. TIE totally rejected these INTC's.

93. A meeting took place on 10 June 2008 between Steve Bell and Scott McFadzen to discuss TIE's concern over BSC's mobilisation and other issues. There followed emails on 18 and 20 June 2008 between, Willie Gallagher, Steven Bell and me, document reference **(CEC00793596)**. Mr Bell continued to be concerned in August 2008 in relation to slow mobilisation and that there had been no attempts by BSC to halt the *"slip to the right"* in the contract programme or to *"proactively progress matters"*. This confirmed my view that TIE's position was that they were under the illusion they had got a fixed price contract and it was all our responsibility. There was a long, long war of attrition to try and beat the contractor down into accepting risk and cost for which it was not liable under a contract. To try and resolve the matter we attempted to manage the project as best we could. We tried to prioritise the designer into giving us the right information. We carried out works in Leith Walk. We undertook that work in a piecemeal fashion, bit by bit, working around the utility contractor rather than just having unrestricted access. So we worked with them. We even worked on one side of the road while they were attending to trackings on the other side of the road. We progressed with reasonable haste with procurement and our subcontractors and major materials. All normal steps. We tried and tried and tried again to resolve all the issues that we could.

94. In an Email dated 17 September 2008, document reference **(CEC01130811)**, Colin Brady, BSC, sent a proposal for amending the Infraco contract to me with a proposal about how to deal with urgent changes (where time was critical) to prevent delay to the construction operations in progress, document reference **(CEC01130812)** (revised versions were discussed, document reference **(DLA00001329)** and **(CEC01125115)**). In October 2008 TIE proposed a Protocol, document reference **(DLA00001328)** in respect of clause 80.20. BSC sent a letter dated 4 November 2008 to TIE, document reference **(CEC01123824)**. An

e-mail dated 20 November 2008 from Steven Bell **(CEC01125114)** noted that an agreement appeared to have been reached in principle. I replied on 21 November, document reference **(CEC01125238)** that while good progress had been made, BSC still perceived significant difficulties with the proposed wording of the new clause. On 28 November 2008, Dennis Murray, TIE, sent an Email, document reference **(DLA00002487)** commenting on 15 points that had been raised during a recent discussion. A further change was suggested by Mr Murray by Email dated 4 December 2008, document reference **(DLA00002483)**. Matters had not been resolved by January 2009 (see e.g. Michael Flynn, Siemens, e-mail dated 16 January 2009, document reference **(CEC01119821)**). To understand the purpose and need for such a proposal I will refer to clause 80, which is 'TIE Changes'. There are timescales set out. TIE changes are dealt with in accordance with clause 80: "The TIE change notice which set out the proposed TIE change in sufficient detail to enable the Infraco to calculate and provide an estimate ... TIE require the Infraco to provide, within 18 business days of receipt of the notice of TIE change, an estimate. On receipt of the TIE change notice, if Infraco received ... too complex to be completed and returned within 18 business days the Infraco within five business days and within ten business days ... deliver to TIE a request for a reasonable extended period of time. As soon as reasonably practicable and in any event within 18 days after having received the TIE notice ...". So it is all about the periods, the 18 days and if that is not enough within ten days you can have some more time. The mechanism for change is typical of a PPP contract which, in this instance, was totally unworkable. In a normal standard PPP contract you might get four or five changes over the course of a three-year job. The change mechanism was unwieldy, not designed to cope with changes that needed immediate responses if the work was not going to be disrupted. What Colin Brady sent was a proposal to have a change mechanism whereby the work could continue. The actual resolution of pricing was undertaken afterwards. This sped up the process so it would not be stop-start. Typically, if I describe to you if we were working down this section of road, if we find an obstruction, potentially as identified a below-ground obstruction in the schedule 4, clause 3.3(c): "Ground conditions, work does not include for dealing with replacement of materials below earthworks outline or below-

16 January 2009 should be 26 January 2009

ground obstructions, a void, soft materials, contaminated soils." If we found an obstruction, the contract requires us to stop work and notify TIE. They then ask us for an estimate. We then had 18 days or if it was complicated we can ask for more than 18 days to provide the estimate. They then accept that, issue a TIE change order. When we get the TIE change order, and not before, we commence work again. So you have got a period then allowable of up to 18 days or more, if it was complicated where we do not work. We cannot work. We are not allowed to work by the contract. We then get our instruction and we carry on. If two metres further down the road we hit another utility we stop and go through this process again. It was just totally unworkable for the type of work that we are doing in an urban environment and with the number of changes that occurred. So we tried to put together something that was workable. We worked with Dennis Murray and we actually got something that we thought would work and it was rejected by TIE, so it did not work. An amendment to the change mechanism in the contract and/or protocol was not agreed and I do not know why.

95. In late September 2008, BSC submitted an application for payment in relation to various claims for Notified Departures. This primarily related to the work undertaken in this period of goodwill I had agreed with Willie Gallagher, and in respect of working with and around the utility contractor in Leith Walk in a piecemeal fashion rather than doing it efficiently. We would be trying to lay 10 metres of kerbs at a time and then have to move to a new location so we would up all our tools and equipment, our men and our traffic management, and you go further up the road where the utility is not in the way and would go and do another 10 or 15 metres, then go across to the other side of the road and do something else and then go back when the utility contractor had finished it and patch it up. Willie Gallagher said that he would get the application put through.

96. BSC submitted a further or repeated application for payment in October 2008. I made a presentation to Mr Gallagher around this time with photographs and drawings showing the problems encountered by BSC with the utility works and access to the site, document reference **(WED00000025).** This was a repeat application of the September

application because the September one had not been paid. Willie Gallagher, again, told me that he would sort this out. I informed Willie Gallagher that if this could not be resolved that I would have no alternative than to strictly abide by the terms and conditions of the contract, particularly in respect of the change control (Notified Departure) process. I was attempting to get Willie Gallagher to clearly understand the actual extent of our disruption and why we were submitting the application. He then resigned two or three weeks later.

97. In a letter dated 13 October 2008, document reference **(DLA00001671)** I suggested a structured approach to progressing matters. Mr Gallagher replied by letter dated 14 October, document reference **(DLA00001672)**. In his letter Mr Gallagher stated, *"We … feel it will be important to recognise that normal design development from the base date design was provided for in the price agreed at contract close".* There was a conference call on 14 October 2008, document reference **(DLA00002766)** and **(DLA00002768)**). I cannot recall the conference call and believe that the chosen sentence is misleading. I acknowledged that TIE did not cause the MUDFA contractor to be late. It was the MUDFA contractor, or the complexity of the utilities that were there or works done. But it is TIE's responsibility to the Infraco contractor to ensure that the MUDFA contractor is out of the way.

98. Willie Gallagher ceased to be TIE's Chief Executive and Chairman in October 2008 and David Mackay became interim Chief Executive of TIE. It is my belief that Willie Gallagher had recognised the enormity of the issues and difficulty facing the construction contract in terms of time and money, and the significance, extent and scale of those things. I think he decided that the 'kitchen was going to get too hot', so he would get out while the going was good. Or he made an estimate of what he thought the increases were going to be and reported those upwards and he was told to get out. I do not know which. This changed BSC's relationship with TIE in a big way. The gentleman's agreement to try and resolve issues and get it all working smoothly, disappeared. David Mackay came in and he was pictured in the press, I think The Scotsman and the Edinburgh Evening News, I am not sure which or both, and there was a photograph

of him on the front page making derogatory comments about kicking the Germans out and not a penny more. So the relationship deteriorated. Also his personal attitude towards me was arrogant and supercilious. He ignored me, he would not engage. I had never seen such a figure in a senior position.

99. I am aware that an internal TIE Email dated 18 November 20008 by Steven Bell noted that: "*the lack of an agreed commercial position with BSC has been holding up completion of various alterations to the designs submitted for Prior Approval*". Part of the change requirement is to get redesign done. Redesign costs money and therefore SDS needed an instruction, in accordance with the novation agreements and the contract, before they would implement work and therefore we needed an instruction from TIE before we pass down the instruction to them. We are not in a position to reimburse them for their costs unless we are going to get reimbursed from TIE so that was the flow-down, if you like. The dispute between TIE and BSC held up completion of the design by SDS and the obtaining of outstanding approvals and consents as they were not going to do the work unless they knew they were going to get paid and we are not going to pay them unless we know we are going to get paid.

Events in 2009

100. I note in a letter dated 23 January 2009, document reference **(CEC01182823)**, BSC intimated a Compensation Event to TIE on the basis of the failure of SDS to achieve the release of Issued for Construction Drawings (IFC) by the dates identified in the programme in relation to section 1A, Lindsay Road Retaining Wall. I do not know why SDS were unable to achieve the release of these drawings as I did not work for the SDS, but they were probably swamped by the amount of work that they had to do. Colin Brady mistakenly referred to this as Compensation Event in the letter, which should have been documented as a Notified Departure. I do not think the failure to achieve the release of these drawings by the due dates caused or materially contributed to the dispute between TIE and BSC. BSC were not able to take the steps to ensure SDS released the drawings on time for exactly the same reason

that TIE were unable to manage the SDS to complete the design to 100 per cent IFC by the time of the novation. As I have noted repeatedly above and in my original witness statement, the design was supposed to be completed by the time of contract award. Initially, we had never anticipated having to supervise the completion of the design by a designer novated to us. However, when this happened, and we were left with the obligation of supervising the completion of the design, I believe that the Infraco did so very well in the circumstances. I would also state that SDS were never the critical delay on the project, albeit they were also delayed by the continued presence of utilities etc and the need to complete their design out of sequence. The continued presence of the utilities (the incomplete MUDFA Works) was the critical delay.In relation to Lindsay Road, this is dealt with by pricing assumption 19 (in Schedule Part 4) and it says: *"In respect of Tower Place Bridge, Victoria Dock Bridge and Lindsay Road Retaining Wall the Infraco shall only be obliged to carry out the works to the extent shown in accordance with the base date design information".*

101. A meeting took place between BSC and TIE on 9/10 February 2009 to discuss the issues between the parties. I note the following: (i) TIE's slides provided in advance of the meeting, document reference **(DLA00003129)**, (ii) TIE's note on BDDI, document reference **(TIE00665341)** and BSC's response, document reference **(CEC01119885)**, (iii) TIE's note on BSC Claim for Change from BDDI to IFC, document reference **(TIE00665342)**, and BSC's response, document reference **(CEC01119886)**. Steven Bell, Stewart McGarrity, Jim McEwan, Dennis Murray, Frank McLaren, Michael Heerdt and Robert Sheehan were at that meeting. We were trying to resolve the escalating disagreements that were bubbling up to the surface, but they were not resolved adequately because the dispute escalated further. Stewart McGarrity's notes of the meeting record that BSC had estimated our projected outturn costs on the project as between £50 million and £80 million, comprising broadly £20 million of direct costs due to notified departures/TIE changes, £20 million extension of programme and £10 million delay and disruption. This is a correct record of what was discussed. This is my estimate for the scale of the probable outturns at the time. I believe that we reasonably accurately calculated the £20 million in direct costs; extension of time, £20

million for that, construction site is basically a machine for building. It had fixed costs whether it did any work or not because the people are there. The power is there, the rates, the guys' wages, and the hire costs of pieces of plant equipment. If the site does no work, it still has a fixed cost. The delays that were incurred, if you extrapolate that fixed cost on a weekly basis, circa £20 million. If we were supposed to start working at one point, but we did ten metres and then we packed up and we went across the road and put traffic management out, we did ten metres over there and then we packed up and we went and did 20 metres over there and then we came back, it has a cost and that cost was the £10m. Potentially you could have another £30m of the same because of the same problems of changed design, poor design, utilities in the way, utilities not cleared even when the utility contractors had ostensibly finished. The problems were not resolved. Mr McGarrity's notes also record me as having said that there was general acceptance by TIE pre-contract that the project would cost £50 million to £100 million more than was in the contract at 15 May 2008. My basis for that statement is what Willie Gallagher said to me at that time.

102. The slides for the above meeting, document reference **(DLA00003129)** noted that there were approximately 250 change notices at that time. These change notices were largely INTC's. In terms of broad groupings, I cannot give you the numbers, but significant numbers on the pricing assumption 1.1 and 1.2, pricing assumption 2 and pricing assumption 4. I do not think we were up to number 12 by then. The most significant INTC initiallywas the lack of access into the depot which was due to utilities. It probably held up the depot for a year in respect of that part of the works.

103. BSC's response, document reference **(CEC01119886)** to TIE's note on Base Date Design Information, document reference **(CEC01119885)** states: *"BSC letter 927 (13/11/08) [TIE00382741] accepts that drawings both issued and available are BDDI but repeats that there is no agreed list, and provides a list for agreement. The significant issue preventing agreement is the status of 21 marked up drawings, showing highway layouts with surfacing details, upon which BSC state their price is based. BSC state that these drawings were available prior to 25th November;*

were the product of a design workshop, were issued by SDS and are part of the BDDI. These drawings conflict with other BDDI drawings". What we had thought was, because these drawings were in existence we will put in pricing assumption number 12 and number 13. Number 12 is*: "Highway works in Princes Street, Shandwick Place, Haymarket Junction, St Andrew Square ... Infraco shall be required only to plane back the existing road structure to a sound base at the underside of a new surface course and replacement of surface course suitable for the purpose of revised road surface profile ... full depth of reconstruction, as current designs in this area shall not be required".* There were a series of drawings that were marked up in coloured highlighter pens, namely turquoise blue and orange, about the extent of where we just pulled the top surface off and re-profiled it, rather than digging down this deep and rebuilding it. For some unfathomable reason the actual list of the drawings were not put into appendix H, and it should have been. This was resolved in the Tower Bridge Adjudication, where Infraco won. But if TIE did not like the adjudicator's decision they ignored it.

104. A dispute arose in relation to the Princes Street works due to start in February 2009. The dispute was resolved by parties entering into the Princes Street Agreement, document reference **(CEC00302099)** (an initial draft of the agreement was agreed on 20 March 2009, to allow work to commence on 23 March, and that the final version of the agreement was signed on 30 May 2009). The underlying cause is when we put in an Infraco notice of a TIE change, we submitted an estimate, TIE failed to agree that estimate. They knocked a sum of £1,500 off an estimate for £8,000. But they were actually in breach of the requirements of the contract, so we could not agree it. Because we could not agree, the contract prevented us from starting work. We had had a series of meetings with myself, with Michael Heerdt, with Robert Sheehan, with the chief executive coming over, with Alex Messenger, all trying to resolve these issues where we had a belief or an interpretation of the contract and TIE disagreed with that interpretation of the project. We had a series of meetings, and then we started working. This was after Mr Mackay had publically stated there was not a penny more, when quite clearly the contract was not a fixed price and there were many, many exclusions and

variables in it that required more money to be paid and more time to be awarded. We started working in accordance with the contract, which, for the avoidance of doubt, states *"The Infraco shall not commence work in respect of a TIE change until instructed through receipt of a TIE change order"* (Clause 80.13 again). The reason why BSC did not start work on Princes Street is that the contract did not allow it, not because we refused to do it. To resolve this, we came to a supplementary agreement to enable the works to progress. That was necessary because, as I described before, if we found an obstruction in one place, then we had to stop until we had it agreed and a TIE change order was received then we would proceed. It was so complex on the ground that 2 metres further down, approximately, you would hit another one, and you would stop again. It was just completely unworkable. The contract was the wrong contract. I guess DLA Piper may have been to blame for this, although they may have been directed to use this contract. I do not know, but it is completely unworkable. We came up with a workable agreement, called the Princes Street supplemental agreement, so that we could carry on and do the work, and record the disruption, the delays, the obstructions, the voids, the contamination, whatever we found there, record it as we went along and get paid, essentially, for the work that we were doing over and above what we were contracted to do. The main terms of this agreement were that we would, on an on-going basis, get paid for the work that we did. It was agreed that BSC would carry out the Princes Street works at demonstrable cost as the contract was not workable in that situation. There were many unknowns and time constraints of assessing the impact of those unknowns. I cannot recall the extent that this agreement increased the cost of works on Princes Street.

105. An Email dated 27 February 2009 from Councillor Phil Wheeler, document reference **(CEC00868427)** noted that he and I had a meeting to discuss the dispute between TIE and BSC. Prior to that meeting we had been approached by the press with various questions, a schedule of questions. The contract required us to get agreement from TIE, and the contract actually requires for each party to get an agreement from the other party prior to publishing anything or disclosing anything. So we offered to TIE the list of questions from the press and our proposed answers and said,

"This is what we want to send out to the press. Please can we have permission"? That permission was denied under the Clause 101, euphemistically known as the gagging clause. Although TIE breached the terms of that clause multiple times and put more or less anything they wanted to into the press, we did not breach the contract. But I went in and spoke to a number of people who I felt I could talk to without breaching that contract, namely members of City of Edinburgh Council, some members of the Scottish Parliament, and also a senior executive in Transport Scotland, because nobody would listen and I did not believe that these people were getting fed the right story. I thought they were getting a litany of lies and half-truths, perpetrated most likely by David Mackay, as he seemed to be the conduit. In fact it goes on record as saying that he told City of Edinburgh Council the price was 95 per cent fixed-price, when quite clearly through the history of what we have talked about over the last 24 hours, by reading the documentation, it was nowhere near a fixed price. In my view, possibly 50 per cent of it was fixed price with 50 per cent variable. In fact, at the time of contract there were only 60 per cent of the drawings in our possession. The construction, the programme, was already seven weeks and three days late on day one. I went to Phil Wheeler, and I told him how the contract worked and where the problems were. I showed him the photographs of the disruption we had suffered on Leith Walk. I told him that I thought that TIE was playing games, but nobody would listen. I did not think he was being told the truth. I instigated this meeting. Phil Wheeler actually wrote to David Mackay basically saying that he had seen copies of documents that I had shown him. I had explained how the contract was not working properly, what Schedule Part 4 was included in the contract for, and the backing (priority) that the main contract under clause 4.3 gives to Schedule Part 4. I demonstrated and evidenced everything that I was saying in print. Phil Wheeler said that he had concerns that it leaves TIE exposed and that potentially there was going to be financial and time consequences. I had a series of meetings. I saw Shirley-Anne Somerville on multiple occasions. I saw the leader of the Conservative Party in the parliament offices. I saw the leader of the Labour Party. I saw John Swinney, who was Minister for Finance and I saw Ainslie McLaughlin, who was a senior executive in Transport Scotland, all to try to get somebody to listen to the reality of the

situation that had developed and was continuing to develop. Meanwhile TIE, for their part, were talking to the press. The Transport Convener was on TV and we were not given access at all to tell our story. In response in the same Email chain, David Mackay stated, *"I did counsel you that you would be fed a litany of lies, half-truths and so on and I'm sure you will recall from many briefings and from many sources that has been characteristic of RW for many moons".* We had zero respect for each other. This had arisen throughout the tender process. TIE was just trying to get a figure that was underneath an unknown threshold to get to the next stage of procurement, i.e. award of contract. They moved money from phase 1(a) into phase 1(b). They moved money out of phase 1(a) and called it a bonus. All to reach a notional figure. TIE acknowledged this verbally, but never in print. I think the words were, "Everyone knows that the value of this is going to go up 50 or 100 million once it is awarded". It is even in print in the contract that they acknowledged and agree that the facts and circumstances on which the price was based were not the facts and circumstances that would apply (Clause 3.2.1 of Schedule Part 4). Everybody knew about it, and as soon as we got the contract they ignored all that and they had said, "No. No. No. We are not paying you, get on and do it", trying to force all the risk and unknown on to the contractor, and effectively get a contractor to donate half the tram system to them, which no contractor was going to do.

106. I met with MSPs around March 2009 which is referenced in an Email dated 13 March 2009 from Mike Connelly to David Mackay, document reference **(TIE00441633)**. I met with Shirley-Anne Somerville from Scottish National Party, John Swinney from Scottish National Party, Jenny Dawe, who is leader of the council, Donald McGougan, who was finance director, and Phil Wheeler who was transport secretary. As for the matters in the Email, did I admit that I lied? I do not recall that. Set the records straight, yes. We did not ask for £80m. TIE put out in the press that we had asked for £80 million before we would proceed on Princes Street. We did not. We asked for £1,500. The £80m was an assessment of the possible overall outcome of the whole job over the four-year construction period.

TIE00441633 should be TIE00446933

107. There continued to be problems with design. An Email dated 30 April 2009 from Tony Glazebrook, for example, document reference **(TIE00037854)**, notes the essential requirement that the Design Assurance Requirement Packages conveyed the answers to the points in Section 2.8.2 of the Design Management Plan, but that 'SDS has failed to do this so far in any DAS offering, whether informal or formal. Their offerings usually come with the implication "the answers are all in there, go and find them". This has not proved to be the case. I did not particularly get involved. It was a technical issue between the site operational staff and the designers about the design assurance statement. The performance of PB both before and after the SDS novation was inadequate leading to only 50% of the design being completed at novation when it was meant to be 99% complete. The reasons for the continuing delay in completing design and in obtaining all outstanding statutory approvals was the quantity and the amount of rework. They probably had the price wrong as well, in terms of the stations and the tram stops, colour of ticket machines and position of ticket machines. You cannot build a tram stop if you do not know where the ticket machine is going to go, because that needs power and that power has got to come in from somewhere across the road. So you cannot actually start work until you know where the ticket machine is going to be or you would have got to go back and dig the road up again.

108. In a letter dated 30 April 2009, document reference **(CEC00322635)**, Steven Bell sent BSC revision 8 of the MUDFA Programme. In a letter dated 8 July 2009, document reference **(CEC00322640)**, Martin Foerder advised Mr Bell that that constituted a Notified Departure because the access dates were at variance with Schedule 4 Pricing Assumptions 3.4.24 (diversion of any utilities) and 3.4.32 (Schedule Part 15 (Programme) programming assumptions). There was further correspondence and a meeting between the parties on 3 September 2009 at which TIE explained that it agreed that a Notified Departure had occurred but did not believe that the estimate submitted by BSC on 6 August 2009, document reference **(CEC00322634)** contained proposals to demonstrate that the Notified Departure would be implemented in the most cost effective manner. This is noted in Steven Bell's letter dated 3

September 2009, document reference **(CEC00322639)**. I think Mr Foerder's correspondence is absolutely correct and Mr Bell's correspondence is an attempt to wriggle out of TIE's obligations.

109. In an email dated 1 June 2009 by Kevin Russell, document reference **(CEC00963392)** attached a short memorandum of understanding dated 29 May 2009, document reference **(CEC00963393)** in relation to DRP1 (i.e. the Princes Street dispute). The initial dispute in Princes Street came about because TIE refused to add the preliminary costs (prelims). The prelims are basically those static fixed costs which operate whether any work is undertaken or not. TIE refused to add that to the direct cost of the change in Princes Street so that was the cause of the dispute. By this time we had got the Princes Street supplementary agreement to enable work to continue. This was a dispute on the preliminaries which were to be added to Notified Departures. It was going to pop up in further variations, if you like. There was a mediation and we actually got agreement in that mediation that 17.5% would be added to the actual cost, the direct costs to our static costs, and the preliminary costs. The purpose of the memorandum itself was to fix the level of prelims which were to be added to further variations as and when they arose.

110. On 3 June 2009 parties entered into a Minute of Variation ("MoV2") of the Infraco contract, document reference **(BFB00053622)**. The need for, purpose and effect of that agreement was to formalise the memorandum of understanding into the contract (on prelims), so it became a contractual agreement.

111. An informal mediation took place between 29 June 2009 and 3 July 2009. TIE produced position papers on the following topics for the mediation: Value Engineering, document reference **(CEC00951731)**, On Street Supplemental Agreements, document reference **(CEC00951732)**, Off Street Issues: RRRW, Gogarburn bridge, Carrickknowe Bridge and Depot, document reference **(CEC00951733)**, Misalignments between Infraco Proposals and SDS Design, document reference **(CEC00951734)**, Hilton Hotel car park, document reference **(CEC00951735)**, Evaluation of Change, document reference **(CEC00951736)**, Evaluation of EOT (TIE

Change No 1), document reference **(CEC00951737)**, Earthworks Outline, document reference **(CEC00951738)** and Agreement on BDDI (Drawings), document reference **(CEC00951740)**. To the best of my recollection we were provided with TIE's position papers and the persons present at the mediation, were, Martin Foerder, Kevin Russell, Robert Sheehan and I, probably Michael Flynn (of Siemens) and maybe some of his other colleagues from Siemens: Antonio Campos (CAF), Steven Bell, Stewart McGarrity, Susan Clark, Dennis Murray. I think Richard Jeffrey just stuck his nose in for five minutes and did not participate. I cannot immediately recall the exact issues that were discussed or the outcome. We were provided with TIE's position papers and they were provided with ours. My only comment on the views expressed in TIE's position papers is that our papers were right and theirs were not. Subsequently that was proved to be correct, in pretty much every adjudication we went to.

112. In an Email dated 31 July 2009, document reference **(TIE00031088)** Martin Foerder sent Richard Jeffrey BSC's Final Settlement Proposal, document reference **(TIE00031089)**. The following proposals were made: Extension of time was for V26 to V31 and our proposal was £4.9m, MUDFA programme, ten and a half months' delay. The £4.9 million was for seven weeks and three days. Ten and a half months was the MUDFA. We wanted to put it up to 12 months but 1½ months without costs and that protects us from liquidated damages. That is what the extension of time is for. The proposal was offering to credit 4% of the value of the measurement back to represent normal development of design with reference to pricing assumption 3.4.1. (to deal with what was meant by 'normal development and completion of designs') . I think Martin Foerder had calculated that, of the changes, as an average 4% of them were normal design development and anything above that was a change to the scope, changes in design principle shape, form, specification as identified in Schedule Part 4 (clause 3.4.1). We put a proposal there to do the rest of the On-Street works in the same manner as the Princes Street supplemental agreement had been agreed to prevent further dispute arising in Haymarket and Shandwick Place all the way right down to Newhaven. 'Let us adopt this principle, this supplemental agreement that works in Princes Street', as a way of overcoming all the issues in the city

centre. In relation to misalignment, we said that we could not accurately identify the cost and time impact because there were so many cases of misalignment. I think, therefore, we got an independent quantity surveyor to try and do the assessment. We worked over a period of five months on a larger scoped supplemental agreement for all of the on-street works, and then after five months' work it was rejected by TIE. In my view, they strung us along for five months and then rejected it when it got to the point where it needed to come to a head and there was no reasonable way they could further delay it and they just said that was not acceptable. I cannot recall if anything else was accepted.

113. Discussions continued in the second half of 2009, in particular in relation to the on-street works. Parties met on 6 October 2009, and thereafter, to explore the possibility of using the Princes Street supplementary agreement as the basis of a wider on-street supplemental agreement. Martin Foerder, Warwick Mellor, Robert Sheehan, David Darcy, and then for TIE :Richard Jeffrey, Steven Bell, Stewart McGarrity, Dennis Murray were involved in discussions on the possible extension of the PSSA for the rest of the on street sections. These discussions were on how we could turn the Princes Street agreement into something that encompassed Haymarket down to Newhaven, so the extent of what they call the On-Street Works. It was rejected because they said it would be contrary to EU procurement rules. This was very frustrating. Was the Princes Street supplementary agreement not contrary to EU procurement rules as well?

114. An adjudication decision was issued on 13 October 2009 by Robert Howie QC in relation to the Hilton hotel car park works, document reference **(WED00000026)**. Adjudication decisions were issued on 16 November 2009 by Mr Hunter in respect of the Gogarburn bridge, document reference **(CEC00479432)** and Carrickknowe bridge, document reference **(CEC00479431)**. On 4 January 2010 Mr Wilson issued his adjudication decision in relation to the Russell Road retaining wall two, document reference **(CEC00034842)**. Richard Jeffrey said that he wanted to establish point of principle. Through two or three adjudications, points of principle which could then be applied to all their disputes. Hilton car park was raised by TIE and had no real point of principle attached to it.

Carrickknowe and Gogarburn were also raised by TIE. I think Russell Road retaining wall was raised by Infraco. They all have big points of principle, apart from Hilton Hotel car park which is like a really narrow one on what accommodation works meant and it was worth about £30,000. But Carrickknowe and Gogarburn, that was about what the changes from base date design information to IFC meant, and it is about pricing assumption 3.4.1.1, so it is about, in terms of design principle, shape, form and/or specification that would not be amended and what does that definition in schedule part 4 mean. A lot of these disputes between the parties were about design change principle. What is design development? What is not? It was felt that these two adjudications where that was the issue, would help unlock a point of principle which then could be used going forward by the two parties. All of these adjudications apart from Hilton, were intended to establish principles of wider application in relation to the other matters in dispute. I would say that the Hilton car park favoured TIE. It was a very narrow issue. Gogarburn, Carrickknowe and Russell Road Retaining Wall all went in favour of Infraco and these were the ones which mattered. On Carrickknowe and Gogarburn and Russell Road Retaining Wall, the adjudicators in those disputes were asked to confirm what the meaning of Schedule Part 4 was. What that did to the contract price, how it changed, particularly where there were design changes between what we priced and what we had to build. And it was 100% in favour of supporting the Infraco interpretation on those points. The really disappointing thing is that TIE then refused to acknowledge those outcomes.

115. In an internal email dated 9 December 2009, document reference **(CEC00328711)** Baltazar Ochoa, Change Manager, BB, circulated a draft memorandum of understanding between BB and PB, document reference **(CEC00328712)**. If you boil this down, this is a letter which is very clearly legally privileged. This is from Suzanne Moir to her own client, Baltazar, copying in me and Fraser McMillan, and it is commenting on a minute of understanding. It is giving legal advice to Infraco on what that document does and is intended to do. Highly confidential. And the TIE guys have promised to delete it and then did not and it is now in this Inquiry and it is legally privileged information. It is clearly very underhand. It is typical of

the underhand tactics displayed by TIE throughout the course of the contract.

Events in 2010

116. In a letter dated 3 February 2010, document reference **(CEC00655626)**, BSC sent a letter to Richard Jeffrey setting out BSC's views on certain contractual issues. Steven Bell responded by letter dated 16 February 2010, document reference **(CEC00578867)**, and BSC responded by letter dated 1 March 2010, document reference **(CEC00578328)**. I wrote these letters, so they are my views.

117. In a letter dated 19 February 2010, document **(CEC00574090)** TIE set out the findings of their review of the estimates provided by BSC in relation to the INTCs. They started auditing us to death. Following the collapse of the On Street Supplemental Agreement in March 2010, the relationship between Infraco and TIE began to break down completely. From March 2010 to late 2010 there were two different streams of correspondence, discussions and actions: (a) The first can be described as TIE's war of attrition; and (b) The second was the attempts at conciliation and progressing the Project. From March 2010 onwards, both Infraco and TIE engaged in a significant volume of correspondence during which both Infraco and TIE made allegations as to each other's conduct, failings and problems. During the course of this correspondence, and in the press, TIE called Infraco a "*delinquent*" contractor. This caused great offence to Infraco, and to Bilfinger in particular, given that the word "delinquent" suggests criminal conduct in the German translation of the word. TIE engaged the services of Tony Rush (of the Gordon Harris Partnership) during the spring of 2010. His remit appeared to be to make life as difficult as possible for Infraco. He was involved in Project Carlisle, but he was also involved in a lot of the correspondence, audits and termination letters. His arrival on the Project coincided with the complete deterioration of the Infraco / TIE relationship. His manner was very aggressive, and he tried to use bullying tactics to make Infraco do what he wanted us to do and to stop pursuing our contractual entitlements. The complete breakdown in the TIE/Infraco relationship was defined by a number of activities which

could be said to contribute to a "campaign" by TIE and includes the following: (a) The parties were at complete odds as to the proper operation of the Infraco Contract. In particular TIE failed to operate the Notified Departure (Schedule Part 4) and TIE Change provisions (clause 80 Infraco Contract), and refused to acknowledge Infraco entitlements under the Contract which ultimately led to works coming to a complete halt in September 2010 (b) Following 7 months of close collaboration to derive an acceptable new Programme to complete the works TIE then refused to agree this updated Programme with Infraco. In agreeing to an updated Programme, TIE would have had to acknowledge Infraco's entitlement to an extension of time (particularly due to the MUDFA delays) and they could not do so as this would look bad in the press (c) TIE personnel became extremely difficult to work with (d) TIE increased the number of audits which were carried out. It is not denied that TIE was entitled to carry out audits, but the increased volume distracted attention from Project work, and in my opinion this was abused by TIE and not used for its true contractual purpose. It was used by TIE to try and find "ammunition" which could be used against Infraco, rather than for the purpose for which the audits were intended (to verify the quality of the work and compliance with the contract) (e) There was an increase in the number of disputes referred to adjudication by both parties (f) TIE refused to acknowledge and apply the principles established in adjudication decisions (Infraco were successful on all major points of principle) (g) There was an increased amount of correspondence. This correspondence included multiple letters being sent on the same day (up to 50 letters at a time, frequently arriving at five to five on a Friday evening) and a constant stream of accusations and allegations. Infraco had to dedicate a great deal of resource to responding to this correspondence (h) There was an increase in the nastiness of the allegations contained within the correspondence. TIE frequently and repeatedly referred to Infraco as a "*delinquent contractor*" (i) TIE began to serve Remediable Termination Notices and constantly threatened that the Infraco Contract would be terminated on spurious grounds. These Notices could have had very serious consequences under the Infraco Contract and had to be responded to carefully (j) TIE used the media to criticise Infraco repeatedly, again in complete contravention of the confidentiality clause

(clause 101). In contrast, Infraco was bound by this "gagging clause" (Clause 101) under threat of termination which meant that we were not able to defend our position in the face of TIE's flagrant miss-telling of the truth.

118. In a letter dated 19 February 2010, document reference **(CEC00530669)**, TIE set out their interpretation of clause 65.2 of the Infraco contract. Martin Foerder replied by letter dated 1 March 2010, document reference **(CEC00578327)**. Martin Foerder is trying to set the record straight in these correspondences, as to what the actual facts and circumstances were.

119. In a letter dated 19 February 2010, Martin Foerder sent TIE a detailed offer for a supplemental agreement covering the remainder of the on street works, document reference **(CEC02084034).** The purpose of the proposed agreement was to try and get a workable mechanism to deal with the items which constitute a change in the on the street works, and enable the best possible progress to be made, rather than the stop start nature of an inappropriate change mechanism incorporated in the main contract. It is about continuity of work.

120. In a letter dated 26 February 2010, document reference **(CEC00368373)** Richard Jeffrey of TIE rejected BSC's offer for supplemental agreement covering the remainder of the on-street works. Mr Jeffrey's letter included the following assertions*: '6. ... The recent audit carried out by TIE shows that Infraco has failed to appoint key subcontractors for any civil insuring works required by clause 28 of the Infraco contract. 7. ... the SDS provider should have completed the design in January 2009. TIE are not satisfied that Infraco have complied with their obligations from the Infraco contract in managing the SDS provider. 8. CEC assert that Infraco has been responsible for delays in obtaining approvals*.' This was just typical of the stonewalling that we got in every argument. There was a meeting on 2 March 2010 where Richard Jeffery was trying to force me to say that Infraco were not going to start work until the agreement was signed. He was trying to say I was holding them to ransom, but in fact what Michael Flynn and I were saying was, there was so much change we cannot start.

So you rely upon the contract. He was trying to get me to accept that I was holding them to ransom with the on-street supplemental agreement. The purpose of, and main proposals contained in, my letter dated 3 March 2010 to Steven Bell **(CEC00655822)**, was to try and reach agreement with TIE for a mechanism to allow the contract to proceed as smoothly and uninterrupted as possible. The main proposals were stated to draw a line on the financial change, the cost advised of changes, and all the estimates that were in excess of £100,000 each. To look at the deal but exclude all the prolongation costs and put them on the back-burner to be looked at separately, so they do not need to be resolved prior to the works carrying on, and to finalise a mechanism for doing the on-street works, similar to that of Princes Street.

121. In a letter dated 1 March 2010, document reference **(CEC00578328)** Martin Foerder noted that TIE had sent 312 letters in the month of February 2010 alone. This was a campaign to try and overwhelm us with excessive amounts of letters, to continually audit what we were doing. We were getting audits every day, off various people, which were designed to tie up our resources and generally load us down. I have subsequently seen a document called Project Pitchfork which seems to be TIE's 'blueprint' for this campaign against us and which in retrospect, explains a lot of what was going on. This was indicative of TIE's approach around this time and continued for approximately one year. We had dedicated additional staff and lawyers permanently on site to deal with it. It was very expensive for Infraco to be having to do all this at the same time as our own job. But effectively we firmly believed, and have since been proven to be correct, that we were right and we were not going to give up our principles.

122. On or about 3 March 2010, BSC gave an informal presentation to TIE to explain the effect of the utility delays on the infrastructure works, with reference to the Contract Programme, Revision 1, document reference **(WED00000024)**. The works were between 8 months and 16 months delay at varying places along the whole length of the job. In the contract programme, I believe the orange block is the effect of the delays of the

utilities, and the red arrows seem to be the MUDFA delays in their particular locations, but I am unsure of any of the others.

123. I note Kenneth Reid, BB, met with David Mackay on 5 March 2010 and sent a letter the same day, document reference **(CEC00579534)**. I also note a letter dated 1 April 2010 by Richard Jeffrey, document reference **(CEC00654880)**. The purpose of this meeting was to set out the facts of the contract, and a series of suggestions about how to proceed. I think there were four or five different suggestions there. We were continually attempting to find mechanisms to ease the conflict and every single time we were just rebutted. Mr Jeffrey's letter dated 1 April 2010 refers to a proposal to refer the meaning of Schedule 4 (including, in particular, clause 3.4.1.1) to a form of binding determination. I would have been quite happy to take a binding determination with all that we had, the outcome of two adjudications which particularly refer to that in our favour. The proposal got caught up in this entire morass. There was so much stuff going on. We did not get a binding determination on that issue. I was extremely disappointed with Richard Jeffrey. I can see some of the people who were there from the beginning being entrenched in their views. When somebody fresh comes in you expect them to look at it with an unbiased viewpoint, be able to read the words and interpret the words, what the words mean, what the words say, and say, "Come on, guys, we have had the assessor across three adjudications. We have been proven wrong in all three. They have been proven right. However hard that is, let go of your views and accept that you are wrong. Let us get on and get this job sorted", but he did not do that. He did not have the backbone. He just went with the flow.

Richard Jeffrey should be Steven Bell

124. In a letter dated 8 March 2010, document reference **(CEC00548728)** I wrote to CEC officials providing BSC's perspective of the dispute, expressing concerns as to TIE's interpretation of the contract and handling of the dispute and advising that it was likely that additional costs were in excess of £100 million. Tom Aitchison, CEC, responded by letter dated 24 March 2010, document reference **(CEC00356309)**, to which I replied by letter dated 1 April 2010, document reference **(CEC00234781)**. The reason why I wrote to CEC officials is because nobody was listening to our

side and I thought the council were getting fed the wrong story. I had been to see various MSPs and councillors, and for reasons now known only to them, possibly self-preservation, they had decided not to take the matter further and not to put their heads above the parapet. So I wrote to the chief executive and all he did was send it back to Richard Jeffrey. Richard Jeffrey was part of the problem, not part of the solution. I thought that Tom Aitchison would have been part of the solution. Due to this letter, I received, at some stage, a letter from DLA Piper telling me to withdraw my letter or I would be sued personally for defamation. The figure of £100m was arrived at as we knew the direct costs of the situation at that time. We knew our monthly billing cost. We believed that we knew the extent of the utility delays. We felt we had a good handle on when the design information would be in a sufficient state to enable us to complete everything, so basically from those four things it was pro-rated off. This figure was arrived at very early on. In the very early days people were talking, that bearing in mind the design was supposed to be finished before we were awarded the contract, the utilities were supposed to be completed before we were rewarded contract. We did not have 40% of the information.

125. In a letter dated 28 April 2010, document reference **(CEC00210506)**, Steven Bell noted that at a meeting on 14 April 2010 I had stated that I was aware that the SDS provider was not designing with Best Value in mind. Examination of the design had indicated to me that it possibly was not the best value. To get the best value one wants - let us talk about bridges for a moment - a consistency of bridge type so they are all the same, because you go through a learning curve and the second one you get faster, more efficient, the third one the same again. Every single one was different. This is not best value because you cannot go and install the piles at one place without spending a huge amount on temporary works to gain access for the equipment to construct it. That was not best value. The tram stop at Murrayfield has the most fancy over-the-top steps, an absolutely beautiful, great big construction. TIE insisted on that. That is what they wanted. It is not best value. It is used three times a year when there is a home match on and there are not so many people that can get

on a single tram that you need such a big fancy staircase, but that is what they wanted.

126. In a letter dated 21 May 2010 by Martin Foerder, document reference **(CEC00328161)** noted (at numbered paragraphs 2 and 3) that TIE had proposed that *"after the issue of this instruction Infraco proceeds on a demonstrable cost basis for all Notified Departures"* and that *"your offer to reimburse our reasonable costs on a 'without prejudice basis' in respect of the On-street works is somewhat unsatisfactory."* It was an offer to proceed on a demonstrable cost basis. The point about it is that it is all without prejudice, so we did not trust these guys to stick to their word. All the trust had gone by this stage. They accused us of delinquent behaviour. They were trying to pressurise us into accepting costs and risk which were not ours to accept. There was no possible way you could find what they were saying satisfactory.

127. Further adjudication decisions were issued (1) on 18 May 2010 (by Mr Hunter, re Tower Bridge), document reference **(CEC00373726)** and **(CEC00325885)**, (2) on 24 May 2010 (by TG Coutts QC, re Section 7A-Track Drainage), document reference **(TIE00231893)** and (3) on 4 June and 16 July 2010 (by R Howie QC, re Delays Resulting from Incomplete MUDFA Works), document reference **(CEC00375600)** and **(CEC00310163)**. Tower Bridge: was about what forms were the BDDI. I think on value we did not do as well as we had hoped. It was 50/50 on value but the point of principle was in favour of Infraco 100%. Track drainage: this is the 3.4.1.1 of Schedule Part 4 concerning assumption 1, about what is 'design development'. Gordon Coutts QC found entirely in Infraco's favour. I do not know if that dealt with value as well. Some of the valuations had mixed success. It is correct that on that adjudication and on Tower Place Bridge, Infraco did not get the full amount it was looking for but it won on the point of principle. My view generally is that the adjudicators found in favour of Infraco. An estimate is always an estimate is it not. Our estimates were being valued by a legal person who did not fully understand construction cost and risk. They came up with their best judgement. We had accepted the process for dispute resolution so we accepted it. We were not particularly happy with it. Had it been valued by

construction people I am sure we would have got a lot closer to the amount we were looking for. On MUDFA we were looking for an extension of time for each one of the four sections of the job. We got it in relation to the depot but not the others because we had not ticked a final box. In terms of the wording of his decision it is incredibly helpful on issues such as the MUDFA access issue and the fact that clearly the contractor had been delayed by all of this, so again on a point of principle I think it was one that we were pretty happy with.

128. In a letter dated 4 June 2010, document reference **(CEC00298078)** Anthony Rush, TIE, wrote to Nick Flew, Managing Director, PB (Europe), advising that the design was still incomplete, including the on-street track. In a letter 5 August 2010, document reference **(CEC00337893)** DLA wrote to PB expressing concern *"over the programme and cost implications of the unusually high volume of design changes or alleged design changes that are still appearing and causing claims related to design development".* What TIE was trying to get is the document they already had, because I now know, from looking at the document referred to me and which I discuss at paragraph 118 above, that someone in TIE had got hold of our confidential legal advice, pretended they had deleted it, and in fact circulated this within TIE. So what these letters are doing is asking to get hold of the final version of the agreement between BB and PB which they already knew existed (and had a copy of). That is what this is about. The email that contained the confidential advice was in relation to that agreement. They were pretending that they expected there to be such an agreement in existence. They thought that there were some other agreements that colluded to work against TIE. It is very underhand. That was TIE going to Infraco's subcontractor directly, which contractually speaking they should not have been doing. The thing is that all these guys knew about that agreement. They are pretending they did not and they wanted to be able to reveal it publicly, because they knew they had done 'the dirty' by not deleting that email and they should have done. To me these were underhanded attempts to reveal a document that TIE had procured by underhand and dishonest means. It was typical of their behaviour all the way through. The letters refer to a possible agreement, among consortium members, but the only agreement that was talked

about was a form of financial incentivisation to get the sub-contractor to put additional resource on to try and speed up the process. I think we did enter into some financial incentive agreement, but why would TIE be bothered whether we were going to incentivise the subcontractor to go faster?

129. A meeting took place on 16 June 2010 between David Mackay, Richard Jeffrey, Gordon Wakefield and David Darcy, document reference **(CEC00322176)**. This was an attempt to try and find a way through the morass of dispute at project level. We may have started on a road but it did not get anywhere because we ended up with the main mediation in March 2011.

130. A meeting took place on 19 June 2010 between TIE representatives and Mr Ed Kitzman. I note document reference **(CEC00303004)** and **(TIE00683178).** At that time TIE brought in Tony Rush as an independent advisor and we brought in Mr Kitzman from Bilfinger Burger as the man to front up to him. It was an additional resource that was brought in. From our point of view TIE were now waging a war of attrition on us. The purpose of these meetings was always the same, to try and fix the problems that we were facing. I cannot recall the outcome of that particular meeting, but the outcome of a series of meetings led nowhere.

131. In a letter dated 29 July 2010, document reference **(TIE00885457)** Martin Foerder sent BSC's 'Project Carlisle 1' proposal, document reference **(CEC00183919)** to TIE. Under the proposal BSC offered to complete the line from the Airport to the east end of Princes Street for a Guaranteed Maximum Price of £422,290,156 and 5,829,805 euros (less the amounts previously paid), subject to a shortened list of Pricing Assumptions. The total sum of £433,290,156 was broken down as follows, namely, £234,331,022 to Bilfinger, £126,901,621 to Siemens, £55,781,634 (plus 5,829,805 euros) to CAF and £16,275,879 to SDS. BSC's proposal was rejected by TIE by letter dated 24 August 2010, document reference **(CEC00221164)**, in which TIE responded with a counter-proposal of a construction works price (to BSC) for a line from the Airport to Waverley Bridge of £216,492,216, £45,893,997 to CAF, the amount to SDS to be

determined and a sum of just under £4,922,418 in respect of Infraco maintenance mobilisation, Tram maintenance mobilisation and Infraco spare parts. This was accounted for in the TIE proposal in a sum of £5m for incidental sums. My memory is that it was Tony Rush of TIE that instigated Project Carlisle. He first met with Michael Flynn of Siemens in Carlisle, which is where it got its name from. Possibly with a recognition that the design and the utilities were in such a dire state of progress running from York Place down to Newhaven that it was never going to get built in this particular phase because it was years away. So what could they salvage out of this? That is if they could get a line from the airport to somewhere in the city centre. That proposal was put. I think it was Tony Rush's proposal. We were then faced with: "What about this idea?" "Can you put some figures to it?" So we put our figures to it. We then submitted those. It was not really our proposal. We put the price to the proposal. That was then rejected and they came back with this counter offer. TIE knew that the project would not be able to be completed in a reasonable timescale because the design was not progressed and the utilities were too awkward. The sum proposed for SDS was to cover changes to design work or possibly poor design work carried out, which was not going to be used if we curtailed the scheme, presuming that SDS only got paid when the design was incorporated into the construction. I do not know that. I am not too sure but it is one or the other. It was either work carried out already that was not going to be built or design work that needed to be carried out to get a fixed price. The Project Carlisle Counter-Proposal was essentially the level of risk that TIE wanted BSC to take on board and that proposal was not acceptable to BSC.

132. On 7 August 2010 Lord Dervaird issued his adjudication decision in relation to the Murrayfield Underpass Structure and, in particular, whether, under clause 80.13 of the Infraco contract, TIE were entitled to instruct BSC to carry out Notified Departures without a price having been agreed in advance, document reference **(BFB00053462)**. I think the outcome of this adjudication is aligned with Infraco's interpretation of clause 80.13 that we were not permitted to proceed with the work subject to a notified departure until we had a TIE Change Order.

133. A meeting took taken place on 29 August 2010 between Anthony Rush and James Molyneux for TIE and Mr Kitzman. I note document references **(CEC00216318)** and **(CEC00216319)**. All the meetings were there to try and resolve the entrenched positions of the parties, and the outcome of the meeting was not successful. The meetings might go over specific points but they were all about: how do we get out of this mess that we are in?

134. In a letter dated 11 September 2010, document reference **(TIE00667410)**, BSC submitted its "Project Carlisle 2" proposal to TIE, in which BSC offered to complete the line from the Airport to Haymarket for a Guaranteed Maximum Price of £405,531,217 plus 5,829,805 euros, subject to the previously suggested shortened list of Pricing Assumptions. The total sum of £405,531,217 was broken down as follows, namely, £215,300,646 to Bilfinger, £118,601,221 to Siemens, £55,781,634 (plus 5,829,805 euros) to CAF and £15,847,716 to SDS. In a letter dated 24 September 2010, document reference **(CEC00129943)**, TIE rejected BSC's proposal. Mr Foerder responded by letter dated 1 October 2010, document reference **(CEC00086171)**. Essentially we put this forward because it was becoming apparent that there was only a certain budget that TIE had. We put forward a price and scope of works that we thought would salvage something from any of the discussions that had gone before it with reasonable compensation for the works undertaken, and TIE rejected it. TIE did not like the figures and the fact that for the tram to go from the airport just to Haymarket did not fit in with the transport strategy.

135. Between 9 August and 12 October 2010 TIE served a number of Remediable Termination Notices (RTNs) and Underperformance Warning Notices (UWNs) on BSC. In response, BSC both denied that the RTNs constituted valid notices and, in some cases, also produced Rectification Plans. To me this was all part of a campaign to get us to accept further risk and financial stress. Many of them we did not consider valid but we tried to comply with the particulars of the contract. Some were for really stupid things like failure to set up an intranet or extranet. They were going to terminate the contract for that alleged failure. It was just a load of rubbish. What we did was basically reject them all and then for some, on

a without prejudice basis, forward plans where something could be done. It was just a ridiculous strategy on TIE's part but again I guess it was part of their co-ordinated Project Pitchfork campaign. It would have been a financial disaster to terminate the contract because you would have terminated a job that was incomplete and in utter disarray. You would then get into a major dispute with a contractor that would go through the courts for years. You would have a city that was half dug up. A new contractor would have to come in and would put a giant big price on completing it. It would have cost three times as much as it ultimately has and taken three times as long in my opinion. It would have been a disaster. They knew that. We also knew that. We also had looked at ways of getting out of the contract. Everybody wanted out but termination was not an option that was going to work for anybody. It was only going to lead to a gigantic dispute. None of these RTN's or UWN were taken any further by TIE.

136. In a letter dated 17 September 2010, document reference **(CEC00044544)** BSC set out their position in relation to the dispute concerning defective works at Princes Street. Some of the works at Princes Street were defective and that was because TIE had made commitments to the traders that Princes Street would be open by a particular date. The weather was against us. We were putting road surfacing down. Road surfacing: the actual temperature of the tarmac has to be about 90 degrees for it to effectively bond. It is a semi-liquid when you put it down. It is melted. It needs to be at 90 centigrade. The temperature was about 50 centigrade. It was raining and we said, "We cannot do this because it will not bond. It will end up just cracking up". We were instructed I think by Bob Bell of TIE to put it down anyway because they needed to open the road because of the agreements they had with the various parties. It was night time. We put it down at 3.00 am or 4.00 am in the night at 50 degrees centigrade temperature. We could not get it any hotter because of the ambient conditions and it was pouring down with rain, and then they let buses on it at around 6.30 am. It broke up again. We got an instruction to redo it some months later. Infraco sorted it at its own cost. We could not go and explain to shopkeepers that we had been told to do it and it was wrong.

137. On 22 September 2010 Mr Porter issued his adjudication decision in relation to Depot Access Bridge S32, document reference **(BFB00053391)**. The adjudicator decided that we were correct. We were a bit annoyed that we had had to revert to adjudication to get a judgment on this when with sensible administration of the contract, it could have been resolved between respective commercial people. It is the same point, the change between Base Date Design (BDDI)Information and the Issued for Construction (IFC) information. To be pushed into going to adjudication for these simple, basic decisions where reading the words of the contract made it clear: the design is different so, therefore, you pay.

138. In a letter dated 23 September 2010 **(CEC00159509)**, Mr Foerder advised TIE of certain consequences of the adjudication decision of Mr Howie QC issued on 28 July 2010. We applied for separate extensions on the particular dates. Mr Howie awarded us the first one and, as a consequence of the programme logic, the other three dates automatically ran out to what we were asking for anyway. So Mr Howie felt that he did not need to make a judgment on those because it was automatic. Mr Foerder's letter explains that to TIE.

139. In a letter dated 29 September 2010, document reference **(TIE00409574)** Martin Foerder advised TIE that BSC were no longer prepared to carry out "goodwill" works (i.e. works which were the subject of 94 outstanding INTCs listed with the letter, in respect of which no TIE Change Order or an agreed Estimate existed, and which BSC considered that they were not required to carry out under the contract). There is a schedule of the works. It is attached to the back of that letter. I am not going to go through them now. There are too many. There are 70 or 80 things. 'Goodwill' works are where there are INTCs but there is no Change Order issued, therefore, Infraco under 80.13 cannot proceed to do the work. At this point we knew from Lord Dervaird's decision on the Murrayfield Underpass that Infraco was right on that interpretation of the contract. Basically works had been going on. While we were waiting for this decision to be made through the adjudicator, through Lord Dervaird, we carried on in good faith. We had had the adjudicator's decision that said we were right to comply with clause 80.13 and not undertake these works;

and secondly, the behaviours being displayed by TIE did not encourage us to carry out any goodwill works. We knew we had the contract on our side and we had been right all along. The effect of that decision is that a significant amount of the work ground to a halt and we laid people off.

140. An internal TIE email dated 8 October 2010 by Richard Jeffrey, document reference **(CEC00099403)** referred to a telephone call I made to Mr Jeffrey the previous evening. I rang up Richard Jeffrey to arrange meetings to discuss a break because it was quite clear that I wanted us out because we were losing appetite for the project. We were getting nowhere. Whatever we tried was thrown back in our faces. We were fed with a litany of lies, half-truths, full-truths, full un-truths, in respect of accusations which were totally fabricated about our behaviour. Complete non-recognition of the true meaning of the words in the contract, despite having now a significant number of - and we are talking more than five or six - adjudications that fell in favour of our interpretation and not in favour of TIE. The outcome of this conversation was this Email, but I cannot recall anything else specifically.

141. In a letter dated 13 October 2010, document reference **(TIE00301406)**, I wrote directly to councillors, giving my views on the dispute. I sent a further letter on 5 November 2010, document reference **(CEC00013012)**. Nobody was listening. Everybody was believing the story that TIE was telling, which, in spite of the adjudications, they did not alter their story, that it was our entire fault. Quite clearly, it was not. I was trying to tell the people who were responsible for the public funding expenditure in this city to make them aware, and I sent an open letter to all councillors, to see if anyone would actually stand up and get counted. This threat was in fact after the letter of 10 March 2010.

142. Further correspondence took place between TIE and BSC in October and November 2010, namely a letter dated 19 October from TIE to BSC, document reference **(CEC00132507)**, a letter dated 29 October 2010 from BSC to TIE, document reference **(CEC00133316)**, and a letter dated 3 November 2010 from TIE to BSC, document reference **(CEC00133317)**. In the first letter, it is looking for confirmation of what I said in the phone

call, that we had appetite for Project Carlisle as it would have no apparent condition precedents and that we had no appetite for termination because there seemed to be a condition precedent that we had to donate £45 million to get out of the job, to buy our way out, so to speak, because we did not have any appetite for it. To me, it is still part of the tactic and campaign to get us to be removed from the contract by our own volition or by them. We were saying that we have not withdrawn from Carlisle, but we were just not interested in being in a discussion that included any participation of us funding the project. We were not there to fund the project.

143. A meeting took place between BSC and John Swinney on or about 8 November 2010. I note a reference to this meeting, document reference **(TRS00011187)**. I instigated this meeting as I could not get the local councillors to stand up and be counted. I could not get the MSPs to stand up and be counted. I thought the Finance Minister, as he was at the time, might be the man to listen. John Swinney, Ainslie McLaughlin and I were in attendance, and one other. I cannot recall who it was. The meeting discussed the continued misinterpretation of the contract by TIE, even after adjudications had aligned with our interpretation. The financial pressures they were putting us under. The bullying that was going on. The non-payments of prelims outwith or in contravention of the contract. The continued breach of clause 101 by TIE in terms of going to the press with inflammatory comments, calling us a delinquent contractor.

144. In a letter dated 15 November 2010, document reference **(CEC00054284)** Tom Aitchison, CEC, advised that council workers would be happy to meet with BSC to listen to any information BSC would like to represent. I think this was probably an outcome of the meetings that I had had with John Swinney and Ainslie McLaughlin. It is basically a response to my letter to all councillors and to my letters to him. Presumably, he had received some kind of pressure and said, "Look, you had better meet with this guy. He is not going to give up. He keeps telling the same story. He has consistently told it". It should be noted that I actually wrote to Tom Aitchison with exactly the same arguments on 8 March 2010. So between 8 March and 15 November he did nothing, as the leader of the Edinburgh

City Council. He did nothing for that period, which is seven months, something like that. But ultimately I was starting to get listened to. I had been around that many people. I had been around all the councillors. I had been around the MSPs. I had been to the Finance Minister. I had been to Ainslie McLaughlin, Senior Executive of Transport Scotland. Same, consistent, true story. Every statement I made backed up.

145. On or about 26 November 2010, Lord Dervaird issued his adjudication decision in relation to landfill tax. Lord Dervaird found wholly in favour of Infraco. *"Contaminated land. Lord Dervaird found wholly in favour of the Infraco, confirming that the Infraco works would not have qualified for an exemption to payment of landfill tax. Even if it had, the Infraco was not obliged to pay for such an exemption and the Infraco was entitled to be reimbursed for landfill tax paid on the disposal of contaminated materials. The adjudicator found TIE wholly responsible, wholly liable, for payment of the fees and expenses".* Another 100% win. Once again it proves that our interpretation of this contract was correct and TIE's was wrong.

146. An exploratory meeting took place on 3 December 2010 between Antonio Campos of CAF and Donald McGougan and Alastair Maclean of CEC and me. I note a transcript of the meeting was produced, document reference **(CEC02084346)**. Prior to that meeting, I had held meetings with a number of councillors, MPs and MSPs to explain BSC's perspective of the dispute. Margaret Smith, Conservative MP, Shirley-Anne Somerville MSP, David McCletchley Labour MP, Donald McGougan, Jenny Dawe, Phil Wheeler. I cannot recall when I met with these individuals or in what order. There was another meeting on 3 December with CEC. The purpose of which was to at last get the Infraco's perspective of the disputes heard. At the end of the year Tom Aitchison stepped down. Susan Bruce was the new chief executive appointed. Susan Bruce got hold of it. We then were asked if we were willing to attend a mediation, which we did, and it progressed into the Mar Hall mediation in early March. Five days' worth of locked doors, where a new agreement was brought about or started to be brought about, which then took until 1 September I think before it was signed off.

147. A meeting took place between TIE and BSC on or about 20 December 2010 to discuss the proposed mediation. Richard Jeffrey and I were the only persons present. I was asked if I had any appetite for a mediation to try and cover the whole basket of issues. I said I was perfectly willing.

Events in 2011

148. I met with Richard Jeffrey on or about 13 or 14 January 2011. I note Mr Jeffrey's internal email dated 14 January 2011, document reference **(TIE00684546)**. We discussed press issues, the gagging and the general situation. I was concerned that the press might hijack the mediation, and I was saying again that this was our last chance to salvage something. It was just sort of refining an agenda, as to how we could move forward into the mediation. We discussed what the options were: we pull something out of this and we go forward and we build it, or we separate, and what terms and conditions we would separate on. We talked about a new name which I gave it, Project Phoenix, rising up out of the ashes. The outcome of this was that we prepared for mediation.

149. The Project became extremely stressful for all of us involved. Prior to the mediation in March 2011, two drawings were produced (**ULE90130-SW-DRG-00803 and 8040**) and shown to TIE which demonstrated the extent to which the Project was at a standstill because of the failure by TIE to agree to Notified Departure Estimates and issue TIE Change Orders. These drawings show that there was virtually no part of the site which was not affected by this problem. The purpose of these drawings was to demonstrate the sheer volume of issues.

8040 should be 0804
Doc IDs are PBH00038878 and PBHJ00038879

150. On 24 February 2011, BSC provided its "Project Phoenix Proposal" to complete the line from the airport to Haymarket for a total price of just under £450 million, subject to a shortened list of pricing assumptions. The total price comprised a payment of just over £231 million to Bilfinger, £136 million to Siemens, and £65 million to CAF, and just over £15 million to SDS. We thought we could commit to that proposal. However, we learned after submission that that it did not fit in with what City of

Edinburgh wanted. They wanted something that went further into the city, Haymarket, which was really the start of the city works.

151. Mediation talks took place at Mar Hall between 8 and 12 March 2011. TIE prepared a mediation statement, document reference **(BFB00053300)**, as did BSC, document reference **(CEC01927734)**. I delivered an opening statement of behalf of BSC. A statement, 'ETN Mediation - Without Prejudice - Mar Hill Agreed Points of Principle' was signed by the parties on 10 March 2011, the principles of which were then incorporated into a Heads of Terms document, document reference **(CEC02084685)**. BSC were there with our legal representatives. We had a guy called Mike Shane, who was the mediator, an American guy who did the mediation for Wembley Stadium. CEC were there. TIE was there. Transport Scotland. I was really the lead for our organisation. I did have my chief executive there, Dr Keysberg, on hand, but in terms of the actual initial presentations, I was the lead. Susan Bruce from CEC was the lead on her part. They had all the support necessary to try and finalise these heads of terms, and, as I say, I had my chief executive there to make sure that the requisite authority in Bilfinger Berger was there to commit. To start with, Sue Bruce made an opening statement for which she had been influenced by discussion with people from TIE, that Infraco were the big, bad wolf, and was trying to defraud the council of monies. I made the presentation on behalf of the Infraco. Of the 60 people in that room, I was the only one who had a signature on that contract, so I had been present right the way through. Everybody else had come in part the way through. The main thrust of my argument was all the adjudications, which had gone in our favour, and also the lack of performance of the utility contractor. I showed a three-dimensional fly-through of Shandwick Place. In the 700 metres of that, there were 302 utilities within that space, and that was after the utility contractor had gone through, so 302 utilities still in the 'too-difficult-to-do' box after the MUDFA contractor had opened up the road, diverted all the utilities and put it back again. We could not possibly work in a fashion that is inefficient. I was accused of deliberately picking the worst place on the project. It was certainly one of the most adjusted, but it certainly was not the worst place. We expected the mediator, Mike Shane to be to-ing and fro-ing and discussing with us. He spent all day with TIE, and I

understand that his conversation went somewhere along the lines of, "Infraco's position is undoubtedly correct." He had had briefing documents from both sides. "You are wrong, TIE, and you had better sort this out." There were then lots of negotiations and discussions about how we would resolve it, which included different people coming in to get rid of the entrenched positions. By the end of day one, there was agreement in principle that they were going to have to pay for what they could afford, and we were right. Our position did not change over the course of the mediation. We always had a willingness to try and work in the most efficient manner possible and deliver the best value that we could. TIE and CEC recognised that the contract backed us up, and TIE had been wrong anyway. CEC probably recognised that they had been wrong, for getting on a year, ignoring the efforts by me to get our side out into the open and get heard, and essentially new people came in on TIE's side to administer the contract, and eventually it went forward. Dr Keysberg from Bilfinger Germany was there and had been fully involved since 2007. He signed off on the agreement. The Head of terms, noted in document reference **(CEC02084685)** were agreed at the end of the mediation and signed off at the end of the week. I felt relief at the outcome of this mediation that finally someone had seen sense, and disbelief that it had taken us nearly five years to get there. As for Bilfinger Germany, they could not understand why things in Britain had taken such a long and tortuous route to get to this point. In a Newsnight Scotland programme which was dedicated to the trams, Dr Keysberg comes on and says, "We had never met people like this before. We had never experienced anything like this". After the mediation there was a timescale agreed to work all of this out, but it was contingent on CEC confirming that it had the funds to meet its obligations, and the deadline for that was 1 September 2011. If it did not do that, then the contract would terminate and then parties would sort out what happened after that. So there was a process going forward from this.

152. Parties entered into a Minute of Variation dated 20 May and 10 June 2011, document reference **(BFB00096810)** (minute of variation 4), which varied the Infraco contract to allow certain priority works to take place. I also note document reference **(BFB00094827)** listing the priority works and the

planned completion dates. These were time-critical works to get done before the Edinburgh Festival, and it was entered into in good faith again. We had always wanted to work in good faith. We had started to believe the trust was coming back with the new people that we were dealing with. DLA Piper was no longer on the scene, weaving their web of intrigue. The purpose of the agreement was to get the works going as best we could.

153. The Mar Hall parties had envisaged that a full settlement agreement would be entered into by 30 June 2011. A memorandum of understanding was entered into on 24 August 2011 to extend the timescale for the conclusion of these negotiations until 31 August 2011. The timescale for the conclusion of negotiations was extended as CEC had to confirm that they were going to get the money available to do it, and that was based on a full council meeting at some particular date. It was also a massive big contract amendment. It totally rewrote the change mechanisms of clause 80. I was not particularly involved in the detailed negotiations post contract so cannot comment to any extent on these documents.

154. My involvement with the tram project came to an end on 1 September 2011. I left Bilfinger at that time, in the main because it was clear that Bilfinger in the UK was going to be wound down and I wanted to move on with my career. I had also decided that I had had enough. I had been completely vindicated in the stance that I had taken, but it had taken a lot out of me personally. I had had five years in the middle of my career that did not give me much satisfaction. One of the things with my career you get is satisfaction from the job and not just from your paycheque. It did not give me that. I just felt I was tired, and we had got a new agreement and it was going to go in place and let other people do it, and I would go and do something different. I had been away from home extensively because I live 280 miles away from Edinburgh. I had just had enough. I wanted to do something else. I could not believe that I had got embroiled in such a job. I had lost my appetite for the project after the Head of Terms, so had minimal input in to negotiations or approval of (i) the Second Memorandum of Understanding dated 2 September 2011, document reference **(TIE00899947)** and/or (ii) the full and final Settlement Agreement entered into on 15 September 2011, document reference

(BFB00005464). I cannot comment on the main changes and amendments to the Infraco contract and Schedule 4 made by the Mar Hall mediation and the September 2011 Settlement Agreement as I was not involved in the details.

155. Following the Mar Hall mediation there were approximately 352 INTCs. It may be suggested that that seemed a relatively large number of changes given, by that stage, the design and utility diversion work ought, presumably, to have been largely completed and given that a shorter section of line was to be built. I do not think this is a large number particularly on the face of it. What had changed was the mechanism, the willingness to resolve the situation instead of just burying your head in the sand and saying that it is not a problem, it is Infraco's fault. It is indicative of the quality of the design and the number of utilities that were still in the way.

Project Management and Governance

156. In relation to the project management and governance of the tram project I think that the wrong people were in place. I do not know what motivated them, but the wrong people were in place in the procurement phase. TIE had the wrong people in place in the operational phase. The governance was not close enough because in spite of me reporting to the governing bodies - by which I mean City of Edinburgh Council, Transport Scotland and Members of the Scottish Parliament - nobody took an interest for the best part of 2010 from late 2008. So for two years nobody took an interest, and yet there were people who sat on the board of TIE. I think Donald McGougan sat on the board. Councillors who were there to look after the governance of the project, and they just did not. They got whitewashed, and my belief is the main protagonist in the whitewashing activity was Mr David Mackay. TEL was disgraceful in terms of there was ever really only one person from TEL who was involved, and that was David Mackay, who was chairman of TEL and stepped down to be interim chief executive of TIE, after Willie Gallagher retired to spend more time with his family. TIE's performance was abysmal, disgraceful. In the end CEC participated in how to resolve things, but I went to Tom Aitchison on

8 March 2010, and it was not until something like 10 November that he sat up and took notice. And in the interim I think I had had two letters telling me that I was liable to personal prosecution for defamation of character. Transport Scotland were much better once they got involved. Very shortly after I had been to see Ainslie McLaughlin, we had a meeting with Alistair MacLean and Donald McGougan of CEC. I cannot see a direct connection between my meeting with Ainslie McLaughlin, but something happened, and Transport Scotland and Ainslie McLaughlin were present at the mediation as well, so something happened there and it was very shortly after the meeting with him. It was one of the first meetings I have been to where I saw a reaction within a couple of weeks of somebody sitting up and saying, "We need to sort this out".

157. There has been nothing like my experience of Edinburgh Tram project compared with any other projects I have or had been involved with. I have never experienced anything like it and I have been in this industry for 40 years. I will be 60 years of age in a couple of months. I have never, ever experienced anything like this. I have never experienced people who are just so positively antagonistic, malicious. It was utterly, utterly disgraceful, and to think that this was a company that was created and appointed by a public body to manage and govern a publicly-funded project is absolutely disgraceful. If it was my money, I would want somebody to be accountable for the wastage. I hope this Inquiry does more than just look for a way forward, and does something to bring these people to account who've acted in such a disgraceful manner.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 88 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature.....

Date of signing.....

Appendix 1 – statement dated 12 February 2016

IN THE MATTER OF THE EDINBURGH TRAMS STATUTORY INQUIRY

WITNESS STATEMENT OF RICHARD JOHN WALKER

Introduction and background

1. My name is Richard John Walker. I am 59 years old and reside at [redacted] I am currently employed as the Project Director for the Mersey Gateway Civil Contractors Joint Venture contracted by Merseylink, a construction consortium which was appointed in March 2014 as the project company to design, build, finance and operate the Mersey Gateway Project. I commenced employment on this Project in October 2014.

2. Prior to this I was employed as the Director for Rail, Air and Water Projects for Balfour Beatty Major Civil Engineering and before that I was employed as the Managing Director for Bilfinger Construction UK Ltd (previously known as Bilfinger Berger UK Limited and Bilfinger Berger Civil UK Limited) ("Bilfinger"). I commenced my employment in the position of Managing Director of Bilfinger on 1 May 2006. I left Bilfinger on 1 September 2011.

3. I have an honours degree in Civil and Structural Engineering from the University of Bradford (graduating 1979). At the end of my University degree, I started working with Sir Robert McAlpine, who I had worked with during my site experience at University. I worked for Sir Robert McAlpine between 1979 and 1983. I became a Chartered Member of the Institution for Civil Engineers in May 1983. I left Sir Robert McAlpine in 1983 due to starting a family and began working for John Mowlem Regional Civil Engineering (now part of Carillion plc). I worked for John Mowlem until 2006. During my employment with John Mowlem I was promoted from Site Engineer through the ranks and joined the Board of Northern Civil Engineering in 2001. In 2003, I was appointed as the Director for Highways and Major Projects across the UK.

4. In 2005 and 2006 while I was working with Mowlem, I began to work closely with Bilfinger in relation to a potential joint venture project between John Mowlem and Bilfinger in Scotland (Kincardine Bridge). This opportunity did not materialise.

5. Shortly afterwards I was approached by Bilfinger Berger AG Civil Engineering and was asked to take the lead in establishing the presence of Bilfinger's civil engineering business in the UK. Prior to 2006 Bilfinger had only completed three projects in the UK, all of which had been completed with Bilfinger acting as the minor partner in a

joint venture with another contractor. The Bilfinger construction business had been established in the UK for many years, but the civil engineering business, which was internationally successful, was not well established in the UK. Bilfinger saw the UK market as a market which was continuing to develop, and they wanted to establish themselves as a top 10 contractor. Bilfinger had a great deal of technical expertise which needed to be adapted and applied to the UK market. I have extensive experience in the UK market, knowledge of the types of contract used in the UK, legal frameworks, knowledge of the supply chain and knowledge of the safety and quality systems which are operated. Bilfinger appointed me as the Managing Director of the civil engineering business on 1 May 2006.

Initial interest In Edinburgh Tram Project

6. In early 2006, Bilfinger had a few small projects which were on going in the UK including a couple of hospital and schools projects. One of my first tasks as Managing Director was therefore to win more contracts in order to establish the business.

7. At that time (early 2006), the Edinburgh Tram Project ("the Project") was being discussed by the City of Edinburgh Council ("the Council") and the Scottish Parliament. The Project was an attractive proposition for Bilfinger because it was the right size of project for our business model at that time. Also, Bilfinger had history in Montpellier, France and also in Turkey of constructing successful tram projects.

Pre Qualification

8. The pre-qualification and tender team for the Project was set up in Edinburgh at Edinburgh Park and was led by Scott McFadzen from a technical point of view. In March 2006, Bilfinger pre-qualified as a civil works contractor. Scott McFadzen had previously worked for me at Mowlem on the Kincardine Bridge Tender.

9. As I joined Bilfinger, we were asked to pre-qualify again, this time as part of a joint venture with Siemens who had also pre-qualified (as systems provider). I recall that Michael Howell, Chief Executive of Transport Initiatives Edinburgh ("tie"), encouraged us to work in partnership with Siemens. Michael Howell gave us a very clear impression that Bilfinger would be looked at more favourably if we had an alliance with Siemens.

10. As a result, in July 2006, Bilfinger and Siemens formed an alliance and pre qualified as partners (known as "BBS"). The other tenderer at that time was a Laing O'Rourke and Grant Rail joint venture.

11. Even at this early stage of the Project, tie was running behind schedule. Following the pre qualification process, the contract documents were due to be issued on 25 May 2006. The documents did not actually arrive until 3 October 2006 (Appendix 1).

Tender Phase

12. Following an initial review of the contract documents upon their arrival on 3 October 2006, I phoned Andie Harper, tie's Project Director, on 12 October 2006 to tell him that I had an issue with 5 or 6 of the clauses in the contract which I could not accept. I have reviewed this document again, and I think that the terms I had an issue with were:

12.1 On Demand Performance Bond of £35 million.

12.2 Demanded timescale for the Marked up Infraco Submission.

12.3 Twelve month validity period for the tender.

12.4 Clause 4.4 and 4.5 which related to Infraco examining all of the documents and drawings and accepting all of the risk of discrepancies between the Employer's Requirements and the Infraco Proposals.

12.5 Clause 7.4 which required a warranty that Infraco's proposals met the Employer's Requirements.

12.6 Clause 7.7 which stated that Infraco's duties and obligations would not be released, diminished or affected by an independent inquiry carried out by or on behalf of tie.

12.7 Clause 22.1 which provided that the risk of encountering adverse physical conditions and artificial obstructions would be borne by Infraco.

12.8 Clause 22.5.2 which provided that if Infraco encountered live utility apparatus or contaminated land, Infraco would be entitled to claim for time and money unless the conditions were reasonably foreseen.

12.9 Clause 61.7.1.2 which provided that concurrent delay would not be taken into account when assessing time or cost associated with delay.

These Clauses placed unacceptable, and in some cases unquantifiable, risks onto the contractor and were outwith the normal accepted operating parameters of a UK/European construction company.

13. In the initial draft of the Infraco Contract, some of the terms were labelled as "mandatory". There were a number of these clauses that could not be accepted by Bilfinger and thus I felt that we were unable to tender. Andie said during the call on 12 October 2006 that I had misunderstood the purpose of the documents. He said that the documents were an invitation to negotiate and that all of the terms were negotiable, even those labelled as mandatory. During this call he invited me to meet with him in order to discuss the drafts and our tender.

14. On 16 October 2006 I met with Andie Harper in order to discuss the draft documents and BBS' tender. Garry Dalton, Commercial Director of Bilfinger, also attended this meeting. At that meeting Andie again assured me that tie wanted BBS to tender and that all things were negotiable. The initial draft of the contract appeared to be derived from a PPP form of contract (fixed price with full risk transfer) which was wholly unsuitable for the purposes of this Project given the uncertainty surrounding some of the key aspects of the Project (such as design and obvious delays to the utility diversions) which are highlighted in this witness statement. We could not understand the motivation to attempt to let a project of this nature on such an inappropriate form of contract.

15. After this meeting we commenced work on the detailed tender which had to be submitted to tie. When I first became aware of the project in 2005 whilst working for Mowlem, the contract was originally a build only contract. It was only later in the process that tie decided that the designer, System Design Services ("SDS") (a joint design team comprising Parsons Brinkerhoff and Halcrow Group), would be novated across to the contractor. The requirement to novate SDS was included in the Preferred Bidder Agreement described at paragraph 17 below. The decision to novate the designer made the contract a design and build contract which put the risk back onto the contractor. Given the issues the Project had regarding incomplete design, this was a substantial amount of risk. Both tie and BBS needed to develop a way to deal with this risk in an acceptable way for both.

16. In late 2006, and during the course of 2007 prior to the submission of the tender, the design for the Project was not complete. The tender was therefore based on the design as it was in late 2006 and 2007 with a lot of assumptions built in. The BBS tender was submitted in July 2007 ("the Tender").

Contract Negotiation

17. Following the submission of the Tender we were invited on a regular basis (maybe twice a week) for further negotiations on the run up to Preferred Bidder where we were continually and repeatedly asked by tie to further reduce our price and accept more risk. We received confirmation that BBS had been appointed as Preferred Bidder in

late 2007. I signed the Preferred Bidder Agreement on 22 October 2007. (Appendix 2). I have reviewed this Agreement again recently, and it is very clear from the words of the Agreement that there was much left to be done in October 2007 before the contract could be finalised. Appendix 1 of the Preferred Bidder Agreement contains a table which demonstrates how uncertain the Project was at that stage. This Appendix contains a huge list of major issues which needed to be finalised. The key issues in October 2007 (and prior to and after that date) were:

(a) The final design was not complete;

(b) The multi utility diversionary framework agreement ("MUDFA") works were not complete;

(c) The status of the Third Party Agreements was unclear; and

(d) The pricing was not complete.

18. Following the award of Preferred Bidder status we then commenced a seven month process of final contract negotiations. During the negotiations, BBS were based in our office at Edinburgh Park, and I spent a lot of time between our office, tie's office and DLA Piper (tie's solicitor's) office.

19. During this negotiation process we had to price the works so far as we were able and distribute the risk in the Project to the party best placed to be the owner of that risk. Where risk could be identified and quantified, BBS, as a contractor, were prepared to accept the risk and price for it accordingly. Where the risk could not be quantified or even identified in some instances, we negotiated the contract to ensure that that risk sat with tie, as the majority of the risk items were their responsibility such as MUDFA, Design and Third Party Agreements. These uncertainties continued throughout the contractual negotiations as none of the issues were capable of being resolved during that period. By this I mean that the MUDFA works were still on-going, the Design continued to be developed and the Third Party Agreements had still not been finalised. The exact risk and costs associated with these uncertainties could not be calculated. At no point in these negotiations were we allowed access to the Designer.

20. As a result, the concept of a "risk basket" was developed by Pinsent Masons, where everything which we did not know, or could not quantify would be put in the "risk basket" to be dealt with later. This "risk basket" later became Schedule Part 4 of the Infraco Contract. Those things which were known were properly priced and the risk was passed to BBS. Everything else went into the "risk basket". BBS were not willing to take on the risks of the unknown. The design, and in some places, the concept were still entirely unknown in 2007, so BBS could not, and should not, take the risk for that. The design was also constantly changing, which meant that prices and the tender

quickly became incorrect following the design changes. In order to have a base line design which we could price, the concept of the Base Date Design Information ("BDDI") was developed. This is referenced in Schedule Part 4 of the Infraco Contract, and is defined as the design as at 25 November 2007. This was purely for the purpose of having a base line to price for the Project. Changes from BDDI to Issued For Construction (the final design which we were to build to), were to be treated as Notified Departures entitling us to additional time and money. We were subsequently given design information on 5 discs which we understood to represent the BDDI (although tie subsequently disputed this in one of the adjudications which we had in relation to Tower Place Bridge). BBS carried out a due diligence exercise on the design and produced a report on 18 February 2008 (Appendix 3). I have reviewed this document again recently, and the main issues are perfectly summarised in the executive summary of this report:

"Contrary to tie's original intention for this project stage, the design is incomplete and will require significant further development. Several sections are currently under re-design and the final concepts are unknown to us. According to the SDS document tracker more than 40% of the detailed design information has not been issued to BBS at the abovementioned cut-off date.

...

For many areas the 3rd party approval status is not clear. Formal tie / CEC design approvals are generally outstanding. Not a single design element has received approval and has been issued for construction.

...

In accordance with tie's original procurement concept a complete and issued for construction design would have been novated to the Infraco. The current design is far from meeting these requirements and, as consequence, a novation is considered to present significant and unforeseeable risks to the project."

This summarises the main risk associated with the design - that it was incomplete and therefore could not be subject to a fixed price.

21. With respect to the MUDFA uncertainties, in 2007, all I knew about the MUDFA works was that they were very late and that there were a significant number of services diversions which had not been completed, or which had been classified as "too difficult" by the MUDFA contractor. tie ultimately accepted that we could not price for this situation and that both the design and MUDFA issues were their responsibility (among other items) and therefore the risk had to sit with them under the Contract.

After the Infraco Contract was signed, tie changed their position on this and only really accepted that this was their issue again after the mediation in 2011.

22. I recall a great deal of discussion with tie on price during the run up to Preferred Bidder stage. I also recall that tie kept using the word "normalisation" in respect of the price. To this day I have no idea how the precise mechanism of this normalisation process worked. tie would never explain this "normalisation" process to me or anyone else on the BBS team. Essentially what it appeared to mean was that where BBS' tender had not included a price for something, tie would use this "normalisation" process to insert a price into our tender. I have no idea how they calculated this number, as no one would ever explain it, but I believe they were comparing our submissions with that of the other tenderer (Laing O'Rourke and Grant Rail) or some financial model known only to them. The process was about closing the gap between us and the other tenderer. tie would use a price from the other tenderer to fill in gaps in our tender (and visa versa). We were constantly asking for breakdowns of tie's calculation or the design which they had priced against in order that we could verify the price. We did not receive any such breakdowns. tie's objectives and negotiation methodology appeared to be driven by the necessity to produce a construction price below a particular sum which was not disclosed to BBS. tie would never explain the calculation, but they would just tell us how much we needed to take off the price in order to get us into poll position at tender stage. We were constantly bullied to reduce our price and threatened that if we didn't drop our price there wouldn't be a contract. As an example of this kind of behaviour, I received a letter from Willie Gallagher, tie's Executive Chairman, on 11 December 2007 whereby he states that unless Bilfinger is able to deliver on certain pricing and programming requirements "*tie will not attend* [a meeting which was then planned in Wiesbaden] *and we will need to revisit the entire preferred bidder programme*". This letter is appended to this witness statement at Appendix 4. This letter was an attempt by tie to put pressure on Bilfinger to reduce the price, amongst other things, with the threat of withdrawing preferred bidder status.

23. The reality appeared to be that tie had a top price, which I understood as a "gateway" and was referred to as the "business case", which the price had to be under in order to be approved by the Council. tie were trying to manipulate the numbers to get the price through this "gateway". tie did not disclose to BBS what this figure was. We were simply aware that they were under pressure to get the number below a set figure in order for this "business case" to be approved by the Council. This was apparent both at tender stage and during the subsequent contractual negotiations. tie would tell us how much we needed to take off the price to put us back in poll position to be awarded the contract. I assume that they were doing the same with the other tenderer to get the lowest possible price. At the end of this process, we still had not priced the risks in the "risk basket". These risks subsequently became embodied in Schedule Part 4 – the

whole point was that we believed that those items couldn't be priced. The effect of that was that the price set out in the Infraco Contract was in reality never the price for the Project, it was just the price of some parts of it and both tie and BBS knew that. I do not think that tie realised the full cost implications and significance of some of the items which were left in the "risk basket", because none of them had the necessary knowledge and experience of civil engineering. Nevertheless, they fully understood that the risk of these items (the Pricing Assumptions in Schedule Part 4) lay with them and that they would definitely transpire (e.g. MUDFA). This is reflected in the wording of the Infraco Contract (Schedule Part 4, clause 3.2.1). So while tie might not have been able to realise the full cost implications of these items, they knew that the final outturn cost would be much more that the Contract Price contained in the Infraco Contract.

24. My dealings with, and the contractual negotiations with tie were generally with freelance, self employed people occupying the positions of Project Director and Commercial Directors. The main tie team involved in the negotiations were Willie Gallagher, Matthew Crosse, Geoff Gilbert, Bob Dawson, Susan Clarke and tie's solicitor Andrew Fitchie. Initially I was dealing with Andie Harper and Geoff Gilbert with Andie Harper giving way to Matthew Crosse part way through. As I mention above, the general thrust of the negotiations appeared to be to agree a "price" which could get through some sort of a gateway review process (or below a bar). I understood some time later that some of the tie staff were in line to receive personal bonuses for bringing in a successful contract award.

25. tie repeatedly asked us to provide a fixed lump sum price to capture all of the remaining risk. At that point I said that we could do it for £1 billion. I remember saying this to Matthew Crosse, tie's Project Director in the Kingdom room in tie's office. I remember saying to him "*I'll give you a fixed price if that's what you want, and I'll do it for a billion*". It was done to attempt to convey to tie the likely scale of the overall project out-turn cost. My comment was somewhat tongue in cheek, but I also meant it. My very rough calculation was based on £35 million a kilometre for inner city track and £25 million for the section from Haymarket to the Airport (circa £600 million), some for the depot and some for Siemens' work. I was laughed at with such a high number, but there were so many unknowns on the Project at that time that I could not have signed up to a cheaper price than that and take on all of the risk. The only way the price could come down was for tie to take the risk on the unknowns and that is what ultimately happened. I also recall a conversation which took place during the Project where I mentioned completing the Project for £1 billion to Richard Jeffrey who took over as Chief Executive of tie from Willie Gallagher. I remember saying to him that I had offered to do the job for a fixed price of £1 billion months ago. It wasn't so much an

offer at that stage, but a reference back to my previous offer before the contract was signed.

26. The next significant step in the contractual negotiation process was a meeting with took place in Wiesbaden, Germany, in December 2007. An Agreement was signed following this meeting (which became known as the Wiesbaden Agreement) (Appendix 5). This meeting was attended on behalf of Bilfinger by me and Joachim Enenkel, Axel Metzger, Christian Korf and Rob Sheehan of Bilfinger, and Willie Gallagher and Geoff Gilbert of tie. I cannot recall exactly who else was at this meeting. It might also have been attended by Matthew Crosse and tie's solicitor. Iain Laing of Pinsent Masons, our lawyers, was also present at this meeting. The purpose of this meeting seemed to be to create an assumed fixed price reduction against a "wish list" of value engineered items. These price reductions (which were incorporated into the tender) were caveated such that if they were not achieved the money would flow back into the contract. Again, in my eyes this Agreement was purely about trying to get the base price down and through tie's "gateway".

27. I have since reviewed this document again, and I note that the price stated in this Agreement is £218,262,426. However it is abundantly clear upon reading this document that the "price" is subject to numerous and prolific caveats that essentially put the risks of additional time and money with tie. The Agreement is based on a number of significant assumptions, contains a huge number of exclusions and provisional sums. It would be negligent, if not duplicitous, to say that this Agreement meant that the Project could be delivered for a fixed price given the number of exclusions and assumptions; the Agreement includes a long list full of fundamental issues. For example:

(a) the design was incomplete;

(b) the MUDFA works were not complete; and

(c) The status of the Third Party Agreements was unclear. tie were responsible for obtaining these Agreements but had not done so in key locations such as Edinburgh Airport. Therefore there was a significant risk that there would be an increase in cost associated with works requiring these Agreements and that was not included in the "price".

28. This Agreement was discussed in November and December 2007 between me and Geoff Gilbert, tie's Commercial Director. The Agreement was finalised during the meeting in Wiesbaden on 20 December 2007. I recall that during this meeting, Willie Gallagher, tie's Chief Executive and Joachim Enenkel of Bilfinger left the room to

discuss the number which had to be inserted into the Agreement as the price, subject to the assumptions and exclusions in the Agreement. I remember that at this meeting Willie Gallagher said that we all knew that the "price" wasn't a real number and that as soon as the contract started the price would change because the Notified Departures in Schedule Part 4 would kick in immediately, but that for the purposes of getting the business case approved by the Council, there had to be a lower number in the Agreement. Notified Departures were the mechanism by which the "price" for the Project would increase whenever there was a departure from the Pricing Assumptions in Schedule Part 4. This mechanism is explained in paragraphs 53 and 54 below.

29. Following the Wiesbaden Agreement, contractual negotiations continued between the parties on a daily basis. This involved hundreds of emails being exchanged, phone calls and meetings between the parties. The negotiations took place daily over the whole period from 22 October 2007 (the date we were awarded Preferred Bidder status) to the date the Infraco Contract was signed.

30. I think that the next significant recorded step in contractual negotiation was the Rutland Agreement which was signed on 7 February 2008 (Appendix 6). As I have already said, between the Wiesbaden and Rutland Agreements, negotiations were on-going. These particular Agreements provided "snapshots" of the agreements which were reached, but the months in between each of these Agreements involved long discussions and negotiations over the Infraco Contract. The purpose of the Rutland Agreement was all about price. I have re-read this agreement and note that the price had increased to £222,062,426 since the Wiesbaden Agreement. I also note that this is the first time that the "risk basket", which becomes Schedule Part 4 of the Infraco Contract, appears in the formal documentation as an appendix to this Agreement. Having re-read this document recently, it is again abundantly clear that whilst, as stated in this Agreement, the price will not be increased prior to entering into the Infraco Contract, the price will increase immediately post contract. Schedule 4 to this Agreement contains significant caveats to the price which are detailed in the main body of this Agreement. As I have already explained, this is as a result of the inability to price all of the unknown and uncertain elements accurately. Therefore these elements and issues remained in the "risk basket" which by February 2008 had become Schedule Part 4.

31. Once again, the whole purpose of this Agreement appeared to be to bring the contract price in under tie's threshold price. Both BBS and tie knew that as soon as the contract was signed that the price would increase as a result of Schedule Part 4.

32. Negotiations continued between February and May 2008 with constant emails, phone calls and multiple meetings. In May 2008 we were close to agreeing the final contract. Prior to signing the Infraco Contract on 14 May 2008, we signed another agreement

on 13 May 2008 (Appendix 7). The purpose of this Agreement (the "Kingdom Agreement") was to take some money out of the price in the Infraco Contract and package it partly as an incentivisation bonus and partly compensation for phase 1B of the Project not going ahead. Condition One of the Agreement is an incentivisation bonus of £4.8 million which was to be paid in four £1.2 million tranches. This was not really a bonus it was simply part of the price which was taken out of the Infraco Contract meaning that £1.2m of the Contract Price would be paid to us within 7 days of Sectional Completion of each of the four sections of the Project (irrespective of when that was actually achieved so that it wasn't really an incentivisation to complete early at all). I believe that it was another attempt by tie to keep the Contract figure low, whilst accepting that this money would be payable to us. I think that we applied for payment of the first tranche of the bonus although ultimately this would have been caught up by the renegotiation of the Contract. Condition Two of the Agreement related to Phase 1 B of the Project. This was the "Roseburn Loop" which was envisaged at the outset of the Project (see diagram at Appendix 7A). The Roseburn Loop was a section of the Project which was never built, but was planned to run from Roseburn to Newhaven. The compensation for this part of the Project not going ahead was agreed at £3.2 million in the Kingdom Agreement. Infraco were ultimately paid this sum by tie. The Kingdom Agreement wasn't really a compensatory or bonus payment, it was simply part of the price which was moved into a separate agreement so that tie could keep the "price" for Phase 1a of the Infraco Contract below a certain level.

33. On 14 May 2008, we signed the Infraco Contract (or "Contract"). The price which was included in that Contract was based on significant assumptions and both Infraco and tie knew that the price was going to increase as soon as we signed the Contract. We all knew that. I recall Willie Gallagher, tie's Chief Executive saying this to me as the Infraco Contract was signed. This fact is reflected in the wording of the contract itself where it says in Schedule Part 4 "*Assumptions may result in the Notification of a Notified Departure immediately following the execution of this Agreement*".

34. We (Bilfinger and tie) all knew how important Schedule Part 4 was at the time the Infraco Contract was signed and in order to give Schedule Part 4 the requisite weight, the Infraco Contract was amended by the addition of Clause 4.3 which provided that:

"Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing)"

35. I believe that tie fully understood the nature of the risk that was placed upon them by the Infraco Contract. This is why the negotiation took so long as described above. They may not have had certainty about what the final price would be, but they knew that it would be significantly more than the price in the Infraco Contract.

36. My view was, and remains, that only about half of the Contract Price was fixed as at the date of the Infraco Contract. In my opinion, tie clearly knew and understood that this was not a fully fixed price contract. I also suspected that if they were up front about the likely cost, the Project would not clear the "gateway" they undoubtedly had and they would all be embarrassed and looking for new jobs. I understand that David Mackay, tie's Chairman, reported to the Council that the Infraco Contract was a 95% fixed price contract. I only discovered this when preparing for the mediation in late 2010 when we came into possession of a Report to the Council on the Financial Close of the Project (the report is from May 2008 but I did not see it at that time). I do not agree with this statement. Everyone, including tie, knew that the Contract Price would increase significantly and quickly. We discussed this repeatedly during the negotiations and it is directly reflected in the wording of each of the three agreements leading up to the signing of the Infraco Contract, and the Infraco Contract itself (in Schedule Part 4). This is not an abnormal situation in infrastructure contracts - the difference here is the failure to properly report this publicly and to the Council.

37. Contract Start Up

38. Following the signing of the Infraco Contract in May 2008, Infraco continued to work from our office at Edinburgh Park until the site offices could be established with the necessary telecoms for an office to operate.

39. It immediately became apparent that Infraco could not progress in line with the programme of work primarily for the following reasons:

(a) Underdeveloped, incomplete or missing design; Base Date Design Information was on v25 of the Design programme which had progressed to v31 by the time of award and had incurred further delays and slippage.

(b) Incomplete enabling works i.e. diversion of utilities by the MUDFA contractor;

(c) Relocation of fuel storage for Network Rail;

(d) Incomplete Third Party Agreements e.g. Edinburgh Airport, Forth Ports;

(e) Lack of access;

(i) The Infraco Contract provided for us to have an exclusive licence to enter and remain upon the Designated Working Area.

(ii) In Leith Walk the MUDFA contractor had not completed the utility diversionary work and tie was unable to give us exclusive access. In fact we had hardly any access at all and were unlikely to get access for many months. See photos at Appendix 8.

As a result, we would have been within our rights under the Infraco Contract not to start any works at all. However, as explained in paragraph 44 and 45 below, we commenced certain goodwill works in any event.

40. The reason that the MUDFA works were causing delay was that utilities i.e. gas, water, electricity, telecoms and media data services: ("the 'MUDFA' works") had to be completed so that all the utilities and services which were beneath the ground were properly relocated out of the zone which we were to dig up to enable the new construction works to take place.

41. The Contract had been priced on the basis that the MUDFA works would be complete prior to Infraco commencing works as initially indicated by tie. Schedule Part 4 (clause 3.4.24) of the Infraco Contract provides that one of the Pricing Assumptions is that the "*MUDFA Contractor shall have completed the diversion of any utilities*". At the time that the contract was negotiated, tie and BBS were aware that the MUDFA works were not, and would not, be complete prior to Infraco's works commencing. Clause 3.5 of Schedule Part 4 provides that where the facts or circumstances differ in any way from the Base Case Assumptions (which includes the Pricing Assumptions) that such a Notified Departure will be deemed to be a Mandatory tie Change and would have consequences in terms of time and money which would be assessed in accordance with the Infraco Contract (clause 80). The MUDFA works were a Notified Departure that both tie and BBS were aware of prior to entering into the Infraco Contract. Therefore as soon as Infraco Works began, Notified Departures in relation to the MUDFA works were triggered.

42. In addition those works we did price were on the basis of the Design and programmed design release dates indicated on version (v)25 of the SDS programme for design delivery. At the point of contract award the SDS were on v31 of their design programme. Thus, there was both change and slippage between v25 and v31. This was another Notified Departure which existed immediately upon award of the Contract.

43. I had a meeting with Willie Gallagher, Chief Executive of tie, in May or June 2008 and informed him of the issues outlined at paragraphs 40-42 above and to advise that we

were suffering delay and incurring extra cost by our inability to properly get started due to these delays (particularly those caused by MUDFA).

44. I was looking for payment of additional costs associated with these issues from tie - they were due to us under the Infraco Contract as a result of the Notified Departures in Schedule Part 4. For example, as detailed above, the MUDFA works not being complete on Leith Walk and the relocation of the fuel storage location not being complete, were both Notified Departures. Willie told me that it would be a political nightmare if we started escalating costs before Infraco had even put a shovel in the ground and there was nothing to show for our efforts. Notwithstanding the fact that Schedule Part 4, Clause 3.2.1 contemplated this exact scenario (i.e. that the price would increase "immediately" after the contract was signed), I came to an agreement with Willie Gallagher that we would work over the summer period – June, July and August 2008 - using our best efforts to make what progress we could, and that Willie and I would reconvene in September to reach a resolution on time and money. The agreement we reached was that Infraco would "commence works" which would be visible to the Council and residents of Edinburgh and would allow for money to be paid following visible work having been done. The message I got from Willie Gallagher was that we had to be seen to be progressing, even in spite of the fact that immediately post contract real progress was not actually possible as a result of the outstanding issues outlined above.

45. Infraco maintained contemporaneous records of everything that happened over the course of the summer and all of the difficulties encountered. In September I met with Willie Gallagher to reach agreement as discussed. At this meeting, we agreed that I would include all of the delay and disruption costs in our payment application at the end of September and that it would be dealt with by his team.

46. On submission of our application for payment at the end of September 2008 all our claims for Notified Departures (including the costs of delay and disruption) were rejected by tie. I met again with Willie Gallagher and protested at this rejection, as it was not in accordance with our "gentleman's agreement" or the terms of the Infraco Contract. During that meeting Willie Gallagher again promised to sort out his team and that the account would be brought current through the October payment.

47. In October 2008 our claims were again rejected by tie. We were told, by tie operational staff, that Infraco had to relocate utilities on Leith Walk at our own cost as it was a safety issue and we carried the risk for working safely. This was completely incorrect and a fundamental, and to my mind, deliberate misunderstanding of the Infraco Contract. Diverting utilities was not a safety issue; it was work that Infraco ought to be paid for. There was a provisional sum of £750,000 for the diversion of minor utilities by Infraco in Schedule Part 4 (Appendix B 3.0 – Table 2 – Undefined Provisional Sums

item 2). tie could and should have instructed this work using that provisional sum which would have enabled the work to continue. Instead they rejected the application for payment on the grounds that it could not be supported by the Infraco Contract as no Instructions had been issued. This is notwithstanding the fact that this work had been done by verbal agreement and hand-shake between me and Willie Gallagher

48. Following this rejection I made a presentation to Willie Gallagher with photographs and superimposed images demonstrating our case (see photographs and drawings at Appendix 8). These images showed areas of the site which were occupied by the MUDFA contractor and areas of the site which were available for Infraco works. The images also showed Designated Working Areas (which we were entitled to have exclusive access to), which were around 350 metres long and outlined the required area for the Infraco work. These areas were occupied by MUDFA, and the utilities. During this period (our 'Gentlemen's Agreement' period; June/July/August 2008) we were only able to work on 10 metre sections and even then we were constantly stopping and starting as a result of undiverted utilities. I stated that I required full reimbursement for the delays, disruption and additional costs and that this was to be included in our November Valuation, such that the monies could be paid in December, before our Financial Year End. At this juncture, I recall that we were some £2.5 million down on payment which we were entitled to receive under the terms of the Infraco Contract.

49. I informed Willie Gallagher that if this could not be resolved that I would have no alternative than to commence to strictly abide by the terms and conditions of the contract, particularly in respect of the change control (Notified Departure) process.

50. Shortly after this meeting, Willie Gallagher resigned as Chief Executive to spend more time with his family and David Mackay stepped in as interim Chief Executive of tie.

51. Following Willie Gallagher's departure in late 2008 and David McKay's blatant, antagonistic and defamatory tirade in the press, I felt that Infraco had no option other than to strictly follow the terms of the Infraco Contract from that point onwards. Willie had not kept his word regarding payment for works carried out in the summer of 2008, and the new Chief Executive had gone to the press in complete contravention of their own Confidentiality Clause (Clause 101) of the Contract to state that Infraco would be paid "*not a penny more*". This demonstrated either a fundamental misunderstanding of the Infraco Contract from David Mackay, or that he was misleading the press as to the terms of the Infraco Contract, particularly Schedule Part 4, which always meant that the out-turn cost would be more than the "Price" which had been quoted in the press.

Princes Street

52. The Infraco works on Princes Street were due to commence in January 2009 in accordance with the programme incorporated into the Infraco Contract. However, at the date that the Infraco Contract was signed, this programme had been updated, due to the slippage in the Design deliverables which I have detailed above, and the programme in the Infraco Contract was out of date. The works in Princes Street were still due to commence in January 2009. However, the MUDFA works were not complete by January 2009. This meant that Infraco would not have exclusive access and would have to start works at the same time as MUDFA were continuing their works. This would mean we would only have access to smaller areas and would have to work around the MUDFA contractor. Our work would be more difficult and was likely to suffer delays which would not have been encountered had the MUDFA works been completed. In addition, there were design changes in Princes Street (changes from the BDDI design at November 2007), which had not been agreed. These were Notified Departures under the Infraco Contract.

53. The provisions of Schedule Part 4 (clause 3.5) provides as follows:

"The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions noted herein. If now or at any time the facts and circumstances differ in any way from the Base Case Assumptions (or any part of them) such Notified Departure will be deemed to be a Mandatory tie Change requiring a change to the Employer's Requirements and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the Contract Price and/or Programme in respect of which tie will be deemed to have issued a tie Notice of Change on the date that such Notified Departure is notified by either Party to the other."

54. As such, any Notified Departure had to be dealt with under clause 80 of the Infraco Contract as a tie change. In summary the procedure was as follows:

(a) tie had to serve a Notice of Change on Infraco

(b) Infraco would then deliver to tie up to 18 days afterwards, an Estimate which detailed the impact of the tie change on programme, cost, delivery and any additional requirements and other impacts of the change. If the Estimate was considered to be complicated then the Infraco could request further time to complete it.

(c) Parties then had to discuss the Estimate and agree the issues set out in the Estimate.

(d) If there was no agreement, then the Estimate should have been referred to the Dispute Resolution Procedure to be determined.

(e) If there was agreement, tie had to issue a tie Change Order.

(f) Following a tie Change Order, Infraco would be permitted to and could commence works.

55. The Infraco Contract provided that until tie had issued a tie Change Order in respect of the Notified Departure (after agreement of the Estimate) Infraco was not permitted to commence work in respect of that change (clause 80.13). If there was no 'Dispute' the Infraco was expressly barred from commencing works in respect of a tie Change until instructed through a tie Change Order unless otherwise directed by tie (clause 80.15).

56. At the beginning of 2009, Infraco and tie could not agree the value of tie changes in relation to Princes Street. In accordance with clause 80 we therefore could not and did not commence work in respect of those changes in Princes Street. We were not permitted to do so under clause 80.13. If tie had wanted us to proceed, they could have referred the outstanding Notified Departure to the Dispute Resolution Procedure under Schedule Part 9 (clause 80.15) and instructed us to proceed. They did not do so. This resulted in the non-continuation or cessation of all works in Princes Street. In early 2009, it was reported by tie to the press that Infraco had demanded £80 million before work could commence on Princes Street. That was entirely inaccurate and a total and deliberate mis-representation of the facts portrayed by tie to the media. The £80 million estimate was how much extra, at that point in time, I thought it would cost to complete the whole Project bearing in mind the state of progress of the MUDFA contract and the Design Deliverables. This was not a demand for payment before works commenced. In reality, the delay on Princes Street was caused by tie's failure to agree the Estimates under the Notified Departure/tie Change mechanism in Schedule Part 4 and clause 80 of the Infraco Contract. Due to our previous treatment by tie and their continued refusal to honour firm agreements I had made with their Chief Executive, I insisted that we now followed and fully complied with the contractual procedures.

57. I recall that the Princes Street Supplemental Agreement (Appendix 9) came about following an intensive negotiation with tie. By this point it was clear that we had a major disagreement about how the Infraco Contract was intended to operate including in relation to the Notified Departure and Clause 80 mechanisms. We could not start work where a Notified Departure had occurred and the cost and the consequences of it had not been agreed by tie (who should have issued a Change Order to allow us to proceed). This was the way that the Infraco Contract's change mechanism was set up, and despite tie's challenges during the course of adjudication to the contrary, that

was the proper interpretation of the Infraco Contract. The idea behind the Princes Street Supplemental Agreement was to amend the change procedure to mean that work continued even in the absence of agreed Estimates.

58. The Princes Street Supplemental Agreement was negotiated and reflected in an initial draft agreement dated 20 March 2009. This allowed work on Princes Street to start on 23 March 2009. The final version of this agreement ("the PSSA") was signed on 30 May 2009 (Appendix 9).

59. The PSSA declared that the Princes Street works would be paid on a costs reimbursable basis plus a fee (the actual costs involved plus an uplift for prelims and overheads). Thus work could progress on Princes Street in the absence of issued tie Change Orders, and was proposed as an alternative to compensating us for the many Changes which would otherwise constitute Notified Departures and thus disrupt the works.

On Street Supplemental Agreement

60. Following the success of the Princes Street Supplemental Agreement, Infraco and tie then entered into discussions about the remaining On-Street works to see if we could agree a similar position as with Princes Street for the remainder of the on street works.

61. An agreement of this nature was only deemed to be required for the On-Street portion of the works as this is where the utilities had not been diverted by MUDFA. The causes of delay on the Off-Street sections were mainly through incomplete or late Design Deliverables or changes to the design from BDDI to Issued For Construction ('IFC'). Another matter which had a major impact on the Off-Street sections was the diversion of the 600 mm diameter high pressure water main at the Depot site (which happened much later than programmed).

62. On 19 February 2010, Infraco sent tie their formal offer in relation to the On-Street Supplemental Agreement (Appendix 10). This letter followed around 6 months of negotiation with tie. On 26 February 2010, I received a letter from Richard Jeffrey, tie's Chief Executive, which advised that the terms of the On Street Supplemental Agreement would put tie in breach of European Procurement Law (Appendix 11). This letter came as a complete surprise to me and everyone who had been negotiating the deal with tie. We had been negotiating the deal for 6 months and tie had never expressed any concerns about proceeding on the same basis as we had done with Princes Street. We had spent the best part of 6 months trying to get a workable solution to the On-Street works which would not expose Infraco to risk and cost which was not properly ours, and which would also provide tie with an open book

methodology and way of controlling and auditing the costs incurred so that tie could check and verify the cost.

63. I was astounded at the content of tie's letter of 26 February 2010, and their assertion that the deal would put them in breach of European Law. I wrote to Richard Jeffrey on 3 March expressing my frustration at the waste of time, effort and money that this exercise had incurred (Appendix 12).

64. I do not believe that tie was concerned about European Procurement Law when they backed out of the On Street Supplemental Agreement. In my opinion, the only reason tie backed out of the On Street Supplemental Agreement was that it dawned on them what it was going to cost and they did not want to have to tell the Council. I think that they probably looked at the cost of Princes Street and pro-rated it for the remainder of the On-Street Works. It was probably quite a large number which tie did not want to reveal to others.

65. I sent a further letter to Richard Jeffrey on 3 March 2010 (Appendix 13) which set out the state of play on the Project as at that date (on the assumption that the On Street Supplemental Agreement would not be entered into). In this correspondence I was trying to get Richard Jeffrey and tie to see that the Project was not being carried out efficiently as a result of all of the problems with design, MUDFA delays, late third party agreements and a host of other issues detailed in the letter. The purpose of this correspondence was to engage with tie and say that Infraco were open to talks about how we could move this Project forward in the most efficient way.

Two Paths

66. Following the collapse of the On Street Supplemental Agreement in March 2010, the relationship between Infraco and tie began to break down completely. From March 2010 to late 2010 there were two different streams of correspondence, discussions and actions:

(a) The first can be described as tie's war of attrition; and

(b) The second was the attempts at conciliation and progressing the Project.

tie's war of attrition

67. From March 2010 onwards, both Infraco and tie engaged in a significant volume of correspondence during which both Infraco and tie made allegations as to each other's conduct, failings and problems. During the course of this correspondence, and in the press, tie called Infraco a "*delinquent*" contractor. This caused great offence to Infraco,

and to Bilfinger in particular, given that the word "delinquent" suggests criminal conduct in the German translation of the word.

68. tie engaged the services of Tony Rush (of the Gordon Harris Partnership) during the Spring of 2010. His remit appeared to be to make life as difficult as possible for Infraco. He was involved in Project Carlisle, the detail of which is outlined below, but he was also involved in a lot of the correspondence, audits and termination letters. His arrival on the Project coincided with the complete deterioration of the Infraco / tie relationship. His manner was very aggressive, and he tried to use bullying tactics to make Infraco do what he wanted us to do and to stop pursuing our contractual entitlements.

69. The complete breakdown in the tie/Infraco relationship was defined by a number of activities which could be said to contribute to a "campaign" by tie and includes the following:

(a) The parties were at complete odds as to the proper operation of the Infraco Contract. In particular tie failed to operate the Notified Departure (Schedule Part 4) and tie Change provisions (clause 80 Infraco Contract), and refused to acknowledge Infraco entitlements under the Contract which ultimately led to works coming to a complete halt in September 2010.

(b) Following 7 months of close collaboration to derive an acceptable new Programme to complete the works tie then refused to agree this updated Programme with Infraco. In agreeing to an updated Programme, tie would have had to acknowledge Infraco's entitlement to an extension of time (particularly due to the MUDFA delays) and they could not do so as this would look bad in the press.

(c) tie personnel became extremely difficult to work with.

(d) tie increased the number of audits which were carried out. It is not denied that tie was entitled to carry out audits, but the increased volume distracted attention from Project work, and in my opinion this was abused by tie and not used for its true contractual purpose. It was used by tie to try and find "ammunition" which could be used against Infraco, rather than for the purpose for which the audits were intended (to verify the quality of the work and compliance with the contract).

(e) There was an increase in the number of disputes referred to adjudication by both parties.

(f) tie refused to acknowledge and apply the principles established in adjudication decisions (Infraco were successful on all major points of principle).

(g) There was an increased amount of correspondence (examples of the correspondence exchanged can be found at Appendix 14). This correspondence included multiple letters being sent on the same day (up to 50 letters at a time, frequently arriving at five to five on a Friday evening) and a constant stream of accusations and allegations. Infraco had to dedicate a great deal of resource to responding to this correspondence.

(h) There was an increase in the nastiness of the allegations contained within the correspondence (examples of the correspondence exchanged can be found at Appendix 14). tie frequently and repeatedly referred to Infraco as a *"delinquent contractor"*.

(i) tie began to serve Remediable Termination Notices and constantly threatened that the Infraco Contract would be terminated on spurious grounds. These Notices could have had very serious consequences under the Infraco Contract and had to be responded to carefully.

(j) tie used the media to criticise Infraco repeatedly, again in complete contravention of the confidentiality clause (clause 101). In contrast, Infraco was bound by this "gagging clause" (Clause 101) under threat of termination which meant that we were not able to defend our position in the face of tie's flagrant mis-telling of the truth.

70. Another example of this can be seen from the Contract Programme. As I have already explained above, the Contract Programme (Rev1) was based upon v25 of the Design Programme. By the time we got to contract award, the Design Programme was up to v31. Infraco gave an informal presentation to tie on 3 March 2010 at which we produced Rev1 of the Contract Programme (see Appendix 15). This programme showed the effect of the MUDFA delays (this was Rev 3 as attached at Appendix 15). The purpose of this exercise was to explain in detail the effect that the delays were

having on Infraco's works. However, tie would never accept that impact and maintained that we could and should mitigate the delay.

71. The Project became extremely stressful for all of us involved. Prior to the mediation in March 2011, two drawings were produced (ULE90130-SW-DRG-00803 and 804 (both revision 3)) (Appendices 16 and 17) and shown to tie which demonstrated the extent to which the Project was at a standstill because of the failure by tie to agree to Notified Departure Estimates and issue tie Change Orders. These drawings show that there was virtually no part of the site which was not affected by this problem. The purpose of this drawing was to demonstrate the sheer volume of issues.

72. In my opinion, tie's tactic was to put Infraco under so much pressure and attempt to make us think that we were in multiple breaches of contract, that we would give in, abandon out claims for additional time and money in accordance with the Contract and proceed with the works. This tactic was fundamentally flawed, as we firmly believed that our interpretation of the Infraco Contract was correct. We had been vindicated multiple times at adjudication and we would not agree to complete the Project at a loss as a result, when we firmly believed that we were acting within the Contract and it was tie's behaviour that was duplicitous and delinquent.

73. Relations with tie became so difficult that in March 2010, I wrote to the Chief Executive of the Council (Mr Tom Aitchison) to try to find a way to break the deadlock between tie and Infraco (see letter dated 8 March 2010 at Appendix 18). I was concerned that tie was not properly reporting matters to the Council and that their opinion (the Council's) was swayed by the inaccurate rhetoric which tie propagated through the media. My letter to the Council advised that:

> (a) the Project was delayed as a result of the MUDFA works not being complete;
>
> (b) tie was refusing to engage with Infraco in a constructive manner;
>
> (c) an increasing number of legal disputes were causing unnecessary legal costs;
>
> (d) Infraco were concerned over the accusations being made by tie in relation to Infraco both in the press and in private;
>
> (e) despite tie's assertions that the contract was a fixed price, it was in reality subject to an extensive list of pricing assumptions;
>
> (f) tie were refusing to operate the change mechanism under the Infraco Contract; and

(g) the adjudications up to that date had determined that Infraco's interpretation of the Infraco Contract was correct.

In that letter I advised the Council that the Project was around 2 years in delay which equated to a completion date of November 2013. I also advised that Infraco were focussed on finding a consensual way forward to deliver the optimal project solution.

74. In response to this letter, I received a letter from the Council advising me that the issues raised in my letter would be addressed directly by Richard Jeffrey, the Chief Executive of tie (Appendix 19).

75. I was extremely disappointed and frustrated with this response and on 31 March and 1 April 2010, I responded to express this frustration (Appendices 20 and 21). I advised that ultimately the Council were responsible as guarantors of the Project and urged them to get involved to find a way forward.

76. I received a letter from DLA Piper in return dated 19 April 2010 which was extremely unhelpful and adopted a personally threatening and intimidating style of response culminating in the threat of an action of personal defamation against me (Appendix 22). I was astounded that a body responsible for the public purse would sanction the issue of such a letter.

77. On 21 April 2010 I received another response from the Council which confirmed that they were in regular contact with tie, but did not consider it appropriate to enter into discussions with Infraco (Appendix 23).

Project Carlisle

78. At the same time as the war of attrition described above was progressing, a separate and distinct path was being followed in order to try and make meaningful progress and find a way forward on the Project. We would often get letters on the same day which fell into one or other of the pathways.

79. One such attempt at meaningful progress was Project Carlisle. I understand that Project Carlisle came about following a meeting between Michael Flynn of Siemens and Tony Rush. It was called Project Carlisle because they met in Carlisle for the first time. I remember that the relations between tie and Infraco were so strained and the threat of termination was constantly being made by tie, that Siemens were concerned that their work on the Project (which had not really commenced in terms of installation of the systems because the construction work was so far behind schedule) would be at significant risk in the event of a termination. Siemens had invested a lot of money upfront in the design and procurement of the systems that would be installed. I think

that they were concerned that if the contract was terminated that they would not be reimbursed for their investments.

80. Following this meeting, Infraco sent a proposal (which became known as Project Carlisle 1) to tie on 29 July 2010. This was rejected by tie on 24 August 2010, with tie responding with a completely unrealistic counter-proposal. Infraco then sent tie Project Carlisle 2 on 11 September 2010 which contained slightly revised proposals. Essentially, these proposals came about following a request by tie for a guaranteed maximum price ("GMP"). The key features of these proposals were:

(a) A GMP with a fixed price for change orders;

(b) a reduced scope as the tram line would run from Edinburgh Airport to the East end of Princes Street only. This was proposed because we were lead to believe that tie did not have sufficient funds to secure completion of the entire tram line;

(c) An amended change mechanism whereby work in respect of a change could progress even where the value of it was not agreed; and

(d) Infraco's proposal could not however be fully "fixed price". Even by this time, there were many remaining risks and uncertainties which we still could not price: this included the fact that the MUDFA works were still not complete, and many Third Party Agreements were still outstanding.

81. These proposals were rejected by tie. tie had completely unrealistic expectations as to Price and the level of risk which it wanted Infraco to assume.

82. tie refused to engage with these solutions. Ultimately the solution arrived at during mediation in March 2011 was in principle, very similar to the solutions which Infraco had proposed during the course of 2010.

Road to Mediation

83. After Project Carlisle was rejected by tie, I wrote letters to all Councillors at the Council on 13 October and 5 November 2010, requesting a meeting with the Council as key stakeholders in the Project (Appendix 24). At the time of writing these letters, there was a very real chance that the Contract would be terminated. It was a desperate time, and I felt I had to write a letter to all Councillors as a last resort.

84. Some of these letters received a positive response from the Councillors. I met with Donald McGougan, Director of Finance and Alastair Maclean, Head of Legal & Administrative of the Council, on 3 December 2010.

85. In between my letters to the Council of 13 October and 5 November and my meeting on 3 December 2010, the Council passed an Emergency Motion which allowed the Council Leader, Jenny Dawe to take all appropriate steps to facilitate mediation (Appendix 26).

86. I had previously held meetings with a number of Councillors, MPs and MSPs in an attempt to get them to understand the reality and magnitude of the issues surrounding the Infraco Contract, but none of them had really been willing to either believe me or grasp the nettle even though I backed up every statement I made.

87. The passing of this Emergency Motion by the Council was a breakthrough after months of disputes with tie, and all solutions orientated proposals (On Street Supplemental Agreement, Carlisle 1 and 2) having been rejected by tie. It felt like the Project might have a way forward at long last. This emergency motion and decision by the Council to attempt mediation also coincided with the arrival of a new Chief Executive, Sue Bruce. Her arrival appeared to have a very positive impact on the Project.

88. A course of correspondence was exchanged from mid November in order to set up meetings to discuss the mediation which had been proposed (examples at Appendix 27). Once again, this all appeared very positive.

89. A mediation then look place in March 2011. I was the only signatory to the Contract present. I was given the platform to clearly demonstrate how we were unable to expediently conduct the works due to many, many services still being undiverted, and therefore unable to give a fixed price sum. I gave a presentation to all who were present at the mediation. At the start of this presentation I clearly set out that Infraco's objective was to break the deadlock and deliver the Project. This presentation set out the status of the Project as at that date, including the financial commitments which had already been made and the key issues which were causing the biggest problems. For example, there was a detailed section on the delay issues with the depot which showed photographs and the programme. At that time I saw that the major differences between Infraco and tie were:

(a) Primacy of Schedule Part 4.

(b) BDDI to IFC – Payment for Differences

(c) MUDFA Works – Exclusive Access (Designated Working Areas)

(d) Application of Clause 80 *per se*

(e) Operation of Clause 80.13

These items were all set out on slide 12 of the presentation. The presentation was focussed on a resolution to the issues and moving the Project forward which is the frame of mind in which Infraco entered the mediation discussions.

90. Through the five day process, a settlement was agreed and the Project continued thereafter with a new agreement which was signed in September 2011.

Tie Personnel

91. I was not impressed with the tie personnel on the Project. Tie's Project Director between May 2006 and November 2006 was Andie Harper, and then between November 2006 and 2009 was Matthew Crosse. Neither were particularly impressive. I remember that the whole contract negotiation period was very stressful and at times both personal and unprofessional. I complained to Matthew Crosse after tie's solicitor swore at us in a most disgraceful manner during the course of negotiations at which our female Lawyer was present.

92. tie's first Chief Executive, Michael Howell left the Project in September 2006, just as I began to get involved. He was replaced by Willie Gallagher who stepped down in November 2008. Willie refused to become involved in the day to day negotiations of the Infraco Contract, but would be involved at key parts of the decision making process. He stepped down in November 2008 after our discussions on the delays and disruptions of the summer 2008 works. In my opinion he wanted to get out of what he thought was going to be a very bad contract. He knew that the costs were going to escalate significantly and I had made him aware of the likely scale of those increases. David Mackay, the Chairman of tie, then took over the Chief Executive role until May 2009 when Richard Jeffrey was appointed. David Mackay was a key protagonist in relation to the Project and was constantly criticising Infraco in the press. He did not have any civil engineering experience. Richard Jeffrey was a chartered civil engineer but had not been involved in contracting for many years (if at all) and neither were effective at resolving any of the key issues or unlocking the dispute.

93. The majority of tie personnel appeared to be either commercial or systems experienced. They did not understand construction engineering methodologies or even terminology.

Communication with Germany

94. I had regular and frequent communication with Bilfinger in Germany. I visited Wiesbaden twice per month and my CEO (Civil) visited the Project almost every month. I had people in Germany working with my team and I had people from Germany integrated into the tender team in Edinburgh. We also had reviews conducted by an independent, in-house Tender Review Team, sent in to review our tender and the risks associated with it.

95. Prior to submitting the Tender, a presentation was made to Bilfinger's Civil Engineering board and a further presentation was made to the main Bilfinger Berger AG board. The project was given corporate sign off by these boards, ie the level of accepted risk taken by the contractor and the monies for that risk were deemed to be acceptable and the contractual conditions clearly had a secure mechanism to deal with unacceptable risk.

Departure from Bilfinger

96. My involvement with the Project came to an end on 1 September 2011, when I left Bilfinger. As part of the settlement reached at mediation, the idea was that new personnel would be seen to drive the Project forward. Furthermore, Bilfinger had decided to close the UK business, and therefore my role was coming to an end and I was looking for a new challenge.

I believe that the facts stated in this witness statement are true.

Sign [redacted]

18/06/2017

Richa d Walker [redacted]

24/06/2017

IN THE MATTER OF THE EDINBURGH TRAM INQUIRY

SUPPLEMENTARY WITNESS STATEMENT OF RICHARD WALKER

10 NOVEMBER 2017

1. INTRODUCTION

1.1 I have provided two witness statements to the Edinburgh Tram Inquiry dated 12 February 2016 and 30 June 2017 (both at TRI00000072).

2. comment for CLARIFICATION

2.1 At paragraph 31, page 20 and paragraph 26, page 97 of document TRI00000072, I stated that Mr Ian Laing of Pinsent Masons attended a meeting with me in Wiesbaden with representatives of tie between 17 and 20 December 2007.

2.2 On reflection, I do not think that Mr Laing did attend the meetings in Wiesbaden on these dates.

2.3 Mr Laing attended internal meetings which were held in Wiesbaden on other dates during the course of the contract negotiation, and I may have confused these meetings in giving my statement to the Edinburgh Tram Inquiry.

Signed:

[redacted]

Richard Walker

10 November 2017